

1987

# Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer

Mary Kay Kane

*UC Hastings College of the Law*, [kanem@uchastings.edu](mailto:kanem@uchastings.edu)

Follow this and additional works at: [http://repository.uchastings.edu/faculty\\_scholarship](http://repository.uchastings.edu/faculty_scholarship)



Part of the [Legal Profession Commons](#)

---

## Recommended Citation

Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 *Tex. L. Rev.* 385 (1987).

Available at: [http://repository.uchastings.edu/faculty\\_scholarship/308](http://repository.uchastings.edu/faculty_scholarship/308)

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact [marcusc@uchastings.edu](mailto:marcusc@uchastings.edu).



**Faculty Publications**  
**UC Hastings College of the Law Library**

**Author:** Mary Kay Kane

**Source:** Texas Law Review

**Citation:** 66 Tex. L. Rev. 385 (1987).

**Title:** *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*

Originally published in the TEXAS LAW REVIEW. The English version is reprinted with permission from the TEXAS LAW REVIEW and the University of Texas, Austin, School of Law.

# Essay

## Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer

Mary Kay Kane\*

*When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.<sup>1</sup>*

### I. Introduction

Since the adoption of the Federal Rules of Civil Procedure (Federal Rules) in 1938,<sup>2</sup> federal courts have encouraged the liberal joinder of claims and parties so that one complete adjudication results.<sup>3</sup> The 1966 amendments to the Federal Rules, which changed all the joinder rules, strengthened this judicial philosophy. To encourage broad and flexible joinder, the amendments substituted pragmatic tests for formulaic ones, and rested joinder of claims and parties on a transaction standard.<sup>4</sup> The

\* Professor of Law, University of California, Hastings College of the Law. A.B. 1968, J.D. 1971, University of Michigan.

I gratefully acknowledge the helpful suggestions made by Professor Richard Marcus on an earlier draft of this Essay. Of course, all opinions and errors remain my responsibility.

1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. FED. R. CIV. P. 86(a).

3. See FED. R. CIV. P. 13-14, 18-25. The original Federal Rules' approach to joinder differed substantially from that approach taken by code pleading and common-law pleading systems. For example, under state common-law pleading rules, causes of action could not be joined if they were of a different nature and the same judgment could not be rendered. J. KOFFLER & A. REPPY, HANDBOOK OF COMMON LAW PLEADING § 25 (1969). Misjoinder would have occurred if the parties were not the same in all joined actions. See Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571, 582-83 (1920). See generally C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §§ 56-77 (2d ed. 1947) (discussing pre-Federal Rules state code joinder provisions); J. KOFFLER & A. REPPY, *supra*, § 25 (discussing limited joinder opportunities under common-law pleading rules). The drafters of the Federal Rules firmly embraced joinder as the most effective means of achieving judicial economy. See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 6.6 (1985).

4. See FED. R. CIV. P. 13(a), 20 (governing compulsory counterclaims and permissive party joinder). In particular, rule 19, governing compulsory joinder of parties, was completely rewritten to reflect pragmatic considerations rather than abstract labels. FED. R. CIV. P. 19 advisory committee's note (1966 amend.); see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117 n.12 (1968) ("Where the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize the classification of parties . . ."). Similarly, the revisers completely rewrote rule 23, governing class actions, to

message was clear: increase judicial economy and efficiency by making it easier to join all related matters and parties in one lawsuit.<sup>5</sup>

Interestingly, as the contours of litigation have expanded, little if any attention has been paid to the *lawyer's* role in these larger lawsuits. It is as if all those concerned simply assumed either that the lawyer's role would not change significantly or, if it did, attorneys could adapt easily. The rule amendments focused on the courts and the standards under which judges could allow larger suits, as well as the means by which they should manage this new, more complex form of litigation.<sup>6</sup> This lack of attention to the lawyer's role was shortsighted, as events in the last fifteen years have made clear.

Litigation in the federal courts has grown exponentially since the early 1970s.<sup>7</sup> Although complex litigation, such as class actions, is only a small percentage of the suits filed,<sup>8</sup> each one necessarily consumes substantial judicial resources.<sup>9</sup> Thus, not surprisingly, an increasing number of critics have suggested that these lawsuits are too numerous and com-

substitute functional tests for conceptual ones. See FED. R. CIV. P. 23 advisory committee's note (1966 amend.). See generally 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1753 (1986) (analyzing the 1966 amendments to rule 23).

5. The Supreme Court's expansion of pendent jurisdiction also has encouraged broad joinder of claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The growing use of a transaction standard for determining whether a claim is precluded also has increased the pressure for broad joinder. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980).

6. For example, the 1966 revision of rule 23 included not only a complete revision of class certification standards, but also entirely new provisions. Compare Fed. R. Civ. P. 23, 383 U.S. 1047 (1966 amend.) with Fed. R. Civ. P. 23, 308 U.S. 689 (1938). The new subdivisions address the procedural aspects of class actions, including orders that might be issued to conduct the action more efficiently. See 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1753. Furthermore, in 1969 the United States Judicial Conference published the first *Manual for Complex and Multidistrict Litigation*, containing detailed procedures and suggestions for courts confronted with these lawsuits. The manual has been revised several times as more was learned about case management techniques, and a completely new second manual was issued in 1985. See MANUAL (SECOND) FOR COMPLEX LITIGATION (1985).

7. Annual statistics reveal the size of this litigation explosion. For example, in June 1964 federal courts had only 72,195 civil cases on file. ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS, 1964, at 214 (1965) (table C1). By June 1974, however, that figure had risen to 107,230, ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS, 1974, at 383 (1975) (table C1), and in June 1984 it was 250,292, ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS, 1984, at 249 (1985) (table C1) [hereinafter 1984 ANNUAL REPORT].

8. Federal class action filings reached their peak in 1976 when federal courts had 3584 class actions on file and an additional 5987 pending. But even at that peak, class actions composed only 2.7% of all civil suits filed, and class actions represented only 4.3% of all civil suits pending in the federal courts. 1984 ANNUAL REPORT, *supra* note 7, at 160 (table 34). More recent figures show an even smaller percentage. In 1983, only 1023 class suits were filed, totaling .4% of all civil actions filed, and the 2609 class suits pending equaled only 1.1% of all pending civil suits. *Id.* In 1984 the figures declined even further, only 988 class actions were filed, and class actions accounted for only .9% of all pending civil actions. *Id.*

9. The substantial investment of judicial resources is required as a consequence of the special procedural issues posed by class actions that are not present in traditional two-party suits, such as making sure all members of the class are adequately represented. See *infra* Part III.

plex for the courts to handle.<sup>10</sup> They have leveled this criticism most vociferously against class actions. Some courts and commentators specifically have criticized class action attorneys, accusing them of filing frivolous and ill-prepared suits solely to obtain large attorneys' fees.<sup>11</sup> Despite the class action's great potential for expanding access to courts for some whose rights otherwise might not have been adjudicated, observers in the 1970s perceived that the costs of class actions were too high,<sup>12</sup> and judges retreated from their early enthusiasm about this procedural device.<sup>13</sup>

Courts and commentators in the 1980s have responded more constructively;<sup>14</sup> instead of restricting class suits, courts have attempted to control them more effectively.<sup>15</sup> Although the federal courts have not yet developed uniform practices for handling these cases,<sup>16</sup> commenta-

10. *E.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274-77 (1982); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 200 (1976).

11. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-40 (1975); Piambino v. Bailey, 757 F.2d 1112, 1143-46 (11th Cir. 1985); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 680 (S.D. Tex. 1976); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9-10 (1971); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 390 (1972). Courts recognized early that fee petitions had to be scrutinized carefully to prevent class actions from being simply strike suits filed for large attorneys' fees. *E.g.*, Illinois v. Harper & Row Publishers, 55 F.R.D. 221, 224 (N.D. Ill. 1972); *In re Westec Corp.*, 313 F. Supp. 1296, 1302-04 (S.D. Tex. 1970); *see also* 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, 701-19 (1986) (analyzing the legal and economic incentives that encourage the rational plaintiff's attorney to bring actions which have little probability of success at trial).

12. *E.g.*, 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1754, at 52-54; Handler, *supra* note 11, at 5-12.

13. *See, e.g.*, La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467-68 (9th Cir. 1973) (restricting rule 23 in order to "avoid the intractable problems of massive class actions"); Mudd v. Busse, 68 F.R.D. 522, 527 n.1 (N.D. Ind. 1975) ("As the size and scope of plaintiff class versus defendant class lawsuits expand, [*sic*] there increasingly must be concern that the federal courts may become employed in ways inappropriate to the nature of the judicial process.").

14. The Supreme Court has recognized that the "remedy for [class action] abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also* Coleman v. Block, 580 F. Supp. 194, 208-09 (D.N.D. 1984) (upholding class definition on grounds that division into subclasses would undermine judicial economy and efficiency).

15. *See* Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 331-36 (1983). Judge Williams discusses his ultimately unsuccessful attempt to certify a nationwide class of Dalkon Shield users. He also describes the unsuccessful efforts of two other federal judges to use class actions creatively in the Kansas City Skywalk and Dalkon Shield litigation. *See also* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 680-81 (1979) (discussing the potential for better administration of class actions due to the courts' increased use of rule 23, and the increased willingness of judges to oversee and control discovery, settlement proposals, and fee petitions). *But see* Dionne v. Bouley, 757 F.2d 1344, 1355-57 (1st Cir. 1985) (refusing to certify class because class members could obtain similar relief by private injunctive or declaratory action).

16. When judicial resources become strained, federal courts commonly give special masters responsibility over discovery matters in large complex lawsuits. W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 5 (1983). For a description of other ways in which special masters have been used, as well as some of

tors have suggested several procedural reforms to improve the existing system. One recommendation is to draft contextual procedural rules rather than using one set of general rules to govern litigation that varies so dramatically in size and complexity.<sup>17</sup> Others have suggested new judicial management techniques to handle complex and class litigation.<sup>18</sup> Commentators also have proposed amendments to rule 23 to address specific problems.<sup>19</sup> Finally, trial judges have been devising ad hoc solutions to the problems created by the cases on their own dockets.<sup>20</sup>

All these approaches should be applauded, yet they suffer from one defect: they fail to address the problems of modern class actions from the perspective of the class action lawyer.<sup>21</sup> Although reformers certainly must gauge the effects of their proposals on courts, a look at the lawyer's role is equally important. Class actions cannot become effective procedural devices until class action lawyers appreciate why it is in their interest to change and until appropriate incentives are adopted to encourage change.<sup>22</sup> Examining the lawyer's role and its peculiar tensions may better inform courts about how they can encourage the most efficient and productive litigation practices and discourage the most ineffi-

the dangers, see Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 395-98 (1986).

17. See Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 546 (1986); Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984).

18. See, e.g., W. BRAZIL, G. HAZARD & P. RICE, *supra* note 16; MANUAL (SECOND) FOR COMPLEX LITIGATION (1985); W. SCHWARZER, *MANAGING ANTI-TRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982).

19. E.g., Section of Litig., Am. Bar Ass'n, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 200-03, 210 (1986); Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 322-44 (1980); Mickum & Rhees, *Federal Class Action Reform: A Response to the Proposed Legislation*, 69 KY. L.J. 799, 802-08 (1981).

20. These solutions range from the very creative and well-documented experience of Judge Weinstein in the Agent Orange litigation, see Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 341-43 (1986), to more modest attempts to protect against attorney self-interest that might conflict with class members' interests, see *infra* text accompanying notes 84-97. See also Williams, *supra* note 15, at 331-34 (describing efforts to use class actions creatively in three cases that eventually were overturned by appellate courts).

21. Although the lawyer's role and obligations in class litigation have not been addressed carefully or systematically, the 1983 amendments to rule 11 (prefiling inquiries into pleadings and other papers) and to rule 26 (discovery) are attempts to address more generally perceived failings of lawyers in litigation. See FED. R. CIV. P. 11 advisory committee's note (1983 amend.) ("The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule . . . This standard is more stringent than the original . . ."); FED. R. CIV. P. 26 advisory committee's note (1983 amend.) (noting that the amendments were supposed to correct discovery abuses).

22. Professor Coffee has argued most persuasively about the need to focus on incentives for plaintiffs' attorneys when considering class action reforms and has contributed several provocative ideas for possible changes. Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987) [hereinafter Coffee, *Rethinking*]; Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-917 (1987) [hereinafter Coffee, *Regulation*].

cient and unproductive ones—basically, the ways in which courts can use both the carrot and the stick to implement necessary reforms.<sup>23</sup>

Two features of class actions that most distinguish them from two-party suits are the degree of management required and the problems of client control and conflicts of interest. These two general, yet unique, characteristics of class litigation explain some of the peculiar pressures placed upon the modern class action lawyer and provide the most fruitful model for inquiry.<sup>24</sup>

Class litigation requires a degree of organization and tight management by lawyers that seldom is necessary in an ordinary two-party lawsuit. Class actions commonly involve many lawyers, making coordination and cooperation extremely important, both to foster litigation economies and to control attorneys' fees.<sup>25</sup> In addition, class action parties exercise little, if any, control over their lawyers. This lack of control results in part because the usual employer-employee relationship is absent from this form of litigation and in part because class action lawyers also are charged with representing the interests of an amorphous group of clients. As a consequence, those attorneys make many decisions that are normally reserved for the client—substantive decisions that are likely to affect the outcome of the litigation.<sup>26</sup> In this climate, the potential for conflicts of interest to go unnoticed is enormous. The responses of attorneys and courts to these two features of class actions reflect both the problems of and the challenge for the modern class action litigator. Their responses also suggest some incentives that might be used to encourage further improvements.

23. Similar concerns about the lawyer's role appear in shareholder derivative actions. Professor Coffee has contributed some interesting evaluations of lawyers in this arena, exploring their economic motivations and how the law might better control abuses by creating incentives reflecting those motivations. See Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5, 33-48.

24. A detailed analysis of the differences between litigating class actions and two-party suits is beyond the scope of this Essay. That task would entail inquiring into the host of procedural issues concerning the propriety of class actions. See FED. R. CIV. P. 23. See generally 7A & 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, §§ 1759-1763 (stating the prerequisites for a class action). It would also entail looking at each stage of the litigation process and determining how the complexity or character of a class action alters a lawyer's ordinary behavior. For example, how should the lawyer prepare a jury trial in a class suit? See, e.g., Singleton & Kass, *Helping the Jury Understand Complex Cases*, LITIGATION, Spring 1986, at 11.

25. Although this Essay focuses on class actions, cooperation among counsel in other multiparty cases also may be beneficial. See McSweeney & Brody, *Defending the Multi-Party Civil Conspiracy Case*, LITIGATION, Spring 1986, at 8.

26. Indeed, the unnamed class members most often have no effective control over their lawyers at all. See *infra* text accompanying notes 53-57.

## II. Managing Class Actions

Lawyers have been slow to recognize the need to be more economical and coordinated in their preparation for class action litigation.<sup>27</sup> In fact, lawyers for some time had little incentive to improve their management techniques, perhaps revealing some disturbing features about the bar as a whole.

Early judicial attempts to provide for efficiency often consisted of appointing lead counsel or management committees.<sup>28</sup> The attorneys' fees decision in *In re Fine Paper Antitrust Litigation*, however, shows that these devices alone are insufficient to encourage lawyers to develop economical and efficient litigation practices.<sup>29</sup> In a 169-page opinion, Judge McGynn details a horror story of lawyer mismanagement and nonmanagement.<sup>30</sup> After seven years, the parties settled the case, a series of thirty-eight consolidated cases against multiple defendants charged with conspiracy to fix the prices of fine paper. The court then was confronted with fee petitions on behalf of forty-one private law firms and state attorneys general for a total of twenty-one million dollars, approximately forty percent of the class recovery.<sup>31</sup> In discussing why the attorneys' fees applications were so excessive, Judge McGynn describes how the lawyers had established an organizational structure of committees and subcommittees to handle each task in the case, and how that very structure caused mismanagement.<sup>32</sup> "It was inevitable that this type of structure would generate wasted hours on useless tasks, propagate duplication and mask outright padding."<sup>33</sup> One of the worst examples was a charge of approximately fifteen hundred hours by nine law firms for preparing and taking the deposition of one third-party witness.<sup>34</sup>

Cases like *Fine Paper* finally provoked the judiciary to force lawyers to become more efficient.<sup>35</sup> The 1983 amendments to the Federal Rules

27. Actually, lawyers have reacted slowly to pressure to keep litigation more affordable in civil actions generally, and the courts have begun to force such behavior. See Kane, *The Lawyer as Litigator in the 1980s*, 14 N. KY. L. REV. 311 (1987).

28. E.g., *In re Air Crash Disaster*, 549 F.2d 1006, 1009 (5th Cir. 1977) (management committee); *Percodani v. Riker-Maxson Corp.*, 51 F.R.D. 263, 264-65 (S.D.N.Y. 1970) (lead counsel), *aff'd sub nom. Farber v. Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971).

29. 98 F.R.D. 48, 70-78 (E.D. Pa. 1983). On appeal, the Third Circuit reversed and remanded some of the specific fee rulings, but affirmed most of the district court's opinion. See *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 600-01 (3d Cir. 1984).

30. See, e.g., 98 F.R.D. at 75-76 (describing abuse and waste during trial preparation); *id.* at 215 (describing the failure of managing lawyer to organize and oversee trial preparation properly).

31. *Id.* at 68.

32. *Id.* at 70-76.

33. *Id.* at 75.

34. *Id.*

35. Contrasting the second *Manual for Complex Litigation* with the first demonstrates the recent judicial recognition that class action management and organization cannot be left to the attorney.



provide judicial authority and guidance for pretrial management on an expansive scale.<sup>36</sup> By exercising tight control early in the litigation, courts may be able to compel class action lawyers to stay abreast of these cases, keep fees down, and most importantly, to keep the cases moving along.<sup>37</sup> Arguably, tight judicial management should force attorneys to become better case managers. Although some have suggested that these changes will not alter attorney conduct because the procedural rules now discuss appropriate attorney behavior,<sup>38</sup> class action attorneys should begin to think about the roles they should play.

One of the most effective means courts have to force lawyers to become better managers is their control over fees. In successful class actions, courts typically award attorneys' fees from any fund that is obtained,<sup>39</sup> unlike most other forms of litigation in which each side bears its own expenses.<sup>40</sup> Although the adoption of many statutes authorizing the court to order the losing party to pay the winning party's fees has narrowed this difference,<sup>41</sup> attorney fee awards still may be the major incentive for lawyers to litigate class actions.<sup>42</sup> Courts calculate attorney

neys alone. In the first, the *Manual* suggests that trial courts should not select lead counsel; instead, this task should be left to plaintiffs' attorneys. See *MANUAL FOR COMPLEX LITIGATION* § 1.92 (5th ed. 1982). The second, however, instructs the judge to select lead counsel. *MANUAL (SECOND) FOR COMPLEX LITIGATION* § 20.224 (1985). That manual further instructs the judge to "make an independent assessment of the functions, identities, and organization of designated counsel, considering but not necessarily adopting the views of counsel." *Id.* at 20.

36. The revisers rewrote rule 16 to provide a judicial management process to address the problems encountered in the entire pretrial phase. See *FED. R. CIV. P. 16 advisory committee's note* (1983 amend).

37. The 1983 advisory committee's note to amended rule 16 recognized that empirical studies have demonstrated that early judicial control results in cases being disposed of with less cost and delay. See *id.*

38. Arguably, the use of sanctions provided in the newly amended rules will not produce change, but instead may make matters worse "by imposing an additional layer of procedural resources that can be used by lawyers for tactical purposes." Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 320 (1986).

39. The traditional premise for awarding attorneys' fees in class suits is the common fund rationale. Because the plaintiff's efforts produce a recovery benefiting all class members, equitable notions demand that all members share in the costs (fees) necessary to obtain that result. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980); *Trustees v. Greenough*, 105 U.S. 527, 531-33 (1881). Thus, fees are paid out of the recovery; they are not shifted to the opponent. See 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1803, at 502.

40. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 275 (1975); see also 10 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2675, at 302 (1983) (noting that *Alyeska Pipeline* significantly curtailed the courts' power to award attorneys' fees based on equitable considerations).

41. Most particularly, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)), which created many opportunities for fee awards against losing parties. Various other substantive statutes, such as the Clayton Act, 15 U.S.C.A. § 15 (West Supp. 1987), and the Patent Act, 35 U.S.C. § 285 (1982), also authorize attorneys' fees.

42. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 328 (1980). The amount of fees awarded may reflect the benefit conferred by the action. Cf. *Boeing*, 444 U.S. at 478 (attorneys' fees

fee awards by using a common formula: the hours expended are multiplied by the relevant rate, the "lodestar."<sup>43</sup> The use of this formula without other restrictions gave class action attorneys little incentive to avoid duplicating each other's work. But times are changing. To force litigating attorneys to learn the lessons of ill-managed litigation, courts are encouraging more economical management through their control of attorney fee awards.<sup>44</sup> Courts now often carefully assess attorney fee petitions and disallow fees for work that is duplicative or unproductive.<sup>45</sup>

More creatively, courts may set forth early guidelines or limits on the fees to be awarded later so that counsel will have an incentive to act more efficiently.<sup>46</sup> *In re Continental Illinois Securities Litigation*<sup>47</sup> illustrates this suggestion. Judge Grady, recognizing that the action already had "more lawyers on the plaintiffs' side of the case than [he] or anyone else could possibly keep track of,"<sup>48</sup> issued guidelines for evaluating any fees and expenses requiring court approval. The guidelines listed individual responsibilities (e.g., allowing compensation for only one attorney attending depositions and court appearances); stated rates of compensation; and disallowed fees for general legal research on well-

may be assessed against the fund recovered on behalf of the class, even though each absent class member ultimately might not claim a portion of the fund, because all class members benefited by its creation). Consequently, a successful action on behalf of a class of 100, for example, will result in a larger fee than an action on behalf of a single client; this alone may encourage attorneys to file class suits rather than individual actions. As one commentator noted, "Groups of people rarely form a class and then find a lawyer. Rather, lawyers deal with individuals who have their own personal problems in mind and not those of a 'whole group.'" Lutz, *Thinking About Class Actions*, LITIGATION, Spring 1985, at 23, 23.

43. The Third Circuit initiated the lodestar approach. See *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-69 (3d Cir. 1973). Most courts, including the Supreme Court, have adopted it in allowing fees under the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988 (1982). See *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984).

44. See Court Awarded Attorney Fees, Report of the Third Circuit Task Force (Oct. 8, 1985), reprinted in 108 F.R.D. 237, 262-63 (1985) [hereinafter Court Awarded Attorney Fees].

45. E.g., *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Metro Data Sys. v. Durango Sys.*, 597 F. Supp. 244, 246-47 (D. Ariz. 1984). Compare *Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 106 (W.D. Mo. 1983) ("[C]lass counsel prosecuted the case in an economical and efficient manner. . . . The cost-cutting measures utilized by class counsel merit an award in addition to the lodestar since the very effect of these measures was to reduce the lodestar.") with *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 600-01 (3d Cir. 1984) (upholding the district court's application of a negative quality multiplier to lead counsel's fee petition for failure to manage the case efficiently).

46. One suggestion is that early in derivative litigation the court should set a percentage of the recovery as a ceiling on the amount of fees that can be recovered under the lodestar formula. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.18, at 253 (Tent. Draft No. 6, 1986) [hereinafter CORPORATE GOVERNANCE]. A Third Circuit task force recommended that in traditional common fund situations and statutory-fee cases that are likely to result in a settlement fund (both typically class suits), the court should establish a percentage fee arrangement early in the litigation reflecting a sliding scale dependent on the ultimate recovery. Court Awarded Attorney Fees, *supra* note 44, at 262.

47. 572 F. Supp. 931 (N.D. Ill. 1983).

48. *Id.* at 932.

known legal issues, multiple document review, and communications between lead counsel and other class attorneys.<sup>49</sup> Judge Grady also issued guidelines for determining reasonable expenses and keeping time records to allow easier review of the requested fees.<sup>50</sup> The case is important not because of the precise guidelines established, but because the court provided early incentives for the lawyers to manage the suit economically.<sup>51</sup> The message was clear: lawyers have the responsibility to develop more efficient means of coordinating and managing complex class actions, and the failure to do so will not be at the expense of the class or the opposing party.

Through the imposition of such judicial constraints, the class action attorney is required to become more skilled in management. He is forced to think of litigation strategy and cost-effective planning. This movement has been gradual and really does not change the litigator's role, but only adds another dimension to it. The success of this change will be difficult to assess, perhaps measured only by the decrease in judicial orders reprimanding lawyers who have not learned the lessons of the 1970s.

The need for this added responsibility is clear: not only must courts learn how to manage complex class actions, but also attorneys must share this responsibility. The unique lawyer management aspect of class actions is one area in which courts have identified that the heart of the problem, as well as its solution, lies in the hands of attorneys litigating these suits. Courts have focused on what incentives or disincentives will alter lawyers' conduct to produce greater efficiency. Careful oversight of attorney fee awards by the courts creates that incentive.<sup>52</sup>

### III. Client Control and Conflicts of Interest

A second characteristic of class actions that requires special attention is that class attorneys, more than any other litigators, bear most of the responsibility for the conduct of the litigation. As the Third Circuit observed: "In a massive class action . . . it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the con-

49. *Id.* at 933-34.

50. *Id.* at 934.

51. Attorneys reacted favorably to Judge Grady's order, recognizing the great potential for cost savings with these types of controls, if applied flexibly. T. WILLING, JUDICIAL REGULATION OF ATTORNEYS' FEES: BEGINNING THE PROCESS AT PRETRIAL 11-14 (1984).

52. Tight fee control in class suits under rule 23(b)(3) may create a counter-productive pressure to opt-out for attorneys whose clients have a sufficiently large stake to offer the potential of a large contingent fee. *See Coffee, Rethinking, supra* note 22, at 646-47. Nonetheless, this pressure does not negate the value of court control. It merely suggests the need to find additional incentives or techniques to avoid that result.

troversy, but the lawyers shape the claims for adjudication . . .”<sup>53</sup> This control stems in part from the complexity of the litigation, which is difficult if not impossible to explain to the layperson.<sup>54</sup> Additionally, the lawyer exercises unparalleled control because not all potential class beneficiaries are present or watching; thus, it is not necessary or realistic in class suits to obtain authorization to make many decisions, which in ordinary two-party litigation are made only after client consultation.<sup>55</sup>

Although the named representatives (who are self-appointed)<sup>56</sup> may be consulted, their decisions may not be the same as those that would be made by the absent class members. As a result, the lawyer in the modern class action plays a more dominant role than the traditional adversarial model envisions, and the importance of this role is magnified because the absent class members may be bound by any judgment in the action.<sup>57</sup> Yet class counsel’s obligation to represent *all* class members necessarily

53. *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985); *accord Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973). Professor Coffee describes the class action attorney not as an agent, “but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.” Coffee, *supra* note 11, at 684.

The Supreme Court implicitly recognized this fact in *Sosna v. Iowa*, 419 U.S. 393 (1975). The Court ruled that a class representative whose personal claim had become moot could continue to prosecute the action so long as adequate representation could be assured. The Court found adequate representation because a conflict between the interests advanced in the litigation and those of the unnamed class members was deemed unlikely, and because “the interests of that class have been competently urged at each level of the proceeding.” *Id.* at 403. As Justice White noted in his dissent:

In reality, there is no longer a named plaintiff in the case, 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.

*Id.* at 412 (White, J., dissenting). Justice Powell reached a similar conclusion. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 353 (1979) (Powell, J., dissenting).

54. Consider one district judge’s description of the difficulties confronting court and counsel during one settlement conference. “‘Angry and offended at what seemed to them small counteroffers, and fortified with a case of beer, the plaintiffs were ill disposed to listen to any explanation of the deficiencies of the statistical case against Bell. Posturing and wild talk took the place of reasoned analysis.’” *Parker v. Anderson*, 667 F.2d 1204, 1208 n.3 (5th Cir. Unit A) (quoting the opinion of Mahon, J., N.D. Tex.), *cert. denied*, 459 U.S. 828 (1982).

55. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 to -9 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1984).

56. Named representatives are self-appointed in the sense that they nominate themselves as the representatives of the entire class, instead of being chosen by the class. Although the class representatives may be “self-appointed,” it is well recognized that they are “attorney-selected.” *See* Coffee, *supra* note 11, at 677-79, 682-83.

57. *See, e.g., Susman v. Lincoln A.M. Corp.*, 561 F.2d 86, 90 (7th Cir.), *cert. denied*, 445 U.S. 942 (1977). The question whether the absentees were provided adequate representation becomes critical because of the potential binding effect of any judgment. A total failure of adequate representation may result in a successful attack on the judgment on due process grounds. *E.g., Gonzales v. Cassidy*, 474 F.2d 67, 73-76 (5th Cir. 1973). But this outcome is deplorable because the underlying goal of judicial economy in the class suit is lost.

results in numerous potential conflicts of interest between the lawyers, the named class representatives, and the unnamed class members.

### A. *Identifying Conflicts of Interest*

Commentators have identified several points of potential conflict,<sup>58</sup> but most focus on settlement negotiations.<sup>59</sup> Consider three different settlement scenarios. In the first, a settlement proposal includes an amount for the class and for attorneys' fees. Attorneys' fees may be awarded either on the common fund rationale, in which the court exercises its equitable power to spread the cost of obtaining the fund across class beneficiaries,<sup>60</sup> or in fee-shifting cases, as a product of the simultaneous settlement negotiation of fees with the merits.<sup>61</sup> In a class suit, because of the absent member's attenuated relationship to the litigation, they may not know whether a compromise favors greater attorneys' fees and lesser benefits for them. Professor Wolfram has noted that "most [class action] lawyers regard themselves as entrepreneurs and largely act accordingly";<sup>62</sup> their self-interest can be restrained only by client control.<sup>63</sup> If he is correct, then nothing in the class setting prevents attorneys from

58. See, e.g., 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, 1061-74 (1981) (discussing postfiling conflicts of interest involving class certification, settlements, and fee recovery); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1447-57 (1981) [hereinafter *Developments in the Law*] (stating that the class lawyer's duty to his client is ambiguous because the class is composed of so many disparate elements).

59. See, e.g., Yeazell, *From Group Litigation to Class Action* (pt. 2), 27 UCLA L. REV. 1067, 1115-16 (1980); *Developments in the Law*, *supra* note 58, at 1536-37.

60. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Electric Auto-Lite*, 396 U.S. 375, 391-92 (1970). In common fund cases, the attorney's and clients' interests may differ on whether to accept a small settlement offer that will contain enough to cover the fee award. See Coffee, *Rethinking*, *supra* note 22, at 647-48; Coffee, *supra* note 11, at 718.

61. *Evans v. Jeff D.*, 475 U.S. 717, 730-33 (1986). Simultaneous negotiation of class awards and attorneys' fees presents two possible conflicts. See Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, LAW & CONTEMP. PROBS., Winter 1984, at 293, 294-307. First, the attorney may be forced to waive fees to obtain an extremely favorable settlement for the class. The Supreme Court has ruled that the approval of such settlements is within the discretion of the district courts and they do not violate the policies of 42 U.S.C. § 1988 (1982), which authorizes fee awards to attorneys in civil rights actions. 475 U.S. at 737-38. The attorney faced with the proposal is under an ethical obligation to act in favor of the client. *Id.* at 727-28. If lawyers ignore their ethical obligation and reject the proposal, presumably opposing counsel could seek independent approval of the proposal under rule 23(e), or seek to have the attorney dismissed as an inadequate representative for failing to act vigorously in the best interests of the class. If the attorney acts ethically and accepts a monetary settlement waiving rights to seek fees from the opponent, the problem is similar to the common fund cases because the lump sum awarded the class represents the only possible source of fees.

The second conflict that arises out of simultaneous negotiation is when the settlement caters to the attorneys' self-interest by a particularly generous fee allowance that lessens class relief. See *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972).

62. Wolfram, *supra* note 61, at 295.

63. See *id.* at 295-96.

following their "natural inclinations," compromising the absent members' interests in order to receive larger fees.<sup>64</sup>

In the second scenario, the settlement proposal may offer varying benefits to the class members and class representatives, favoring the few members who are supervising the litigation.<sup>65</sup> This situation creates a conflict among the class members themselves. Can the attorney who represents the whole class support an agreement that favors the named representatives, his "real clients," over the absent class members? Who does the attorney ultimately represent?

Third, in institutional litigation, class attorneys often urge approval of a settlement that favors prospective relief and major changes in institutional policy over relief for past practices that harmed the named and some of the unnamed class members. Class attorneys often pursue an institutional action to foster certain public improvements rather than the interests of any particular client.<sup>66</sup> In this context, lawyers may have developed their own perception of their clients<sup>67</sup> that conflicts with the actual class the attorney represents.<sup>68</sup> Each of these scenarios highlights the conflicts that necessarily arise when a lawyer represents clients with potentially divergent interests or when the lawyer's interests diverge from those of the client.

64. I am not criticizing class action lawyers for being entrepreneurs. Rather, this fact simply clarifies why their interest may diverge from the class during settlement.

For the class members the suit may resemble a giant lottery that could yield a modest payoff. For the attorney, it is serious business. Having located a class representative, fronted the cost of litigation, and invested years of time, the lawyer is likely to be reluctant to risk all on a trial.

R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 243 (1985).

65. See *infra* note 78; see also *Munoz v. Arizona State Univ.*, 80 F.R.D. 670, 672 (D. Ariz. 1978) (dismissing class allegations because named plaintiffs and counsel were not pursuing interests of the entire class); *Rothman v. Gould*, 52 F.R.D. 494, 495 (S.D.N.Y. 1971) (stating that named plaintiff moved to dismiss class action so that an individual settlement offer could be accepted and completed).

66. See, e.g., Rhode, *Class Conflicts in Class Actions*, 34 *STAN. L. REV.* 1183, 1186 (1982) (noting that class actions focus on institutional practices rather than individual grievances).

67. The traditional view recognizes that lawyers and clients have different perceptions of a case. Attorneys hold a "judicial" perspective of the case tied to the attorneys' sense of right and wrong. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 *AM. L. REV.* 729, 773 (1906), reprinted in 35 *F.R.D.* 273, 276-77 (1964).

68. See Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 *U. DAYTON L. REV.* 353, 357 (1979); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 *COLUM. L. REV.* 728, 745-48 (1986); Rhode, *supra* note 66, at 1210-12. The problem for lawyers in institutional reform litigation may be even more basic: attorneys must decide whether their proper role is as an "instructed delegate" or as an "enlightened trustee." *Id.* at 1192-93.

*B. Traditional Solutions*

Once we have identified the problems created by the lawyer's special role in class litigation, the question becomes: What procedural safeguards exist or can be developed to avoid, or at least reduce, the possibility of harm flowing from these conflicts?<sup>69</sup> Rule 23(e) protects class members from some potential attorney conflicts of interest in settlements by mandating judicial approval and notice of any proposed settlement.<sup>70</sup> For example, if a settlement unfairly favors the attorneys or the named representatives, judicial approval may be withheld and the class attorneys disqualified from continuing to represent the entire class.<sup>71</sup> The required notice to absent class members of any settlement proposal, with the opportunity to object,<sup>72</sup> also should restrain attorneys from attempting to ignore any group within the class.

Although few courts have disapproved class settlements as a result of inadequate representation,<sup>73</sup> this alone does not establish that rule 23(e) is providing inadequate protection to the class.<sup>74</sup> The apparently low incidence of first scenario cases (settlements awarding minimal class relief *and* sizable attorneys' fees) may indicate that attorneys are well aware of the courts' sensitivity to any settlement that favors the lawyers over the class, and thus attorneys consciously avoid them. Neither opponents nor the class attorneys spend time developing such proposals because their chances of approval are slim.

69. In traditional litigation these conflicts could result in attorney disqualification. The unique character of class actions and the lawyer's role in them, however, should allow for a different result. *See In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163-65 (3d Cir. 1984) (Adams, J., concurring). Indeed Professor Coffee has gone even further, suggesting that reliance on procedural devices to cure class action problems of client control is misplaced and unlikely to have any real effect on attorney conduct. He offers an alternative approach: "inducing attorneys to mimic the results that a healthy, functioning market for legal services would produce." Coffee, *Regulation*, *supra* note 22, at 878.

70. FED. R. CIV. P. 23(e). For a discussion of how that provision operates in practice, see 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, §§ 1797-1797.1.

71. *E.g.*, *Piambino v. Bailey*, 757 F.2d 1112, 1145-46 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); *Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981); *Soskel v. Texaco, Inc.*, 94 F.R.D. 201, 203 (S.D.N.Y. 1982).

72. FED. R. CIV. P. 23(e). Courts have recognized that they must provide objectors with a full opportunity to expose the problems of a particular settlement proposal. For example, courts have allowed discovery of how the attorneys conducted negotiations. *See, e.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1123-33 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

73. *See, e.g.*, cases cited *supra* note 71; cases cited *infra* note 78.

74. Professor Wolfram has suggested that court approval of settlements over the objection of the named class representative illustrates the lack of both client control and deference to client desires. Wolfram, *supra* note 61, at 298. Although I am sympathetic to Professor Wolfram's notion that class representatives exercise little effective control over the class attorneys, he fails to recognize that the representative is only one of the "clients," and the problem more often may be a divergence of interests among class members. These undetected conflicts may emerge only at settlement time.

Even if the courts easily can identify problem settlement proposals that explicitly provide for large attorneys' fees, the solution is not always self-evident. Courts then must resolve the divergent interests of the class attorney, who desires to maximize fees, and the class members, who prefer to maximize their awards.<sup>75</sup> In the vast majority of class actions, fees are deducted from the class recovery because: (1) no statute authorizes fee shifting to the opponent (requiring that the award be based on the common fund rationale), or (2) the attorney has agreed in the settlement not to seek fees from the opponent (narrowing the recourse for compensation to the settlement award).<sup>76</sup> In either case, the court must protect the class members when their attorney seeks fees that will reduce their recovery. At that point, class counsel's interests are competing with those of her clients in the allocation of a finite sum. Further, the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fees application because, having reached a settlement, the class opponents have no interest in how the fee issue is resolved.<sup>77</sup> Thus, attention to the special nature of class counsel's role at this stage exposes a need for increased judicial scrutiny.

Cases that fall into the second or third scenarios pose additional difficulties because the court may not discover that a conflict exists. Consider the typical case: the judge is given a proposal that clearly benefits some class members at the expense of others,<sup>78</sup> attorneys from all sides ardently support the proposal,<sup>79</sup> and despite notice,<sup>80</sup> few if any

75. See Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 316 (1985).

76. See *supra* notes 60-61 and accompanying text.

77. The only possible adversaries to the attorneys' fee petition may be those that object to the settlement proposal itself. *E.g.*, *Grubin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The presence of objectors, however, is not sufficient protection, particularly when individual class members do not have large amounts at stake. *But cf.* *Shlensky v. Dorsey*, 574 F.2d 131, 150 (3d Cir. 1978) (noting that conflict between class and class counsel over attorneys' fees is minimized in a shareholder derivative suit because the corporation retains an interest in decreasing the amount of fees).

78. Courts have disapproved settlements that facially reveal an unfair allocation to the named representatives. *E.g.*, *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224-25 (6th Cir. 1981).

79. When determining whether a particular settlement proposal is fair, a court may consider whether it has the support of all the attorneys in the case. *E.g.*, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215-16 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Milstein v. Huck*, 600 F. Supp. 254, 262 (E.D.N.Y. 1984). *But see In re Art Mat's Antitrust Litig.*, 100 F.R.D. 367, 371 (N.D. Ohio 1983) ("However much this court respects the professional judgment of the highly experienced counsel involved in this litigation, . . . the proposed settlement must be independently evaluated within the confines of the case at bar—such is the nature of the judicial function.").

80. Although courts often state that because notice was sent they may treat the failure to object as approval, the failure to respond also may reflect the inability to understand what is involved. See *Miller, Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321-22 (1973); *Rhode, supra* note 66, at 1234-36. On the other hand, if the class is relatively sophisticated or if large amounts are at stake for each member, then reliance on the notice and lack of opposition may be entirely reasonable.



absent class members object.<sup>81</sup> What procedures can ensure that the judge can recognize whether some class members' interests have been overlooked? Class action lawyers should have incentives to disclose fully all relevant information. Additionally, the lawyers must be cognizant of the conflicts among class members, especially in institutional litigation.

Although the procedural protections of notice and judicial approval of all settlements in class litigation have existed since the original Federal Rules,<sup>82</sup> serious charges of conflicts of interest persist. Thus, the question remains whether these safeguards are enough, and if not, what other measures are available.

The courts have not been blind to any of these problems, but their responses have not always been creative. Some judges simply assume that, although the problems are real, the existing requirement of judicial scrutiny of settlement proposals, including attorneys' fees, will protect class members adequately.<sup>83</sup> Other judges have accepted the duty of heightened scrutiny of attorneys' fee petitions.<sup>84</sup> Some courts have concluded that class members are protected adequately if the parties negotiate the attorney fee award after the settlement on the merits, thereby reducing the potential for a conflict of interest.<sup>85</sup> In two cases, the court appointed a guardian to represent the class and evaluate the benefits of a

*See, e.g., Art Mat'ls*, 100 F.R.D. at 372; *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1378-79 (N.D. Ga. 1979), *aff'd in part, rev'd in part on other grounds*, 645 F.2d 488 (5th Cir. Unit B May 1981).

81. *See, e.g., Ohio Pub. Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 11 (N.D. Ohio 1982) (stating that no objections were filed and only .27% of class requested exclusion); *Bennett v. Behring Corp.*, 96 F.R.D. 343, 353 (S.D. Fla. 1982) (stating that less than 10% of class objected).

82. The original rule 23(c) stated the requirements of judicial approval and notice of all dismissals and compromises. *See Fed. R. Civ. P. 23(c)*, 308 U.S. 690 (1938). The 1966 amendments to rule 23(e) absorbed these requirements. *See Fed. R. Civ. P. 23(e)*, 383 U.S. 1050 (1966 amend.).

83. *E.g., Parker v. Anderson*, 667 F.2d 1204, 1214 (5th Cir. Unit A), *cert. denied*, 459 U.S. 828 (1982); *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

84. *E.g., Skelton v. General Motors Corp.*, 661 F. Supp. 1368, 1372 (N.D. Ill. 1987); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 627 (E.D. Pa. 1986); *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 152 (S.D. Ohio 1986); *Rothfarb v. Hambrecht*, 641 F. Supp. 71, 74 (N.D. Cal. 1986).

85. Negotiating a settlement on the merits before discussing attorneys' fees obviously would prevent the potential conflicting interests that could encourage the attorney to represent the class less vigorously. Consequently, several courts have banned simultaneous negotiations of the merits and attorneys' fees. *E.g., Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); *Lisa F. v. Snider*, 561 F. Supp. 724, 726 (N.D. Ind. 1983); *Munoz v. Arizona State Univ.*, 80 F.R.D. 670, 671-72 (D. Ariz. 1978); *Lyon v. State*, 80 F.R.D. 665, 669 (D. Ariz. 1978). *But see Moore v. National Ass'n of Sec. Dealers*, 762 F.2d 1093, 1104 (D.C. Cir. 1985) (stating that courts in title VII class actions should not prohibit simultaneous negotiation of merits and fees); *Lazar v. Pierce*, 757 F.2d 435, 438-39 (1st Cir. 1985) (suggesting that, to encourage defense of indigents, counsel should be able to insist on a reasonable fee at the time of settlement on the merits, even if detrimental to successful settlement). Other courts have disapproved the simultaneous negotiation practice, although recognizing that it might be used under limited circumstances. *E.g., Obin v. District No. 9*

settlement apart from the proposed fees.<sup>86</sup> Although all these solutions may protect class members from truly egregious results, they do not identify or control more subtle biases that can be present. Additionally, these approaches only create an incentive for attorneys to get a settlement that merely is sufficient to avoid judicial disapproval, rather than the "best settlement" possible for the class.

Courts have begun to recognize the need for additional controls, especially the need to develop the means to discover and even prevent some of these conflicts of interest.<sup>87</sup> One preventative technique focuses on the adequate representation requirement for class certification.<sup>88</sup> Courts commonly test the adequacy of class representation by examining the abilities of the named class representatives and the class attorneys, respectively.<sup>89</sup> Courts will certify a class only if the named party displays an understanding of the case<sup>90</sup> and an ability to fund the litigation.<sup>91</sup> The class attorney must demonstrate the necessary skill to assure "adequate representation."<sup>92</sup> Those courts that have focused on the qualities of the

of Int'l Ass'n of Machinists, 651 F.2d 574, 582-84 (8th Cir. 1981); *Mendoza v. United States*, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

The Supreme Court's approval of the simultaneous negotiation approach in *Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986), greatly discourages courts from using absolute bans to avoid potential conflicts. Although the Court's ruling was confined to the problem of fee waivers in cases under 42 U.S.C. § 1988 (1982), which allows attorneys' fees, and thus did not decide the question discussed in the text, the opinion suggests that the Court would not be receptive to arguments that a ban was necessary in common fund cases. The Court specifically noted that no conflict of interest is posed by simultaneous negotiation because, under the governing professional codes, the attorney has but one ethical duty: to act in the best interest of his client. 475 U.S. at 727-28 & n.14. Furthermore, the Court noted its concern that a rule prohibiting comprehensive negotiation of the case could preclude settlements because of the defendants' need to know the total cost of the predicted judgment. *Id.* at 733-34.

86. See *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (E.D. Pa. 1977); *Miller v. Mackey Int'l, Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976).

87. Some commentators have suggested ways in which courts can be better informed of potential conflicts prior to certification. See, e.g., Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492, 515-21 (1982) (stating that a court should impose a formal duty on counsel to apprise it of all dissenting views); Comment, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 592-98 (1982) (stating that a court should encourage class attorneys to communicate with absentees and solicit information to define the class).

88. FED. R. CIV. P. 23(a)(4).

89. See 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1766, at 294-303, § 1769.1, at 374-75.

90. Compare *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 140-41 (D.N.J. 1984) (noting that named plaintiffs were sufficiently knowledgeable) with *Efros v. Nationwide Corp.*, 98 F.R.D. 703, 708 (S.D. Ohio 1983) (stating that plaintiff displayed a "glaring" lack of familiarity with the case).

91. See, e.g., *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1112 (5th Cir. 1978), *aff'd on other grounds*, 445 U.S. 326 (1980); *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 535 (W.D. La. 1976); see also 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1767 (stating that the financial stake of the representatives may be an important factor in the adequacy of representation).

92. See, e.g., *Weinberger v. Jackson*, 102 F.R.D. 839, 844-45 (N.D. Cal. 1984); *Munoz v. Arizona State Univ.*, 80 F.R.D. 670, 672 (D. Ariz. 1978); see also 7A C. WRIGHT, A. MILLER & M.

named representatives try to ensure that the named representative is independent and can supervise the attorney's decisions. Courts have refused to certify class actions in which the named representative was a member of the class lawyer's firm or family,<sup>93</sup> or when the class attorney was representing the class *pro se*.<sup>94</sup>

A second protective device that stems from rule 23(a)'s requirement of adequate representation is the use of subclasses. Presuming that more participants will reduce the potential that conflicts of interest will be unexposed or that some interests will be unrepresented, many judges buttress representation at the outset of litigation by appointing multiple representatives<sup>95</sup> and establishing subclasses, each with their own counsel.<sup>96</sup> Adding more attorneys, however, may exacerbate the existing problems of management and coordination<sup>97</sup> and also may deplete the class recovery with additional attorney fee awards. Thus, that cure may be worse than the disease.

Although courts should ensure that attorneys are not manufacturing litigation by finding "straw" clients or by improperly financing the litigation,<sup>98</sup> the focus on ensuring an independent representative for each interest really does not address the more pervasive problem of class management. Instead, this approach attempts to force class actions into

KANE, *supra* note 4, § 1769.1 (stating that prior to certification courts must consider an attorney's quality of work and experience, as well as willingness and ability to prosecute the action vigorously).

93. *E.g.*, *Zylstra v. Safeway Stores*, 578 F.2d 102, 104-05 (5th Cir. 1978); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *Lyon v. State*, 80 F.R.D. 665, 668-69 (D. Ariz. 1978); *see also* Note, *Conflicts of Interest in Class Action Representation Vis-à-vis Class Representative and Class Counsel*, 33 WAYNE L. REV. 141, 150 (1986) (stating that close association between named representative and attorney could create conflicts of interest resulting in a settlement unfavorable to class members).

94. *E.g.*, *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975); *Huddleston v. Duckworth*, 97 F.R.D. 512, 514 (N.D. Ind. 1983); *see also* Note, *supra* note 93, at 146-50 (noting potential for conflict of interest because attorney fees are generally greater than the share awarded to class representative).

95. *E.g.*, *Ernst & Ernst v. United States Dist. Court*, 457 F.2d 1399, 1400 (5th Cir. 1972); *Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 66 F.R.D. 581, 589 (E.D. Pa. 1975).

96. *E.g.*, *Vuyanich v. Republic Nat'l Bank*, 82 F.R.D. 420, 435 (N.D. Tex. 1979); *I.M.A.G.E. v. Bailar*, 78 F.R.D. 549, 557 (N.D. Cal. 1978); *Amos v. Board of School Directors*, 408 F. Supp. 765, 774 (E.D. Wis.), *aff'd on other grounds sub nom. Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *vacated*, 433 U.S. 672 (1977); *see also* *Kremens v. Bartley*, 431 U.S. 119, 135 (1977) (remanding and suggesting that the district court recognize the different interests of the class with separate representation). *But see* *Freeman v. Motor Convoy, Inc.*, 409 F. Supp. 1100, 1123-24 (N.D. Ga. 1975) (refusing to certify class because, among other reasons, interests of class and subclass were antagonistic and separate counsel would not cure antagonism).

97. *See supra* Part II.

98. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 to -104 (1980). To prevent improper solicitation and financing, some courts allow discovery of the fee arrangements between the named representative and the class attorney. *E.g.*, *Klein v. Henry S. Miller Residential Servs., Inc.*, 82 F.R.D. 6, 8-9 (N.D. Tex. 1978). *But see* *Stahler v. Jamesway Corp.*, 85 F.R.D. 85, 86 (E.D. Pa. 1979) (denying discovery because neither computation of attorneys' fees nor the fee arrangement between attorney and representative was relevant to issue of adequacy of representation).

a classical model in which lawyers are hired by clients with traditional objectives who must be consulted about decisions that affect the available relief. In this model, clients can guard against attorney self-interest and conflicts of interest, and the attorney can single-mindedly pursue the goals of the client. Even with the highest of motives, intelligence, and funding, however, the named class representatives may not be able to assure that all class members are adequately represented.<sup>99</sup> The class members' goals may be quite diverse, especially at the settlement stage, and the very complexity of the litigation and its proposed resolution may be something that only the lawyers and judges can comprehend fully.<sup>100</sup> Assuming that the special dilemmas for class counsel can be resolved by relying on a greater number of more independent class representatives is simply sticking one's head in the sand.

### C. *Proposed Solutions: Increased Judicial Scrutiny and Attorney Cooperation*

Once one acknowledges these complexities, as well as the inappropriateness of relying on the named representatives to resolve these dilemmas, the question becomes: What can judges do, and what should be class counsel's role? Initially, the courts should and will continue to ensure that class counsel is competent before certifying a class action. This inquiry is critical because of the attorney's increased responsibilities in class actions.<sup>101</sup> Class counsel has the opportunity to confer good on many, but he also can spread harm just as widely. Class attorneys must recognize these special problems as well as demonstrate their special competence in this complex form of litigation.<sup>102</sup>

Judges also can play an important role in combating conflicts of in-

99. The court still must examine the named representatives because the adequate representation inquiry is supposed to serve two functions. The first is to determine whether there is a "live" client, to satisfy article III's case or controversy requirement. See *O'Shea v. Littleton*, 414 U.S. 488, 494-95 (1974). The second function is the investigation of the qualities of the named class representative. This inquiry is undertaken ostensibly to improve the possibility that the representatives can control the lawyers. See *Sanders v. Robinson Humphrey/Am. Express, Inc.*, 634 F. Supp. 1048, 1057 (N.D. Ga. 1986). In most cases, this latter kind of inquiry fails to ensure that objective and thus is a waste of scarce judicial resources.

100. This statement does not suggest that clients never are capable of monitoring and actively participating in litigation. Rather, it simply recognizes the unique character of class action proceedings, which, as described by Professor Coffee, present an unstable coalition of persons with different and conflicting interests and in which critical decisions have "lower visibility and require greater expertise to understand." Coffee, *Rethinking*, *supra* note 22, at 629.

101. See *supra* text accompanying notes 25-26.

102. Professor Rhode asserts that inquiry into counsel's competence is rarely meaningful, because she believes that few judges will engage "in public *ad hominem*." Rhode, *supra* note 66, at 1193-94. This conclusion gives too little weight to the growing judicial awareness of the need for this inquiry and the many existing examples of careful scrutiny. See 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1769.1. Although relying exclusively on this review would be imprudent, one

terest. The remedy lies in judicial supervision and continuing scrutiny of potential conflicts of interest that might cloud counsel's judgment.<sup>103</sup> As already noted, rule 23(e) provides that class action settlements are permitted only after notice and judicial approval.<sup>104</sup> The court, as acknowledged protector of absent class members,<sup>105</sup> must review carefully any proposed settlement to ensure that it is a fair resolution of the controversy.<sup>106</sup> If the class attorney does not balance all the interests equitably, or if he favors one group or himself at the expense of another, the court may deny approval.<sup>107</sup> Judicial oversight of settlement agreements is an important mechanism to avoid conflicts of interest and injury to some class members' interests; alone, however, it is insufficient. Theoretically, the judicial approval requirement encourages lawyers to think and prepare carefully before any settlement decisions are reached because counsel knows that the court will scrutinize any agreement with care. In practice, however, the rule protects the parties only against the most egregious and blatant abuses.<sup>108</sup>

The problem thus is how to make judicial supervision more effective<sup>109</sup> and pervasive. The notion that the court must protect the interests of the absent class members should be constant throughout the litigation, not just for settlements. To be more effective, the judge must participate actively earlier and fully apprise himself of present and potential problems. Some courts have recognized this necessity and have held that class counsel has an affirmative duty to reveal any conflicts of interest that arise to the court.<sup>110</sup> Absent class members may appeal or collat-

must approach the problem of conflicting interests from many angles. Careful scrutiny of class attorneys at the certification stage may avoid later problems in at least some cases.

103. One suggestion made in the derivative suit context that also might apply to class suits is setting a percentage ceiling on the attorney's potential recovery. CORPORATE GOVERNANCE, *supra* note 46, § 7.18 comment c. Under this proposal, attorneys will have no incentive to spend useless hours running up their bills, *see supra* text accompanying notes 39-43, and their interests, therefore, will be more closely aligned with the class, *see supra* notes 60-61. Although this proposal does not solve the problem completely, it certainly is the kind of creative technique that courts should consider.

104. FED. R. CIV. P. 23(e); *see* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1797, at 340. *See generally id.* § 1797.1 (discussing the factors courts consider in approving class action settlements).

105. *See infra* note 120.

106. 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1797.1.

107. *See, e.g.*, cases cited *supra* notes 71 and 78.

108. *See, e.g.*, cases cited *supra* notes 71 and 78; *cf.* Note, *supra* note 75, at 319-25 (suggesting that rule 23 may not protect the parties from even blatant abuses).

109. One commentator has suggested that courts can improve the effectiveness of judicial scrutiny by appointing a neutral third-party guardian to oversee the pretrial negotiation process. Note, *supra* note 75, at 308.

110. *E.g.*, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *National Ass'n of Regional Medical Programs, v. Mathews*, 551 F.2d

erally attack any judgment if class counsel fails to do so.<sup>111</sup> But this threat is meaningful only if one can assume that an interested absentee will come forward to expose the problem—an unlikely possibility if past experience is any guide. Indeed, the bar is likely to view any attempt to impose a duty of disclosure, with the threat of sanctions for failing to do so, as a nuisance, and thus this approach is not likely to encourage class counsel to be more alert to conflicts of interest.<sup>112</sup>

Professor Rhode, who has examined thoroughly the problems of conflicts of interest in institutional litigation,<sup>113</sup> proposes a scheme of mandatory disclosure to expose any potential conflicts between the class and the attorney or among the class members themselves.<sup>114</sup> She sets out three primary strategies to effectuate this objective. First, to ensure the court's sensitivity to the importance of notice to the class,<sup>115</sup> the court should construct an elaborate factual record about the information provided to the class.<sup>116</sup> Second, the court should make a complete factual record about the adequacy of representation before any decree is entered. To accomplish this, courts should require counsel to disclose all contacts with class members and any substantial class dissension.<sup>117</sup> Third, she would prohibit simultaneous negotiation of fees with the merits.<sup>118</sup> This elaborate system, however, would be extremely costly and burdensome to courts and counsel and is unlikely to produce the needed control. The system's very formality easily could devolve into pro forma compliance. Nonetheless, the thesis underlying Professor Rhode's suggestions is sound. The court must have better information before it can oversee the class action effectively. The problem lies in achieving that objective.<sup>119</sup>

340, 346 n.31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1011 (E.D. Wis. 1984).

111. Unnamed class members in *Hansberry v. Lee*, 311 U.S. 32 (1940), successfully attacked a prior judgment on conflict of interest grounds. *See also* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1789, at 247 (noting that absent class members can attack a judgment on grounds of inadequate representation).

112. To avoid this problem, Professor Rhode suggests that courts should make clear to all parties that exposing conflicts will not guarantee decertification, and that courts should increase attorneys' fees for that work. Rhode, *supra* note 66, at 1250. This last incentive certainly also would apply to my less structured suggestion of cooperation between the court and class action attorneys. *See infra* text accompanying notes 120-36.

113. *See* Rhode, *supra* note 66, at 1186-91. Professor Rhode focuses primarily on rule 23(b)(2) suits in which the conflict arose at the remedial stage. *Id.*

114. *Id.* at 1197-1202.

115. Notice is not typically required in institutional class suits because they are brought under rule 23(b)(2). *See* *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 257 (3d Cir. 1979); 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1786.

116. Rhode, *supra* note 66, at 1248.

117. *Id.* at 1249-50.

118. *Id.* at 1251. The likelihood of courts adopting a ban on simultaneous negotiations is slim. *See supra* note 85.

119. One commentator has suggested that the courts fashion special attorney-client privilege

The most productive way to monitor class actions carefully may not require formal procedures, but rather less formal cooperation between the courts and the lawyers. Unlike most other litigation in which attorneys appropriately may view the court as the final, somewhat removed arbiter of the dispute, the judge in a class action necessarily must actively and independently protect the rights of absent class members.<sup>120</sup> Consequently, attorneys should seek the court's aid in resolving some of the class action's representational problems. Class counsel should not hide conflicts and problems in making decisions affecting people with different views, but instead should disclose fully any conflicts, using the court as a resource to help resolve these problems. Only a partnership between the judge and class counsel can ensure adequate representation.

This kind of partnership and cooperation would require a major change in attitude by both the bench and bar. Reflecting on the role of judges and lawyers in the American court system over thirty years ago, one commentator succinctly summarized this attitudinal problem:

Unfortunately, true understanding of the judicial process is not shared by all lawyers or judges. Instead of regarding themselves as occupying a reciprocal relationship in a common purpose, they are apt to think of themselves as representing opposite poles and exercising divergent functions. The lawyer is active, the judge passive. The lawyer partisan, the judge neutral. The lawyer imaginative, the judge reflective.<sup>121</sup>

This observation remains valid today. One legitimately can question whether significant change in these traditional postures ever will occur.<sup>122</sup> A break from this long tradition will require both judges and lawyers to perceive some gains to be achieved by change.

Furthermore, the viability of inducing cooperation may vary de-

rules to allow class members full inquiry into the communications of counsel and the named representatives. Class members then could disclose any problems to the court. See Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception To Promote Adequacy of Representation*, 97 HARV. L. REV. 947, 956-60 (1984). This proposal would reduce the possibility of conflicts in my second scenario, see *supra* text accompanying note 66, although its success depends on unnamed class members assuming that oversight function.

120. Courts widely recognize their special position as guardian of all class members' rights. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 69 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975).

121. D. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 7 (1954).

122. Any abandonment of tradition is likely to create serious consternation, at least until there is time to absorb its effects. For example, the court abandoned traditional roles in *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), in which Judge Weinstein became an active participant in shaping the settlement. Although many participants praised the results, many also feared the potential problems of judicial overreaching. See Schuck, *supra* note 20, at 359-61 (noting that judicial overreaching may cause lawyers to conform their actions to desires of judge, not needs of clients).

pending on the type of litigation involved. In particular, judges may be more willing to oversee institutional class litigation (represented in my third scenario)<sup>123</sup> than damage class suits. Some of the unique features of institutional class litigation—problems of prospective relief and independent counsel persona, as well as the recognition of these suits' important prophylactic effect—may encourage judges to supervise the litigation actively. Although damage actions also are legitimate private enforcement devices, the class members' interests often are more highly individualized and obvious. Additionally, class members in these actions have the opportunity to opt-out of the class.<sup>124</sup> Also, the class attorney's motivation for bringing the suit is more likely to be economic than ideological. Consequently, the courts often will be concerned in damage suits with the more obvious conflicts that may arise between the attorney and the class,<sup>125</sup> not with the potential for more subtle conflicts among class members. Indeed, the damage class action has been the most highly criticized form of class relief, perhaps reflecting a belief that it does not serve as important a role as institutional class litigation.<sup>126</sup> Because of these distinctions, judges in damage suits may not be as willing to assume additional supervisory responsibilities. Instead, they simply may refuse to certify actions with potential conflicts or they may be content to rely on class members to opt-out of the suits. Finally, courts still review settlement proposals in those actions and thus do perform some oversight.<sup>127</sup>

Even if we disregard the differences between institutional and damage class actions, the basic question remains: What incentives might encourage judges and attorneys to shed their typical postures and enter into a more cooperative partnership as a way of avoiding or reducing the dangers of distorted results caused by conflicting interests in class actions? Judges have been schooled to remain independent and aloof, and they are extremely busy, indeed, overworked. Thus, it may be unrealistic to expect the courts to welcome yet another responsibility to their already overcrowded schedules. Class litigation, however, always has made great demands on judicial resources,<sup>128</sup> and this suggestion ultimately may *save* time because ongoing informal consultations may avert later less meaningful and time-consuming formal reviews and proceedings.<sup>129</sup> As judges

123. See *supra* text accompanying note 66.

124. FED. R. CIV. P. 23(c)(2).

125. See *supra* text accompanying note 11.

126. See Miller, *supra* note 15, at 675-76; see also Marcus, *Apocalypse Now?* (Book Review), 85 MICH. L. REV. 1267, 1284-89 (1987) (describing some of the problems in the *Agent Orange* litigation surrounding class counsel).

127. See 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 4, § 1797.

128. See *supra* note 9 and accompanying text.

129. The virtue and need of early consultation with the court was underscored in *Agent Orange*.



slowly accept the need to develop case management techniques,<sup>130</sup> they also may be persuaded to assume a consultative role in order to avoid potential conflicts of interest.<sup>131</sup> This is particularly true because the judge is not required actively to seek out conflicts;<sup>132</sup> rather he merely must encourage the class attorneys to seek advice.

Opponents of class certification might view the court's more active role as harmful because of the risk that the judge will lose his independence. Even if that is not so, if the public perceives that the court has become a participant, rather than an independent arbiter, that itself may undermine the integrity of the process. Some defendants in *In re "Agent Orange" Product Liability Litigation*<sup>133</sup> raised this question when Judge Weinstein became so intimately involved in the settlement stage that he essentially crafted the proposal and then was charged with determining whether it was fair and reasonable.<sup>134</sup> Although *Agent Orange* may be unique and not really apposite because Judge Weinstein's role was more active than my proposal contemplates, the concern is a legitimate one.

*See infra* text accompanying notes 133-34. In order to obtain sufficient capital to fund the litigation, the nine lawyers comprising the plaintiffs' management committee entered into a private fee-sharing arrangement, providing for a threefold return on advances before the remaining fee monies would be distributed under the lodestar formula. They did not reveal the arrangement to the court until after the settlement was approved and petitions for fees were filed. Judge Weinstein reluctantly upheld the plan, finding no conflict of interest in fact had occurred. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1462 (E.D.N.Y. 1985). The Second Circuit reversed. *In re "Agent Orange" Prod. Liab. Litig. (Appeal of Dean)*, 818 F.2d 216 (2d Cir. 1987). The court specifically noted that court review of the settlement under rule 23(e) was not sufficient to limit the threat from a potential conflict of interest. *Id.* at 224. Rather, counsel must inform the judge of any fee-sharing arrangements when they are formulated. "Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising . . ." *Id.* at 226.

130. The focus on pretrial management is reflected in the total revision of rule 16 in 1983 providing specific authority for early judicial control of case scheduling, *see* Fed. R. Civ. P. 16, 97 F.R.D. 168 (1983 amend.), as well as the amendments to rule 26 in 1980 and 1983 providing additional tools for judicial management of discovery to eliminate waste, *see* Fed. R. Civ. P. 26, 97 F.R.D. 171 (1983 amend.); Fed. R. Civ. P. 26, 85 F.R.D. 526 (1980 amend.).

131. The judge should not delegate this responsibility to a master or magistrate because it is not a question of ruling on issues that may be sent to another independent professional and then reviewed by the court. What is involved is the court's own guardianship responsibilities on behalf of the class. Furthermore, the contact made and information gained through such consultations will be most valuable when a party presents some proposed settlement to the court.

132. *Cf.* Rhode, *supra* note 66, at 1218-21 (discussing institutional constraints that tend to leave judges in a passive role regarding their responsibilities under rule 23). One noted jurist argues that the trial judge who acts as a participant is more likely to impair the trial process than aid it. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1045 (1975). He views the court, however, as an active intruder, whereas the model discussed here presents a responsive role. Judge Frankel then suggests that it might be productive to consider modifying the adversary model in some cases to provide better information, such as in an inquisitorial model. *Id.* at 1053.

133. *In re "Agent Orange" Product Liability Litigation* began in 1979. Judge Weinstein approved the settlement. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 862 (E.D.N.Y. 1984). The Second Circuit upheld his decision. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987).

134. Schuck, *supra* note 122, at 362. Others have voiced this criticism. *See, e.g.*, Marcus, *supra* note 126, at 1295 (raising questions about Judge Weinstein's role).

Nonetheless, the judge's responsibilities always have been one-sided at the settlement stage of class actions: the court's uniformly recognized role is to review any proposals to preserve the rights of the class members, not to make certain that the class opponents have not given away too much. Judicial protection, however, should be used as a resource throughout the litigation, rather than solely as a check on the end result. If there is concern in a particular case that a given judge went too far, abandoning all impartiality, appellate courts always are available to scrutinize the results.<sup>135</sup>

The potential success of this counseling or partnership model, however, depends primarily on its acceptance by class counsel and their willingness to use the court in this fashion. Most class action lawyers view the judges' role as threatening rather than helpful in achieving a desired solution; consequently, they contact the courts only as the last resort. This view may have developed in part because in some cases judges have forced cooperation and because many lawyers simply do not believe that the conflicts described earlier even exist, much less that they need outside help to resolve them. Whatever the reason, as judges increase their case management and more carefully scrutinize settlement proposals, the bar must realize that a partnership with the court can be only beneficial.<sup>136</sup>

Attorneys willing to try this approach may find more tangible incentives.<sup>137</sup> Not only will lawyers avoid wasted efforts (e.g., rejected settlement proposals), but courts that are fully apprised of all problems and working with the attorneys may be less likely to appoint additional counsel to ensure full representation, thereby increasing the fee potential. More importantly, the capacity to handle these problems better ensures the adequacy of the representation, decreasing the opponent's ability to

135. Typically, appellate review of judgments entered as a result of a settlement differs from review of other judgments because it is limited to ensuring that the appropriate procedural safeguards were utilized and that the judge did not abuse his discretion in determining fairness. See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975).

136. Class action lawyers may have to view the obligation to discover and reveal potential conflicts to the court as part of their ethical duties. *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1392-97 (1976) [hereinafter *Class Actions*].

137. Professor Rhode concludes that the class lawyer's responsibility to apprise trial judges of conflicting interests has proved unworkable in practice and suggests that, at least in institutional litigation, counsel has prudential and ideological reasons not to expose the divergent class interest. Rhode, *supra* note 66, at 1205-12. Her analysis of the disincentives for disclosure in institutional litigation also would suggest that these same attorneys never will change their attitudes and approach the court as a partner in dealing with intraclass conflicts. *Id.* at 1205-10. Although I agree that not all will, some incentives exist to disclose conflicts that have not been appreciated fully. Additionally, the courts' heightened sensitivity and increased scrutiny of the adequacy of the representation prerequisite during the class certification and settlement review stages may have created a climate in which attorneys will be more receptive to change.

have the class decertified for that reason.<sup>138</sup> Finally, the courts can encourage these partnerships by making clear that they favor such efforts when they award attorneys' fees. Not only might the attorney be compensated for the time spent in court consultations, but the fee might be increased if the court concludes that the attorney's efforts produced significant improvements, gained efficiencies, or avoided problems.<sup>139</sup>

#### IV. Conclusion

The role of the class action lawyer presents some unique problems for the litigating bar. Not only are new skills demanded, but special responsibilities must be assumed. No one suggestion or procedural change can eliminate the complex management problems of or the potential for conflicts in this modern form of litigation. The first step, however, is to approach these problems anew, focusing on the lawyers and the need to create incentives for them to modify their traditional attitudes and practices. Attorneys have recognized the need to develop better case management techniques, and the courts are encouraging attorney cooperation and creativity through their control of attorneys' fees. But the problem of conflicts of interest in many class actions, although widely recognized, is not as readily resolved. The solution must rest predominantly with class counsel: Courts cannot achieve change unless the attorneys recognize their special responsibilities and desire change. This Essay presents just one small suggestion to aid that process of change with the hope that it will inspire further reflection by class action participants, to the benefit of all concerned.

138. See *Class Actions*, *supra* note 136, at 1493-98.

139. The Supreme Court has ruled in fee-shifting cases that an upward adjustment for quality typically is not appropriate because the quality of the lawyering is reflected in the lawyer's rates. *Blum v. Stenson*, 465 U.S. 886, 899-900 (1984). When fees are premised on the common fund rationale, however, this restriction may be less compelling. Furthermore, the kind of cooperation suggested here is the kind of exceptional or "superior" service that might merit an upward adjustment even under the Supreme Court's standard—at least until such cooperation becomes the norm.