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Class Actions' Ethical "KISS": The Class Action Lawyer's Client Is the Class

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Class Actions' Ethical "KISS": The Class Action Lawyer's Client Is the Class

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The legal ethics of class actions is a mess, with many lingering, unresolved questions and conflicting answers. The culprit is a fundamental lack of agreement regarding the identity of the client, without which it is impossible to consistently resolve concerns about conflicts of interest and determine the scope of lawyers' duties of competence and communication to the class, class representative, and class members. This Essay offers a simple solution to this disagreement: the class lawyer represents the class as an entity, not the class representatives and members, who are constituents of the class client. While conceptually simple, treating the class as the client is but the first step on the road to untangling the legal ethics of class actions. The representation of entity clients requires a well-developed governance structure, complete with authorized constituents who can make decisions and communicate on behalf of the entity. Current class action law does not yet include such a governance structure for class actions. Instead, the class representative and class members are sometimes treated as clients and sometimes as authorized constituents, while class lawyers and courts are called upon to make decisions for the class as if they were its constituents. This Essay outlines a way out of this mess. It argues that we ought to keep things simple by treating the class as the entity client and developing governance structures to allow the class to act via authorized constituents, reducing its reliance on class counsel and judicial supervision.

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TABLE OF CONTENTS

INTRODUCTION 1435
I. ETHICAL KISS: THE CLASS ACTION LAWYER REPRESENTS THE CLASS, AND ONLY THE CLASS, BEFORE AND AFTER THE CLASS IS CERTIFIED 1436
A. THE ETHICAL TRILEMMA OF ENTITY REPRESENTATION 1437
B. THE ETHICAL TRILEMMA OF CLASS ACTIONS 1441
C. RESOLVING THE ETHICAL TRILEMMA OF CLASS ACTIONS WITH A KISS: THE ENTITY CLASS IS THE ONLY CLIENT OF THE CLASS ACTION LAWYER 1444
II. CHALLENGES TO THE KISS APPROACH 1449
A. THE MODEL RULES CRITIQUE: THE MODEL RULES SHOULD NOT APPLY TO CLASS ACTIONS 1449
B. THE CLIENT CRITIQUE: THE KISS APPROACH DEPENDS ON CONSTITUENTS AND GOVERNANCE STRUCTURES, WHICH DO NOT EXIST IN CLASS ACTIONS 1451
C. THE LAWYER CRITIQUE: THE CLASS LAWYER IS THE DE FACTO CLIENT IN THE CLIENTLESS CLASS ACTION 1455
CONCLUSION 1458

INTRODUCTION

More than fifty years after the rise of modern class actions,[1] confusion continues to reign over the role of class action lawyers. Fundamental questions—Does a lawyer represent both the class and the class representative?[2] Can a class representative or absent class member sue the class action lawyer for malpractice?[3] How should a lawyer communicate with absent class members?[4]—currently remain unsettled, decided differently by courts throughout the United States. This chaotic situation stems from a central disagreement regarding the identity of the class action lawyer's client. Without knowing whom the class action lawyer represents, one cannot identify, let alone resolve conflicts of interest;[5] consistently apply the doctrine of professional negligence; or coherently determine the scope and meaning of the duty to communicate. This state of affairs is not only an academic problem, but also imposes uncertain and unpredictable costs on litigants and is a waste of judicial resources.

There is, however, a KISS—"keep it simple, stupid"[6]—solution to this conceptual mess. The law governing lawyers can be clarified, and courts can consistently hold that the class, and the class alone, is the client of the class action lawyer. A lawyer who files a class action and acts on behalf of a class should be deemed to represent the class as an entity or "organizational" client, per the terms of the Model Rules of Professional Conduct ("Model Rules").[7]

The basic, simple insight that the class action lawyer represents the class, not its various constituents, resolves four of the most important legal ethics questions surrounding class actions. First, by virtue of representing the class, the class action lawyer does not represent the class representative or class members. Rather, class members and the class representative are constituents of the entity

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1. *See generally* David Marcus, *The History of the Modern Class Action, Part I*: *Sturm und Drang*, *1953–1980*, 90 WASH. U. L. REV. 587 (2013); David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785 (2018).

2. *See generally* Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083 (2020) (discussing conflicts resulting from class action lawyers also representing class members as individuals).

3. *See, e.g.*, Martorana v. Marlin & Saltzman, 96 Cal. Rptr. 3d 172, 181 (Cal. Ct. App. 2009).

4. *See generally* Candice Enders & Joshua P. Davis, *The Ethics of Communications with Absent Class Members*, 74 HASTINGS L.J. 1331 (2023).

5. Comment 2 to Rule 1.7 states in relevant part:

> Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) *clearly identify the client or clients*; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.

MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 2 (AM. BAR ASS'N 2023) (emphasis added).

6. KISS, an acronym for "keep it simple, stupid," is a design principle pursuant to which systems work best when kept simple rather than made complicated. *See generally, e.g.*, Duane F. Alwin & Brett A. Beattie, *The KISS Principle in Survey Design: Question Length and Data Quality*, 46 SOCIO. METHODOLOGY 121 (2016). Accordingly, simplicity should be a key design goal, and unnecessary complexity should be avoided. *Id.*

7. MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 2023).

class. The class representative, as a constituent of the class, can act for the class before it is certified and should be retroactively recognized as a constituent after the class is certified. Since the lawyer is representing the class, the lawyer may also represent the class representative, a constituent of the class, only if no conflict of interest exists, or if it has been adequately resolved.[8] Second, because the class action lawyer does not represent individual class members, individual class members have no standing to bring a malpractice lawsuit against the lawyer pursuant to the privity doctrine. Class members would only be able to sue for malpractice in circumstances that constitute an exception to the privity rule—for example, when they relied in good faith on bad advice given by class counsel who intended class members to rely on and benefit from it.[9] Third, because class members are not clients, the class action lawyer owes them the same duty of communication afforded by the Model Rules to all third parties, but no greater duty.[10] Fourth, because class members are not clients of the class lawyer, defense counsel is not per se precluded from communicating with class members under the no-contact doctrine[11] but may be subject to other communications restrictions.[12]

This Essay is organized as follows. Part I spells out class actions' ethical KISS principle in detail, showing how treating the class, and the class alone, as the lawyer's client resolves many of the conundrums afflicting class actions today with clarity and predictability. Part II explores and addresses several critiques of the class-as-client approach.

I. ETHICAL KISS: THE CLASS ACTION LAWYER REPRESENTS THE CLASS, AND ONLY THE CLASS, BEFORE AND AFTER THE CLASS IS CERTIFIED

In many attorney-client relationships, identifying the client is easy. Generally, a client is a person "who manifests to a lawyer the person's intent that the lawyer provide legal services for the person."[13] In class actions, however, identifying the client is complicated for three related reasons. First, the class is not a "person" in the ordinary corporeal sense, but rather consists of disparate individuals. Second, even if it were held to be a juridical person, the class, comprising of many individuals, generally cannot manifest a single intent and therefore cannot manifest intent that the lawyer provide legal services for the class. Third, even if the class could manifest intent, it could not do so for purposes of forming an attorney-client relationship, investigating the viability of

8. *See infra* Part I.C.

9. *See infra* Part I.C.

10. MODEL RULES OF PRO. CONDUCT r. 4.3–.4 (AM. BAR ASS'N 2023).

11. *Id.* r. 4.2.

12. *See generally* Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) (concerning communications between class counsel, opposing counsel, and class members); Enders & Davis, *supra* note 4 (discussing communications by defense counsel with absent class members).

13. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 14 (AM. L. INST. 2000).

filing a class action, or filing the class action because the class does not exist until certified by a court.

A. THE ETHICAL TRILEMMA OF ENTITY REPRESENTATION

All three problems are familiar to lawyers who represent clients that are not corporeal individuals, including corporations, nonprofits, various organizations, and governmental entities. But resolving these three problems—the *ethical trilemma of entity representation*—and identifying noncorporeal clients is often a straightforward affair. Consider the case of for-profit corporations. As to the first leg of the trilemma, the Supreme Court held long ago that corporations are persons for purposes of suing and being sued.[14] Second, corporate law, specifically corporate governance, defines and empowers various actors, such as officers and directors, who can act on behalf of corporations as authorized constituents. These constituents are empowered to speak for the corporation and manifest its intent, including to retain corporate counsel. As to the third leg of the ethical trilemma, corporate law also recognizes additional constituents, incorporators, and promotors who can take action on behalf of corporations before they are formed, including filing to incorporate.[15] Thus, for purposes of the ethical trilemma, a corporation is a client because (1) it is a person (2) who manifests to a lawyer, through the conduct of its authorized constituents (the incorporator before it is incorporated and management after it is), (3) its intent that the lawyer provide legal services for the corporation.[16]

The law governing lawyers follows the same approach to corporate representation when it comes to identifying the client and those who can act for it—namely, the first two legs of the trilemma. Rule 1.13, titled "Organization as Client," states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[17] Comment 1 explains that "[a]n organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the

14. In a series of cases in the nineteenth century, the Court developed the corporate personhood doctrine, recognizing corporations as legal persons. *See* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2018 (2019). More recently, the Court has expanded corporations' personhood. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010) (exploring corporations' First Amendment rights in the context of making campaign contributions); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (expanding corporations' right to religious freedom).

15. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(a) (2022) ("Any person, partnership, association or corporation, singly or jointly with others, and without regard to such person's or entity's residence, domicile or state of incorporation may incorporate or organize a corporation under this chapter by filing with the Division of Corporations in the Department of State a certificate of incorporation . . . ."); *see also* N.Y. BUS. CORP. LAW § 401 (McKinney 2022); CAL. CORP. CODE § 200(a) (West 2022); MODEL BUS. CORP. ACT § 2.01 (AM. BAR ASS'N, amended 2016). Professor Nancy Moore correctly points out that an incorporator's ability to act on behalf of the entity is limited and sometimes requires ratification by the corporation after its formation. *See* Nancy J. Moore, *Forming Start-Up Companies: Who's My Client?*, 88 FORDHAM L. REV. 1699, 1714–15 (2020).

16. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 14 (AM. L. INST. 2000).

17. MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 2023).

constituents of the corporate organizational client."[18] Thus, a corporate lawyer represents the corporation, not its authorized constituents. In terms of the ethical trilemma of entity representation, the Model Rules recognize the corporation as a person and acknowledge that although a corporation cannot technically manifest intent to form an attorney-client relationship, it can do so by acting through its authorized constituents, who are not clients of the corporate lawyer.

The third leg of the ethical trilemma*,* the ability of a corporate client to act before it is incorporated, has proven more challenging for the law governing lawyers. Although corporate law clearly acknowledges the power and authority of an incorporator to act on behalf of the corporation (for example, to identify potential investors and to incorporate the entity),[19] legal ethics has had a hard time settling on the status of the incorporator as a potential client of the corporate lawyer. Specifically, is the incorporator, by virtue of purporting to act for the corporation, a current client of the lawyer until the corporation is formed? If so, does the incorporator become a former client upon the formation of the entity, or does the promotor continue to be a current client of the corporate lawyer alongside the entity? Or is the incorporator simply a constituent of the entity client even preformation, such that it never becomes a client of the corporate lawyer?[20]

Part of the difficulty is explained by the realities of practice. An incorporator may very well happen to be a lawyer's existing client at the time the client retains the lawyer to help form a corporation. If so, the corporeal client may continue to be a current client of the lawyer even after the corporation is formed. To make matters even more complicated, the attorney may become, after formation of the entity, the lawyer for the corporation. Thus, Rule 1.13 states that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7," the conflict of interest rule.[21]

Complicated facts, however, ought not create conceptual confusion. The third leg of the ethical trilemma of entity representation necessitates a conceptual choice: Putting aside situations in which the incorporator happens to be a client of the lawyer, preformation, does the incorporator, by virtue of acting for the corporation, become a client of the lawyer? Or is the incorporator at all times merely a constituent of the entity and therefore a nonclient? Factually and conceptually, both approaches are possible and plausible. As a matter of conceptual common sense, however, the latter approach is superior, as held in the leading case of *Jesse ex rel. Reinecke v. Danforth*.[22]

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18. *Id.* r. 1.13(a) cmt. 1.

19. *See supra* note 15.

20. Moore, *supra* note 15. *See generally* Paul R. Tremblay, *The Ethics of Representing Founders*, 8 WM. & MARY BUS. L. REV. 267 (2017) (discussing lawyers' role as startup founders' counsel).

21. MODEL RULES OF PRO. CONDUCT r. 1.13(g) (AM. BAR ASS'N 2023).

22. 485 N.W.2d 63, 67 (Wis. 1992).

In *Danforth*, several doctors retained a lawyer to help form a corporate entity to buy and operate an MRI machine.[23] The lawyer created the entity and became its corporate counsel.[24] Subsequently, two patients of two of the doctors sued them for unrelated medical malpractice.[25] A partner at the lawyer's firm represented the patients-plaintiffs.[26] The two doctors-defendants moved to disqualify the partner, arguing that the law firm had a conflict of interest because the two doctors were current and former clients of lawyer.[27] The trial court denied the motion to disqualify, the court of appeals reversed, and the patient-plaintiffs appealed to the Wisconsin Supreme Court, which reversed the court of appeals and ordered reinstatement of plaintiffs' counsel.[28]

Resolving the conceptual ambiguity surrounding incorporators' status as clients, the Wisconsin Supreme Court held that

> where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.[29]

The Court's elegant retroactive formulation makes ample sense. Where a person retains a lawyer for the purpose of organizing an entity, the person acts on behalf of the entity as its constituent-incorporator or promotor. Thus, where the lawyer's involvement with that person is directly related and limited to that incorporation, and the entity is eventually incorporated, the retroactive finding as a matter of law that the lawyer's pre-incorporation involvement with the person is deemed to be a representation of the entity, not the person, follows the logic and purpose of corporate law's recognition of an incorporator's ability to act for the entity before it is formed.

The retroactive recognition of the person as a constituent-incorporator is conceptually necessary: before the corporation is formed, the incorporator as the person who seeks legal services is the lawyer's client because it is possible that the corporation will never be formed. Once the corporation is formed, however, by operation of law, the incorporator is retroactively recognized as a constituent of the corporation.[30] To err on the side of caution and ensure that the incorporator appreciates the consequences of whom the lawyer represents, the lawyer should obtain the incorporator's informed consent at the outset, confirming that the person understands that they are not becoming the lawyer's client and after formation would be retroactively recognized as a constituent of the entity client.

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23. *Id.* at 65.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 67.
30. *Id.*

Notably, *Danforth*'s retroactive constituent-incorporator holding does not foreclose the factual possibilities that the incorporator may be a current client of the lawyer in an unrelated matter, may be a co-client of the lawyer alongside the entity, may continue to be a current client of the lawyer after formation of the entity, or may become a former client of the lawyer after the entity is formed. Rather, the holding simply means that by virtue of acting for a corporation, the incorporator does not become a client of the lawyer. If the incorporator is otherwise a client of the lawyer or wishes to become a client, the lawyer will have to comply with the usual conflict principles of Rule 1.13.

First, Rule 1.13(a) confirms that when representing an entity, the lawyer represents the entity, not its constituent-incorporator.[31] Second, per Rule 1.13(g), if the lawyer wishes to also represent the constituent-incorporator, either in an unrelated matter or as a co-client of the entity, the lawyer must comply with the usual conflict of interest rules.[32] Practically speaking, in most cases, this application of Rule 1.13 is straightforward and will not preclude a lawyer from becoming the lawyer for the entity even if the incorporator is a current client, because when a person retains a lawyer to form a corporation, the interests of the incorporator and the entity will be aligned. Nonetheless, if the interests of the entity client and the incorporator do conflict at the outset, or if a conflict arises after formation, the lawyer would have to resolve it per Rule 1.7, including obtaining informed consent from both clients per Rule 1.7(b)(4).[33] Admittedly, before incorporation, there will be no authorized constituent other than the incorporator to give informed consent on behalf of the entity client, unless there are several incorporators, and only a subset of whom are clients of the lawyer. Importantly, however, the corporal client would be advised of the conflict in advance and give informed consent. As to the entity client, the lawyer would have to reasonably believe, per Rule 1.7(b)(1), that the representation of the entity would be competent and diligent.[34] Moreover, the corporation could, after formation and acting through its new, authorized constituents, ratify the informed consent. Or, if it did not endorse the informed consent given on its behalf by the incorporator, the corporation could either revoke the informed consent or terminate the client-lawyer relationship. In any event, by virtue of acting as a constituent-incorporator, after formation of the entity, the person does not become a former client of the lawyer; under the retroactive doctrine, the person was acting as a constituent of the entity and was never a client of the lawyer.

The retroactive approach makes ample sense because it allows the lawyer, following incorporation, to continue representing the corporation without worrying about conflicts of interest. Consider the alternative approach. If the

31. MODEL RULES OF PRO. CONDUCT r. 1.3(a) (AM. BAR ASS'N 2023).
32. *Id.* r. 1.13(g).
33. *Id.* r. 1.0(e) cmt. 6; *id.* r. 1.7(b)(4).
34. *Id.* r. 1.7(b)(1).

incorporator were recognized as a client of the lawyer, then once the purpose for which the lawyer was retained had been accomplished upon incorporation, the incorporator would become a former client. As such, to continue representing the corporation, the incorporator's informed consent would often be required because the representation of the corporation would be "substantially related" to the incorporation.[35] Moreover, should disputes arise between the corporation and the incorporator, the lawyer would not be able to represent the corporation against the incorporator, a former client. These complications are avoided by *Danforth*'s retroactive approach—as long as the lawyer clearly communicates the identity of the client to the incorporator at the outset of the representation, to avoid confusion on the incorporator's part.[36] This sensible approach has since been adopted outside of Wisconsin.[37]

B. THE ETHICAL TRILEMMA OF CLASS ACTIONS

The analogy from corporate law to class actions is straightforward. The class, although technically not a person, could be recognized as an entity client akin to a corporation.[38] Although the class, like other noncorporeal clients, cannot act for itself, it could act through authorized constituents.[39] In particular, the class representative or lead plaintiff acting as an authorized constituent of the class could, akin to an incorporator, hire a lawyer to investigate the viability of filing a class action and to file the class action. Finally, following the retroactive approach of *Danforth*, before the class action is certified, the class representative as the person who seeks legal services would be the lawyer's client because it is possible that the class will never be certified. However, once the class is certified, by operation of law, the class representative would retroactively be recognized as a constituent of the class, not a client or a former client of the class action lawyer.

To begin with, "[a]lways in the foreground of any discussion of the class action, or at least well within view, is the continuing debate between the advocates of individual autonomy in litigation and the proponents of what has

35. *Id.* r. 1.9(a).

36. Jesse *ex rel.* Reinecke v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992).

37. *See, e.g.*, Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994). Notably, Moore disapproves of the retroactivity approach, explaining that its "major weakness" is that the court could have avoided the undesirable automatic dual representation of the entity and its incorporator constituent and the resulting slew of possible disabling conflicts of interest simply by having the lawyer "clarify that, once the entity comes into being, the lawyer will become the entity's lawyer only and will cease representing the constituents as individuals." Moore, *supra* note 15, at 1710. Moore is correct that *Jesse ex rel. Reinecke v. Danforth*'s retroactivity approach was not inevitable. Nonetheless, its reasoning is compelling. Moreover, as Moore appears to concede, as long as the incorporators are aware from the outset of their legal status as nonclients and give their informed consent, the "major weakness" of the retroactivity approach is well addressed. *Id.* at 1716.

38. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

39. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 1 (AM. BAR ASS'N 2023) ("'Other constituents' as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.").

been praised as 'collective' justice"[40]—that is, between those who view the class "as an aggregation of individuals, a complex joinder device and nothing more," and those who "view the class action as transforming the class members into an entity."[41] This debate, to be sure, takes place outside of the four corners of the law governing lawyers, and many of its aspects have little to do with legal ethics. Nonetheless, the debate arguably informs the first leg of the ethical trilemma analogy: one cannot deem the class action an entity for legal ethics purposes if the entity view is well disputed in civil procedure and torts.

Fortunately, from a legal ethics perspective, one can legitimately sidestep this debate. While contested, the entity view of class actions is sufficiently accepted to easily support its adoption by the Model Rules.[42] Indeed, the Model Rules regularly adopt specific internal definitions, even when alternative definitions abound in other areas of law.[43] Moreover, the entity view makes ample sense for purposes of the Model Rules. While some courts hold that the class lawyer represents absent class members once the class is certified (but not before),[44] it is hard to see practically how the class action lawyer can meaningfully represent and communicate with thousands if not millions of absent class action members as clients. Unsurprisingly, most of the legal ethics scholars who have considered the individual autonomy versus entity views of class actions have sided with some version of the latter.[45]

Yet as David Shapiro—among the first scholars to advance the entity view of the class action for legal ethics purposes—points out, adopting the entity view is but the first step of resolving the ethical trilemma of class actions: "[The entity] approach does not imply that class members should be deprived of a significant role in litigation brought on behalf of the class. Even if the class is the relevant litigating entity, it is not one that can act, think, or communicate on its own."[46] Moreover, "[i]n the case of a class that is, in effect, created for purposes of a particular litigation, there is likely to be no preexisting structure, and methods should be devised for creating that structure and endowing it with the widest representation consistent with efficient case management."[47] Finally,

> [t]he precise role of any such group in the conduct or settlement of the case, and the need to take periodic samplings of the entire class, are important issues that fall outside the scope of this analysis, but the basic point remains: the class

40. Shapiro, *supra* note 38, at 916.

41. Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1939 (2011).

42. *Id.* at 1944.

43. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.0(c) cmts. 2–3 (AM. BAR ASS'N 2023) (regarding the definition of a firm); *see also id.* r. 1.0 (defining numerous terms of art used by the Model Rules).

44. *See, e.g.*, McWilliams v. Advanced Recovery Sys., Inc., 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); Gortat v. Capala Bros., No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("A number of courts have held that this [attorney-client] relationship arises once the class has been certified and not only at the end of the opt-out phase.").

45. Most, but not all. *See generally* Green & Kent, *supra* note 2.

46. Shapiro, *supra* note 38, at 940.

47. *Id.*

> (like other litigating entities) is the client, and its members should play a role not as clients themselves but as representatives of the client.[48]

Eminent legal ethics scholar Nancy Moore agrees that "the class should be viewed as an entity client,"[49] explaining that "[t]he problem with characterizing either named representatives or unnamed members of the class as 'clients,' or even as having the 'characteristics of clients' in some cases, is that for the purposes that appear to count most, these persons are not treated like clients."[50] Moore notes that "[m]ost notably, class counsel can recommend a settlement over the objections of the named representatives. As a result, it is hard to see how even named representatives can be considered 'clients' of the lawyer in any meaningful sense of the word."[51] Moreover, she adds that

> viewing the class as an entity client is not inconsistent with recognizing that class counsel has significant responsibilities to the individual class members, just as viewing an estate as an entity client does not preclude a finding that the estate lawyer has responsibilities to either the fiduciary or the beneficiaries.[52]

Moore then concludes that

> the better view is that the class itself is an entity client, just as corporations . . . may be entity clients under Rule 1.13. . . . [I]t has the best fit with class action case law and provides the most workable solution for purposes of applying the ethics rules.[53]

As to the second leg of the ethical trilemma, the class representative, or lead plaintiff, ought to be recognized as a constituent of the entity class who can act on its behalf. Similarly, class members are also constituents of the entity client, not clients of the class action lawyer. Moore, for example, opines that "[i]f the class itself is an entity client, something like a corporation, then the named class representatives are constituents of the class, more like corporate officers or directors than individual clients. Continuing with the analogy, the absent class members can then be viewed as akin to corporate shareholders."[54] In a subsequent article, Moore adds that "class counsel should be viewed as representing the class as a whole, as a form of entity, not only in the time period subsequent to the filing of a class action lawsuit, but also any time before the filing when the lawyer is actually negotiating a class-wide lawsuit."[55]

Yet with regard to the third leg of the ethical trilemma, Moore rejects the retroactivity approach of *Danforth*, both as applied to incorporators,[56] and by analogy to class action lawyers, stating that "by its terms, the entity approach

48. *Id.*
49. Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1482.
50. *Id.* at 1484.
51. *Id.* at 1484–85.
52. *Id.*
53. *Id.* at 1485–86.
54. *Id.* at 1487.
55. Nancy J. Moore, *Who Will Regulate Class Action Lawyers?*, 44 LOY. U. CHI. L.J. 577, 585 (2012).
56. Moore, *supra* note 15, at 1710.

would apply only after a lawyer is appointed as class counsel—that is, after the certification stage of a class action lawsuit."[57] Who, wonders Moore, is the class action lawyer's client prior to certification of the class? "Must it be the named representatives? In my view, it is possible for the lawyer to view even the putative class as a client, or better yet, a prospective client."[58] But without the retroactive approach, this answer may contribute to the very confusion surrounding the ethics of class actions. If the entity approach were to apply only after certification, it would mean that the class lawyer would have no client pre-certification.

As *Danforth* holds by analogy, however, the class is always the client in the class action. The named plaintiff is not a client but a constituent of the entity client, who can act for the client before the class is certified. When and if the class is certified, by operation of law, the class representative retroactively becomes a constituent of the class action lawyer. Accordingly, the class action lawyer can continue representing the class without being bogged down by possible conflicts of interests and duties owed to the class representative as a former client. The remaining challenge, in Shapiro's words, of devising structures and developing constituents authorized to act for the class[59] is undertaken below.[60]

C. RESOLVING THE ETHICAL TRILEMMA OF CLASS ACTIONS WITH A KISS: THE ENTITY CLASS IS THE ONLY CLIENT OF THE CLASS ACTION LAWYER

The KISS approach offers consistent, predictable answers to many of the legal ethics questions plaguing class actions. First, can a lawyer represent both the class and the class representative?[61] Yes, but only if there is no conflict of interest between the class and the representative; or, if any conflict is adequately resolved, should one arise. By analogy to Rule 1.13(a), a class action lawyer represents the class, not its authorized constituents. A class action lawyer representing a class may also represent any of its constituents, including the class representative, subject to the conflict of interest rule.[62] Professors Bruce Green and Andrew Kent reach the same conclusion, finding that "[i]t is not easy to dismiss the idea that the standard conflict rules should govern the propriety of a lawyer's joint representation of a class and a class representative, just as they would govern the joint representation of a corporation and a corporate officer."[63] They add further that "[t]here would be nothing exceptional about applying

57. Moore, *supra* note 49, at 1486.

58. *Id.*

59. Shapiro, *supra* note 38, at 940.

60. *See infra* Part II.B.

61. *See generally* Green & Kent, *supra* note 2 (discussing conflicts resulting from class action lawyers also representing class members as individuals).

62. MODEL RULES OF PRO. CONDUCT r. 1.13(g) (AM. BAR ASS'N 2023).

63. *See* Green & Kent, *supra* note 2, at 1126.

ABA Model Rule 1.7 in this context, other than that the court's authorization would have to serve as a substitute for the class's informed consent."[64]

Although the KISS principle proposed here and Green and Kent's analysis reach the same conclusion, the former approach helps clarify and resolve many of the legal ethics tensions correctly identified by Green and Kent in contemporary class action law. For example, Green and Kent note that "[a]fter filing the class action complaint but prior to certification, counsel has no 'formal' attorney-client relationship with the putative class but, according to caselaw and official commentary on FRCP 23, 'generally must act in the class's best interests.'"[65] Whereas under current law the source of this duty is unclear, the KISS approach would clarify that the lawyer represents the class and must act in the class's best interests because it is the client.

Similarly, Green and Kent observe that "[a]fter a class is certified and a lawyer is appointed to serve as class counsel, the lawyer owes the class most—but not all—of the ethical and fiduciary duties of loyalty that lawyers ordinarily owe to clients," and that "class counsel has a primary duty to the class and only a secondary duty to individual class members."[66] In contrast, under the KISS approach, after the class is certified, the lawyer would owe the class all the ordinary duties owed to clients. The lawyer would owe these ordinary duties, not "primary" duties, to the class. Additionally, the lawyer would owe no duties, as opposed to "secondary" duties to individual class members, who would be constituents of the entity class.

Finally, following current law, Green and Kent conclude that a "*treatise goes too far in suggesting that the lead plaintiffs have become 'former' clients of class counsel*. Most lawyers, courts, and commentators view the individual attorney-client relationship with named plaintiffs as continuing, albeit in *modified form*."[67] They add that "the treatise does capture the common view that after certification class counsel's *primary loyalty* is to the class as a whole, which must be preferred over lead plaintiffs—*whether or not they are also individual clients—and absent class members*."[68] As accurately described by Green and Kent, the law's current approach is confusing. Under the KISS approach, the lead plaintiffs would not become former clients. Rather, they would retroactively be recognized as constituents of the class. Because lead plaintiffs were never clients but rather constituents of the entity client, lead plaintiffs never formed an "individual attorney-client relationship" with class counsel and would not have a continuing relationship with the lawyer in a "modified form." Accordingly, practitioners, courts, and commentators would not be placed in the awkward and uncertain position of trying to figure out the meaning and contours of such a

64. *Id.*
65. *Id.* at 1093.
66. *Id.* at 1094.
67. *Id.* at 1095 (emphasis added).
68. *Id.* at 1095–96 (emphasis added).

"modified" relationship. Moreover, practitioners, courts, and commentators would be spared having to speculate regarding class counsel's "primary loyalty" to the class and its relationship to the interests of lead plaintiffs and class members. Rather, under the KISS approach, class counsel would owe all the ordinary ethical duties to the class as they would to any client and no duty to the interests of constituents such as lead plaintiffs and class members.

To be sure, if the KISS approach is adopted, some, perhaps even most, class lawyers may proceed by representing the class and the class representative individually from the outset, when first retained by the class representative acting as a constituent on behalf of the class. Some might then wonder whether the entire KISS exercise was worth it—in other words, to hold that the class lawyer represents the class and not its constituents, only to have lawyers bypass the rule by agreeing to also represent the class representative. But the import of the KISS approach cannot be understated. Since the lawyer represents the class, if and when a conflict arises between the class and its representative, the lawyer would have to resolve the conflict of interest. In particular, this means that the class lawyer would have to comply with the conditions of Rule 1.7(b)(1); that is, that class lawyer would have to objectively conclude that they can competently and diligently represent the class and the lead plaintiff.[69] The class lawyer would also need to comply with Rule 1.7(b)(4). With regard to the lead plaintiff, in order to obtain the lead plaintiff's informed consent, the class lawyer would have to explain the advantages and risks of the dual representation and offer the lead plaintiff alternatives.[70] With regard to the entity class, informed consent could not be given by the lead plaintiff.[71] Rather, it would be given by an "appropriate official" of the entity class,[72] the supervising court on behalf of the class in due course,[73] when the class action is filed. If the conflict cannot be resolved, class counsel would have to withdraw from the representation of both the class and the lead plaintiff.[74]

Recall that as Green and Kent explain, in most class actions this would not be a concern at the outset because the interests of the lead plaintiff and the entity class would be aligned.[75] Importantly, however, if and when conflicts of interests do arise between the class representative and the entity class—for example, when class representatives act as holdouts or sellouts or when they seek to negotiate payouts[76]—the class action lawyer would need to obtain the informed consent of both the class representative and the entity class, the latter from the

69. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1) (AM. BAR ASS'N 2023).
70. *Id.* r. 1.0(e) cmts. 6–7, r. 1.7(b)(4).
71. *Id.* r. 1.13(g).
72. *Id.*
73. *See* Green & Kent, *supra* note 2, at 1126.
74. MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2023).
75. Green & Kent, *supra* note 2, at 1114.
76. *Id.* at 1101–10.

supervising court acting as a "constituent" of the class. As Moore eloquently states:

> A lawyer representing individuals seeking to serve as class representative must, at the very least, inform them precisely what that role entails, including substantial limitations on the ability of class representatives to control the class lawsuit. Surely it is the wiser course for the lawyer to simultaneously address the risk that conflicts between the individual and the class will arise, including disagreements over holdouts, sellouts, and payouts. Having identified an existing conflict (based on the significance of the risk that the clients' interests will clash at a later point), the lawyer must then follow the dictates of Rule 1.7.[77]

Some commentators worry that this "strict" application of the Model Rules might unnecessarily burden courts.[78] Consider, for example, *In re "Agent Orange" Product Liability Litigation*, in which the court reviewing the applicable rules of professional conduct stated that "[c]lass action litigation presents additional problems that must be considered in determining whether or not to disqualify an attorney."[79] Yet this observation is not unique to class action matters. The Model Rules are not self-executing. Specifically, when a conflict of interest arises in litigation per Rule 1.7(a), and it cannot be resolved per Rule 1.7(b), a lawyer is not automatically disqualified from a case. Indeed, a lawyer tainted by an unresolved conflict of interest in litigation cannot even withdraw without the permission of the court.[80] When deciding motions to disqualify, courts never automatically disqualify counsel simply because the Model Rules have been violated. Rather, courts consider the integrity of the proceeding, including prejudice to the parties involved, and disqualify lawyers only as a matter of last resort.[81] In this sense, the onus on courts handling class actions would not be greater or different than the burden imposed on any court deciding a motion to disqualify counsel based on a conflict of interests.

Observers may be troubled by the characterization of the court as a "constituent" of the class. Courts, of course, already supervise class counsel closely per Rule 23 of the Federal Rules of Civil Procedure, but the issue is not mere semantics. As Part II.C discusses, the reference to the court here as a "constituent" is not meant as a provocation, but rather as means of stressing the role courts already play on behalf of the class in supervising the class lawyer and emphasizing the need to reduce that role by creating additional constituents able to act on behalf of the class.[82]

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77. Nancy J. Moore, *Ethical Duties of Class Counsel Also Representing Class Representatives*, 72 FLA. L. REV. F. 160, 163 (2022).

78. *See, e.g.*, Green & Kent, *supra* note 2, at 1100 & n.83.

79. 800 F.2d 14, 18 (2d Cir. 1986).

80. MODEL RULES OF PRO. CONDUCT r. 1.16(c) (AM. BAR ASS'N 2023).

81. *See, e.g.*, *In re* Est. of Myers, 130 P.3d 1023, 1027 (Colo. 2006).

82. *See infra* Part II.C.

Second, can a class member sue the class action lawyer for malpractice? The KISS approach offers a clear answer to this fraught question. The class action lawyer represents the class, not its authorized constituents, including class members.[83] Since the class lawyer does not represent the class members, the lawyer does not owe a duty of care to the members who cannot ordinarily sue in malpractice for the breach of the duty. This is the traditional application of the privity rule, pursuant to which only parties in privity with a lawyer—that is, the lawyer's clients—can sue for legal malpractice.[84] However, exceptions to the privity rule exist—for example, the intended beneficiaries of negligently drafted wills and parties who relied on badly executed title searches can sue a negligent attorney for malpractice.[85] As Professor David Luban argues: "There is no reason why the privity rule should not erode still further."[86] Courts can hold that class members who relied on the negligent advice of class counsel who gave the advice intending class members to rely and benefit from it may sue the lawyer for malpractice. Alternatively, while class members may not have standing to bring a suit against the class action lawyer, the certifying court, acting as a "constituent" of the class, can evaluate whether the lawyer acted in the best interest of the class as a whole, consistent with powers the court already has pursuant to Rule 23 of the Federal Rules of Civil Procedure.[87]

Third, what duties of communication and disclosure do class lawyers owe absent class members, especially around settlement, and what would the recourse be for class members who think that they might not have gotten the information they wanted? Per the KISS approach, class members are constituents of the entity client, not clients of the class action lawyer. Because class members are not clients, they are not owed the duty of communication that lawyers owe their clients.[88] Instead, as nonclients, the contours of communication and disclosure owed to class members would be set and limited to court-ordered disclosures, the very approach already laid out by the Supreme Court in *Gulf Oil Co. v. Bernard*.[89] Similarly, because class members are not clients of the class lawyer, the "no-contact" doctrine—under which lawyers cannot generally contact represented parties without the consent of their lawyers, and defense counsel cannot specifically communicate with class members, at

83. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 25 (AM. BAR ASS'N 2023) ("*When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer* for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter." (emphasis added)).

84. *See, e.g.*, David Luban, *Ethics and Malpractice*, 12 MISS. COLL. L. REV. 151, 157 (1991) (internal citations omitted).

85. *Id.*

86. *Id.*

87. *See, e.g.*, FED. R. CIV. P. 23(g)–(h).

88. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2023).

89. 452 U.S. 89, 100 (1981).

least after certification of the class—would not apply.[90] Importantly, however, this does not mean defense counsel should be able to contact class members unsupervised.[91] Rather, it means that we need mechanisms, grounded in Federal Rule of Civil Procedure 23 and its jurisprudence, and perhaps akin to notice to shareholders in corporate law, to regulate the manner in which class and defense counsel communicate with class members before and after certification.[92]

The KISS approach does not answer every class action legal ethics question. Indeed, the approach will require ample work in the near future to develop governance mechanisms and structures designed to allow the entity class to express its will, as well as safeguards designed to prevent class lawyers from taking advantage of the entity class and to protect the interests of class members from overreaching class and defense counsel. If the KISS approach is accepted by courts, however, it will bring clarity, predictability, and certainty to class actions.

II. CHALLENGES TO THE KISS APPROACH

A. THE MODEL RULES CRITIQUE: THE MODEL RULES SHOULD NOT APPLY TO CLASS ACTIONS

The Model Rules of Professional Conduct, which date back over a century, often show their age. Originally designed to regulate the practice of solo general practitioners representing individuals in court, the Model Rules are often a poor fit for law firms, lawyers representing entities, and attorneys representing clients outside of courtrooms.[93]

At first glance, class actions appear to be a prime example of the Model Rules' modern poor-fit critique. Class actions depart from the paradigmatic attorney-client relationship envisioned by the Model Rules in fundamental ways. Instead of an individual client, class actions feature, in theory, many individual clients giving rise to a myriad of conflicts of interest and communication challenges, or an entity client lacking governance structure and organization. Moreover, they often involve many law firms, rather than an individual lawyer, triggering complicated confidentiality, fee, and financing concerns. Instead of general litigation, they entail a highly specialized practice spanning many areas of law.

It should come as no surprise that, shortly after the publication of Judge Weinstein's iconic article a quarter century ago that systematically explored for

90. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2023) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

91. *Gulf Oil Co.*, 452 U.S. at 103–04.

92. *Id.* at 99; *see also* Enders & Davis, *supra* note 4.

93. *See generally* Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227 (2014).

the first time the modern ethical quandaries of complex litigation,[94] eminent legal scholar Linda Mullenix exclaimed, correctly, that "the Model Rules of Professional Conduct were not drafted with complex litigation in mind and certainly not with the concept of the modern mass tort."[95] Similarly, courts often state that the Model Rules should be relaxed or ignored when their application complicates or undercuts the goals of class actions.[96] Perhaps conceding the point to critics, one author states that "[i]nstead of articulating a vision of the nature of the relationship between class counsel and the class, the Model Rules defer to the procedural law, stating that class counsel 'must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.'"[97]

The Model Rules' failure to offer guidance to class actions lawyers, litigants, and courts resulted in courts developing an ad hoc, inconsistent approach in which the lawyer represents the class for some purposes, but for others represents the lead plaintiff or class members. These unpredictable practice realities also brought about "[s]cholars . . . [stepping] into the breach with two views of the class action lawyer."[98] One would have thought that scholars would track the two views of the class action debate—the individual versus the entity—exploring respectively what it would mean for the class lawyer to represent many joined individuals, or what it would mean to represent the class as an entity client. Instead, as Professor Alexandra Lahav aptly describes, scholars have added to the confusion by offering two views of the class action lawyer as entrepreneur and public servant: "[T]he first suggest[s] that the lawyer is a type of entrepreneur (more negatively referred to as a 'bounty hunter') who conceives of the lawsuit, finds the client, and pursues the litigation for private gain."[99] The second view of the class action lawyer, according to Lahav, "is as a public servant, sometimes called a 'private attorney general' who furthers the deterrent effect of the law by harnessing the power of representative litigation."[100] Both of these views, Lahav argues compellingly, "liberate the lawyer from her client. For this reason, they are each an incomplete account for how the law simultaneously recognizes and ignores the class client."[101] Furthermore, these views "share a basic common element," resulting in "the interests of the class [being] imputed rather than ascertained, as no provision in

94. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

95. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 433 (1999).

96. Green & Kent, *supra* note 2, at 1100 ("[T]o the extent that applying ethics rules would appear to make class actions less useful or more complex, courts often state that traditional conflicts rules should be relaxed or ignored.").

97. Lahav, *supra* note 41, at 1947.

98. *Id.*

99. *Id.* at 1947–48.

100. *Id.* at 1948.

101. *Id.* at 1953.

the procedural law requires a lawyer to canvass the class and find out individual members' shared desires."[102]

There is no disputing that the Model Rules predate modern class actions and were not written with them in mind. Nonetheless, the KISS approach shows that the basic framework of Rules 1.13 and 1.7 neatly maps onto class actions' practice realities. The ethical trilemma of class actions can be easily addressed by keeping it simple: the class lawyer represents the class, the lead plaintiff and class members are constituents and not clients of the class lawyer, and the lead plaintiff retroactively becomes a constituent of the entity client once the class is certified. This approach systematically and consistently resolves many legal ethics questions pertinent to class actions without developing new conceptions of the lawyer's role as either an entrepreneur or a private attorney general. Instead, the KISS approach calls for spelling out in detail the role of the lawyer representing an entity client, a topic addressed below.

B. THE CLIENT CRITIQUE: THE KISS APPROACH DEPENDS ON CONSTITUENTS AND GOVERNANCE STRUCTURES, WHICH DO NOT EXIST IN CLASS ACTIONS

Rule 1.2(a), titled "Allocation of Authority Between Client and Lawyer," captures the basic agency principle in the attorney-client relationship. The client-principal determines the objectives of the relationship, and the lawyer-agent, in consultation with the client, determines the means by which objectives are to be pursued.[103] Critics may argue that the entity approach works well for corporations and corporate lawyers because corporations have a well-defined structure of corporate governance, including constituents well beyond incorporators such as officers and directors, who owe entity clients the fiduciary duties of care and loyalty and are authorized to take different actions on behalf of their corporations. When it comes to the law governing lawyers, this corporate governance structure allows corporate lawyers to effectively communicate with the entity client, taking directions from officers on day-to-day matters and objectives, and from the board of directors on strategic and big policy objectives.[104] Class actions, in contrast, lack such a system of governance. Thus, critics may assert, the entity view at the heart of the KISS approach fails because the lack of class constituents akin to officers and directors means that the class lawyer will not be able to communicate effectively with the class and take marching orders about class objectives from the entity client. Nancy Moore, for example, has pointed out that "a class differs from other types of entity clients under Rule 1.13. For one thing, it is the court, rather than a decision-making

102. *Id.* at 1956.
103. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023).
104. *Id.* r. 1.13(b)–(c).

body within the class itself, that is empowered to make decisions normally reserved for clients."[105]

Adopting the entity view of class actions for purposes of the law governing lawyers does not mean that Rule 1.2(a) does not apply. Rather, it means that the class lawyer must be able to communicate with the class and determine its objectives. Current class action law relies on two mechanisms to allow the class lawyer to ascertain the class's objectives: communicating with the only authorized constituent of the class, the class representative, and taking directions from the court. Under the KISS approach, the class representative as a constituent of the class and the supervising court would be analogous to corporate law's officers and directors and would populate a regime akin to a corporate governance structure. Moreover, new class governance mechanisms, ranging from the certification of subclasses with their own subclass representative and counsel to the appointment of class representative committees staffed with "independent" class representatives in addition to the traditional lead plaintiff, would have to be acknowledged and developed by courts.

Consider once again Green and Kent's analysis of current class action law. Green and Kent observe that "[a]lthough class counsel has something akin to an attorney-client relationship with those appointed by the court to serve as class representatives—for example, class counsel must consult with class representatives—this is not an ordinary attorney client relationship."[106] Under the KISS approach, there would not be "something akin to an attorney-client relationship." The class representative would be a constituent, not a client. Accordingly, the duty to consult with the class representative would mean nothing more than a duty to consult with the client via its constituent.

Furthermore, Green and Kent explain that "[t]he class action lawyer does not take direction from the named plaintiffs, as a lawyer would from a client. 'A class representative may not singlehandedly veto a proposed settlement,' whereas under the ABA Model Rules, a client has an absolute right to reject any proposed settlement."[107] Next, "[u]nder standard agency law principles, a client has the near-absolute right to access the lawyer's files about her case. But class representatives generally do not have any unfettered right to access."[108] Indeed,

> [i]n a standard attorney-client representation, the client has the absolute right to fire her lawyer for any reason at any time; the only qualification is that the client's discharge of counsel is subject to court approval if litigation has been filed. But a class representative has no "right to replace class counsel at will."[109]

105. Moore, *supra* note 49, at 1487.
106. Green & Kent, *supra* note 2, at 1096.
107. *Id.* at 1097.
108. *Id.*
109. *Id.* at 1097–98.

Finally, "[i]n the typical attorney-client relationship, the client and lawyer privately negotiate a fee, subject to only extremely loose regulation under ethics rules."[110] In a class action, by contrast,

> the court sets class counsel's fee. Unlike in an ordinary representation, class counsel is not obligated, or even permitted, to loyally and competently pursue the individual class representative's interests as distinct from those of the class members collectively. Rather, the lawyer is responsible to do what is in the class's best interest, which may at times be contrary to the named plaintiffs' preferences.[111]

Green and Kent's accurate observations reflect current class action law's inconsistent approach to who is the class action lawyer's client. The KISS approach, in contrast, would clarify that the entity is the only client of the lawyer, and would treat the class representative and the court as constituents of the class. The class action lawyer would not take direction from the named plaintiffs, as a lawyer would from a client, because the named plaintiffs are constituents, not the client, and their direction ought to be subject to approval by the court, another "constituent" of the class. Similarly, the class representative may not singlehandedly veto a proposed settlement, does not have a near-absolute right to access the lawyer's files about the class action case, does not have the absolute right to fire the class lawyer for any reason at any time, and does not have the power to set the class counsel's fee because the class representative is but one constituent of the class. Just as officers must seek approval of the board of directors for certain decisions pertaining to the corporation, so also must the class representative seek the approval of the court, acting as a supervising "constituent" of the class, for certain decisions regarding the interests of the entity class. Put differently, under the KISS approach, the class representative acting as an authorized constituent and the court acting as a "constituent" of the class together constitute the governance structure of the class, akin to the corporate governance apparatus of corporations.

Thus, the KISS principle offers a middle ground between the individual-autonomy or complex-joinder approach on the one hand, and the traditional entity approach of Rule 1.13(a), which depends on a well-developed governance structure, on the other. Since current class action law does not yet recognize mechanisms of class action governance, other than the class representative, that are akin to corporate governance, the KISS principle treats the certifying court as a "constituent" of the class. Together, the court and the class representative comprise the "joint" governance structure of the class.

Critics may retort that treating the certifying court as a "constituent" of the class misconstrues the role of the court in the adversary system, turning it into an advocate for a party as opposed to acting in its traditional, neutral role. This critique fails for two reasons. First, under Federal Rule of Civil Procedure 23,

110. *Id.* at 1098.
111. *Id.*

courts already discharge many of the duties and obligations traditionally reserved for a "constituent" of the class.[112] Yet under current law, exactly because this role of the certifying court seems antithetical to the traditional understanding of the role of the court in the adversary system, different judges discharge their obligations differently with unpredictability and inconsistency.

The KISS principle would not alter what courts already do and would not solve, overnight, all of the problems plaguing class actions. Rather, it would constitute a necessary first step, providing the conceptual clarity to ensure that all courts discharge their duties to the class under Rule 23 similarly and consistently. Second, by transparently exposing the role courts *already* play for the class, the KISS approach would highlight the modern need to develop new class governance mechanisms to allow courts to gradually do less while enabling the class to systematically reflect the will of and act for its members. As noted above, necessary reform may include developing principles for certifying subclasses with their own subclass representative and counsel and appointing class representative committees staffed with "independent" class representatives, akin to independent board members, alongside the traditional lead plaintiff. Once such class governance mechanisms are developed and new class constituents begin to act for the class, the role of the court as class "constituent" acting in a "joint" governance structure with the class representative would gradually lessen.

Since statutory reform of the Federal Rules of Civil Procedure is unlikely,[113] it may fall to courts to introduce and develop these new class action governance structures. Reluctant as some judges may be to engage in this endeavor, when faced with the choice between the status quo—the current confusing and inconsistent state of affairs, which turns courts into a de facto class "constituent"—and the KISS alternative—a conceptually clear, predictable, simple model with new class governance structures that will allow courts to retreat back to their traditional, neutral role over time—courts may very well prefer the latter.

Next, critics may argue that even if the combination of the class representative as a constituent and the court as a "constituent" temporarily offers enough structure for the class as an entity until such time as courts acknowledge new class constituents and develop additional governance mechanisms, the corporate analogy fails because designating class members as mere constituents, akin to shareholders, inaccurately reflects their situation under class action law. Moore, for example, correctly points out that "class members differ from either management or shareholders of a corporation because their rights are directly adjudicated in the class action lawsuit."[114] Yet this observation does not mean that the KISS approach fails. Instead, it means that because the rights of class

112. *See* FED. R. CIV. P. 23.

113. Green & Kent, *supra* note 2, at 1128; Moore, *supra* note 77, at 169–70.

114. Moore, *supra* note 49, at 1487.

members are directly adjudicated in the class action, the interests and desires of class members ought to be ascertained rather than assumed, imputed, or imagined.[115] In the twenty-first century, this need not be science fiction. Technological advances could, for example, enable effective and cheap polling of class members.[116] More generally, adoption of the KISS approach would necessitate developing additional mechanisms and structures of governance and potentially identifying additional class constituents, akin to institutional investors, to allow the entity client to determine and communicate its objectives.

Lastly, critics may argue that "characterizing the class itself as an entity client does not by itself solve the problem of delineating the duties owed by class counsel to the named and absent members of the class, and class counsel certainly need more direction than current law provides."[117] Indeed, even under the KISS approach, it is quite possible that class counsel would owe duties to named and absent members of the class as constituent nonclients, just as lawyers owe some duties to other nonclients, such as prospective clients; intended beneficiaries of negligently drafted wills; and parties who relied on poorly executed title searches.[118]

C. THE LAWYER CRITIQUE: THE CLASS LAWYER IS THE DE FACTO CLIENT IN THE CLIENTLESS CLASS ACTION

Another critique of the KISS approach centers upon the role of the class action lawyer in class actions. Some may argue that the entity approach works for corporations, because in the entity-corporate lawyer relationship, the entity can and does play the role of the principal, who determines the objectives of the relationship, and the corporate lawyer can and does play the role of the agent, who helps the client pursue its objectives.[119] In class actions, the entity approach would fail because even if the entity class can act as a principal, acting through the lead plaintiff, the court, and mechanisms such as online polling, the class action lawyer is not a mere agent. Rather, critics may argue, the class action lawyer exercises inappropriate power and authority over aspects of the client-lawyer relationship. For example, Green and Kent correctly point out that the "class counsel's role differs from that of a corporation's lawyer. Corporate lawyers take direction from duly authorized corporate officers, whereas class counsel makes decisions for the class."[120] The authors conclude that "a lawyer who represents only the class must decide *independently* what is in the class's best interest and cannot accept a class representative's direction to act contrary to the lawyer's judgment about what is in the class's best interest, even if the

115. *See* Lahav, *supra* note 41, at 1960–63.
116. *Id.* at 1962.
117. Moore, *supra* note 49, at 1487–88.
118. Luban, *supra* note 84, at 157.
119. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023).
120. Green & Kent, *supra* note 2, at 1099.

question is simply a judgment call."[121] To be sure, class action lawyers do not operate in a vacuum and do not make independent, unsupervised decisions on behalf of the class. Rather, lawyers are constrained by the fiduciary duties they owe the class, subject to the supervision of the certifying court.

To the extent that lawyer critique is a mirror image of the client critique—that is, that the entity class cannot meaningfully determine and communicate the objectives of the class, and therefore the lawyer cannot receive this guidance—the critique is overstated. As we have seen, a combination of direction from the lead plaintiff acting as an authorized constituent of the class, supervision by the court, and the development of new mechanisms designed to allow the class to express its wishes, such as polling, can allow the class to provide ample direction to the class lawyer.

Another aspect of the critique, however, warrants attention. Critics may assert that, irrespective of directions from the entity client, the class action lawyer systematically usurps the authority of the class, stepping outside of the traditional bounds of the role of an agent in the attorney-client relationship. Lahav concisely describes this challenge, which she terms the "central problem in class action representation, the agent-principal problem."[122]

> In any agency relationship, there is an incomplete overlap between the interests of the principal and those of the agent. When this gap is significant, the agent may seek to take advantage of the principal in order to further her own interests. The agent-principal problem is present in . . . the individual representation context (between lawyer and client)[] and in the class action context (between the lawyer and the class). *The agent-principal problem is a crucial issue in the class context because neither the class as a whole nor its individual members exercise control over the lawyer*. An individual client can threaten to fire the lawyer, but the class cannot. An individual client, particularly the corporate client, may be a repeat player. Class members are decidedly not. Individual clients can negotiate lawyer pay and may withhold pay or negotiate discounts, while class members cannot. The class's lawyer has an incentive to do right by the court, which appoints class counsel, fixes attorneys' fees, and may seek the same lawyer again to represent additional classes.[123]

As Lahav observes, the agency-principal problem is a serious concern that affects all attorney-client relationships, including traditional individual representations. This latter point deserves further consideration. As Professor Bill Simon compellingly explains, the risk of lawyers usurping clients' autonomy and authority, sometimes disempowering clients out of the best intentions, is a widespread problem.[124] Clients retain lawyers to help resolve

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121. *Id.* (emphasis added).

122. Lahav, *supra* note 41, at 1948.

123. *Id.* (emphasis added).

124. *See generally* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

serious concerns and threats, often involving their liberty and safety, ability to stay at their homes, maintain their economic independence, have custody over their children, etc. In these circumstances, clients are often scared and feel powerless, asking lawyers, whom they understand to be knowledgeable professionals, to resolve the disputes. Lawyers who attempt to empower clients to make informed decisions are something faced with clients who reply, "I do not know! You tell me what to do."[125]

Although theoretically clients exercise control over lawyers, in reality, especially in the individual hemisphere, they often do not. Clients theoretically can threaten to fire the lawyer and withhold pay or negotiate discounts, but in many situations, they do not have the actual power to do so. This is the phenomenon Professor David Wilkins has described as the inherent vulnerability of some clients in the individual hemisphere to their lawyers.[126] Such clients, who are nominal principals, do not have the power and do not exercise control over their lawyers.[127] Indeed, clients' limited de facto control over lawyers is also a concern outside of the individual sphere. In the corporate hemisphere, large entity clients, increasingly armed with in-house lawyers, tend to be sophisticated and powerful vis-à-vis their outside counsel.[128] Yet their outside counsel, typically BigLaw attorneys, are no pushovers, and large entity clients often hesitate to sever the relationship due to the high costs of establishing a new relationship with another large firm. At the end of the day, the relative power of the class action lawyer vis-à-vis the class is a concern, but it ought not be overstated because other clients, in both the individual and corporate hemispheres, routinely experience challenges exercising control over their lawyers.

Moreover, while the class action context permits few of the traditional theoretical safeguards that are supposed to prevent lawyers from taking advantage of their clients in ordinary litigation,

> [t]he more extreme problems posed by a relationship between a collective [of individual class members] and its agent make[] the entity model a particularly attractive lens through which to view the class action. Because they exercise little or no control over the litigation, it is difficult as a practical matter to see

125. *See id.* at 216–17.

126. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 68, 70–79 (Austin Sarat et al. eds., 1998) (describing the "traditional model" of the law governing lawyers as relying on four sets of assumptions about lawyers, clients, the nature of legal advice, and the workings of legal ethics, including the vulnerability of clients vis-à-vis their lawyers).

127. *Id.*

128. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 489–90 (1989). *See generally* Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765 (2020).

> class members as an aggregation of individuals. This lack of individual say suggests a collective approach is the right one.[129]

Some scholars who understand class counsel as a type of entrepreneur view the lawyer as a constituent of the class, akin to corporate management.[130] As the KISS approach establishes, however, this is a conceptual mistake. The lawyer is the agent, not a constituent, of the entity client in class actions. Others who conceive of class counsel's role as a "private attorney general" view the lawyer as holding a position of public trust vis-à-vis the class.[131] This too is a mistake. The class lawyer is neither an entrepreneur nor a public servant. The class lawyer, like all lawyers, is simply an agent in an agent-principal relationship, serving the interests of a principal, the entity class. The challenge is developing appropriate safeguards, including supervision by courts, designed to prevent class lawyers from taking advantage of the entity class in class action litigation.

CONCLUSION

Courts and litigants caught in the hot mess of the legal ethics of class actions face chronic uncertainty and unpredictability. The law governing lawyers and the Model Rules are in part to blame for this state of affairs. The Model Rules fail to offer a consistent, clear answer to the fundamental question of whom class counsel represents. As a result, courts navigating through the Federal Rule of Civil Procedure 23 and the Model Rules have come up with a mishmash of inconsistent answers. In some contexts and circumstances, the lawyer represents the class. In others, class counsel represents class members or the class representative. For some purposes, courts follow the Model Rules; for many others, they do not.

This Essay offers a "keep it simple, stupid" approach to the legal ethics of class actions: the class action lawyer represents the entity class. The lawyer does not represent the lead plaintiff and class members, who are constituents of the entity class. The lead plaintiff, as a constituent of the class, can act on behalf of the class before it is certified, and retroactively becomes a constituent after the class is certified.

The KISS approach does not solve every legal ethics problem of class actions. Indeed, in the near future, the approach will require more work in developing governance mechanisms and structures designed to allow the entity class to express its will. Implementing the KISS approach will likewise necessitate developing safeguards designed to prevent class lawyers from taking advantage of the entity class and to protect the interests of class members from overreaching class and defense counsel. If the KISS approach is accepted by courts, however, it will bring clarity, predictability, and certainty to class actions. It is an approach worth pursuing.

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129. Lahav, *supra* note 41, at 1948.
130. *Id.* at 1948–50.
131. *Id.* at 1951–53.