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I. INTRODUCTION

Class actions[1] are a popular scapegoat, seemingly embodying[2] many of the horrors associated with a legal system purportedly out of control.[3] Complaints about the "litigation explosion" generally,

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[1] This Article focuses on class actions as seen through the lens of Federal Rule 23 of the Federal Rules of Civil Procedure. In addition to governing class actions filed in the federal courts, Federal Rule 23 has been widely copied for use in state class actions as well. *See* Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 233 n.61 (noting that "many states . . . have adopted class action rules based on FRCP 23."); *see also* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 5 (2000) (same). *See generally* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES (2003) (discussing state class action rules and court decisions). Accordingly, this Article does not address the implications of aggregated claims in other contexts, such as those arising as a result of multidistrict litigation. *See* 28 U.S.C. § 1407 (1993) (governing multidistrict litigation); *see generally* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).

[2] *See DeLay: American People Get the Joke; House Republicans Pass Class Action Lawsuit Reforms*, U.S. NEWSWIRE, June 12, 2003, *available at* 2003 WL 55658827 ("House Majority Leader Tom DeLay (R-Texas) today said the class action reforms passed today by Republicans in the House will meet the needs of the American people by reining in the excesses of the trial lawyer community . . . .").

[3] Claims regarding the litigious nature of American society are asserted both generally and with respect to virtually every sort of specific type of lawsuit imaginable. *See, e.g.*, Thomas Adcock, *Lawyers Without Clients: A Legal Education is Valuable Training for Many Other Careers*, LEGAL TIMES, June 9, 2003, at 43 (referring to United States as "perhaps the most litigious society the world has ever known"); Christopher S. Burnside et al., *Mold Spores: Bad Science or Bad Dream?*, NAT'L L.J., Feb. 18, 2002, at B13 (asserting that "[m]old is the next litigation explosion"); John C. Coffee, Jr., *Sarbanes-Oxley Act Coming Litigation*

and class actions in particular, have been the subject of media reports,[4] commentary,[5] and voter polls.[6] Stories about purported class action lawsuits have become the stuff of urban legends,[7] and calls for class action reform are a common subset of the tort reform movement.[8] Legislators regularly propose class action reform;[9] the

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Crisis, NAT'L L.J., Mar. 10, 2003, at B8 (warning that Sarbanes-Oxley Act will result in litigation crisis due to increased securities litigation); Kimberly Edds, *On Deck, at Bat and, Increasingly, in Court: High School Coaches Face Lawsuits from Disappointed Parents*, WASH. POST, June 6, 2003, at A3 (noting increase in sports lawsuits and referring to United States as "[a]n increasingly litigious society"); Robert P. Hartwig, *Report on First-Quarter 2002 Results*, 5 ANDREWS NURSING HOME LITIG. REP. No. 3, Rep. 10 (2002) ("In several states, the medical malpractice market has essentially collapsed, in large part due to excessive litigiousness."); Neil A. Lewis, *President Promises to Veto Product Liability Legislation*, N.Y. TIMES, Mar. 17, 1996, at A30 ("Groups like the National Association of Manufacturers have pressed the view that the nation's civil litigation system is out of control . . . ."); Tom Mashberg & Robin Washington, *Church Bankruptcy Option OK'd*, BOSTON HERALD, Dec. 5, 2002, at 1 (discussing Catholic archdiocese's preliminary move towards filing Chapter 11 bankruptcy as "strategy . . . to speed an end to the litigation crisis consuming the nation's fourth-largest archdiocese."); Ameet Sachdev, *Asbestos Deal Faces Huge Hurdles*, CHI. TRIB., Apr. 23, 2003, at C-3 (referring to "asbestos litigation crisis"); *Long-Term Care: Study on Healthcare Trends in America Released*, BIOTECH BUS. WK., Apr. 14, 2003, at 15, *available at* 2003 WL 19394334 (noting that seniors and taxpayers are "victims of a litigation explosion that siphons increasingly scarce federal dollars out of the nation's healthcare system, starkly threatens senior access to quality healthcare, and costs taxpayers billions").

[4] *See supra* note 3.

[5] *See infra* notes 13-15 and accompanying text (citing commentary regarding fairness issues in class actions).

[6] *See Chamber Poll Shows Americans Want Class Action Reform; Almost Half Believe Plaintiffs' Lawyers Benefit More than Consumers*, U.S. NEWSWIRE, Mar. 5, 2003 ("The United States Chamber of Commerce today released the findings of a new poll . . . [in which s]ixty-seven percent of the 813 likely voters surveyed said the class action system should be reformed."); *see also* PENN, SCHOEN & BERLAND ASSOCIATES, INSTITUTE FOR LEGAL REFORM, N.S. CHAMBER OF COMMERCE, POLLING ON THE CLASS ACTION SYSTEM 1 (Mar. 3, 2003), *available at* http://www.legalreformnow.com/resources/classaction.pdf.

[7] *See, e.g.*, *Gerber Hoax*, *at* http://www.snopes.com/inboxer/hoaxes/gerber.htm (last modified Jan. 18, 2001) (reporting false claims from 1997 and 1999 that parents could claim one $500 savings bond per child from Gerber as result of class action lawsuit:

> [T]he word on the street—and on fax machines, fliers, and the Internet—is that settlement of a class-action lawsuit against Gerber allows parents to receive anything from a $500 savings bond to $1,400 cash if they bought baby food or formula during the last 17 years from the Fremont, Michigan-based company.
>
> But Gerber is not involved in any class-action settlement. It is not even the target of a class-action suit.).

[8] *See GOP Leaders Plan to Take Up Asbestos Next Session*, CONGRESSDAILY, Dec. 3, 2002, *available at* 2002 WL 102859633 ("Class action reform is not tort reform, but often gets lumped in with it . . . .").

[9] *See* Justin Gest, *For Third Time, House OKs Reforming Class-Action Suits*, L.A. TIMES, June 13, 2003, at A24 ("This is the third time in five years that class-action reform legislation

most recent federal version, the so-called "Class Action Fairness Act of 2003,"[10] which was widely believed likely to become law,[11] failed by only one vote in the Senate.[12]

Among academic commentators, too, fairness in class actions is a recurring theme. In particular, fairness issues underlie recent commentary addressing collateral attacks upon class action judgments;[13] class action settlements in which the biggest beneficiaries are counsel rather than the class members;[14] and

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has passed the House, and House Democrats can only wait to see whether the bill will be stymied in the Senate, as it was in 1999 and 2002.").

[10] Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003).

[11] *See, e.g.*, Mark A. Hofmann, *House OKs Class-Action Bill*, BUS. INS., June 23, 2003, at 1 ("The House action [in passing the Class Action Fairness Act of 2003] has lead proponents of class-action reform to feel more positive than ever before over the chances of reform becoming law."); *Class-Action Bill Gains Steam*, CHEM. MKT. REP., Jun. 16, 2003, at 9 ("[I]ndustry attorneys expressed confidence that the [class action reform] measure will pick up enough Democratic votes to defeat a likely filibuster when it is considered on the Senate floor...."); David Pilla, *AIG's Greenberg is Hopeful on SARS and Tort Reform, Worried About European Accounting*, BESTWIRE, May 13, 2003 ("Maurice R. Greenberg, chairman and chief executive officer of American International Group Inc., ... said the present time offers the greatest opportunity in years to win tort-reform legislation, both on the state and federal level. 'Federally, class-action reform will probably pass in the Senate,' he said.").

[12] *See* 72 U.S.L.W. 2233-34 (Oct. 28, 2003) (reporting that on Oct. 22, 2003, the Senate rejected, by one vote, Senate Bill 1751—the Class Action Fairness Act of 2003); Chris Grier, *Class-Action Bill Fails in Senate*, BEST'S INS. NEWS, Oct. 22, 2003, *available at* 2003 WL 59121593.

[13] *See, e.g.*, William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1163-64 (1998) (criticizing suggestion that class members should be able to attack adequacy of counsel collaterally); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 371-74 (1999) (describing potential post-judgment remedies for non-class members); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 779-83 (1998) (criticizing broad right to mount collateral attack upon adequacy of representation); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1047 (2003) (noting that allowing collateral attacks upon adequacy of representation in class forum "contradicts modern understandings of class actions"); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 433-38 (2000) (arguing that collateral attack on judgment is important safeguard to ensure that class members receive hearing on merits of case).

[14] *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 408-17 (2000) (discussing issue of whether attorneys or class members control lawsuits); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 827-30 (1997) (contending that counsel's recovery should be fraction of class recovery); Stephen B. Murray & Linda S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel* for *the Class or a Selection of Counsel* with *Class?*, 74 TUL. L. REV. 2089, 2092 (2000) (discussing conflicts that make attorney inadequate to represent class); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs'*

settlements that disproportionately benefit some claimants to the detriment of others.[15]

All of these concerns, by academic commentators and the public alike, relate to the same underlying issue—adequacy of representation. Because a class action judgment is intended to bind all members of the class,[16] regardless of whether they actively participated in the class litigation,[17] the ability to collaterally attack a class action judgment largely depends on whether the challenger's interests were adequately represented in the first lawsuit.[18] Settlements benefiting counsel rather than the class implicate lawyer self-interest and thereby conflicts of interest,[19] which are

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Counsel in Allocating Settlement Proceeds, 84 VA. L. REV. 1465, 1483-1500 (1998) (discussing attorneys' obligation with respect to taking fees out of class recovery or settlement).

[15] *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1051-86 (1995) (discussing problems with adequacy of representation in *Amchem*, including both intra-class conflicts and issues of collusion among counsel).

[16] *See* Lilly, *supra* note 13, at 1009 ("American law generally holds that when a properly structured class action is resolved by a judicial judgment, the entire class is bound.").

[17] *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine in the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ."); *see also* Lilly, *supra* note 13, at 1019 (noting that "throughout the history of the modern class action in the United States, the Supreme Court has accepted the binding effect of the class judgment on absentees").

[18] *See* Matsushita Elec. Indus. Co. Ltd. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring and dissenting) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."); *see also* Lilly, *supra* note 13, at 1029 (noting that "the adequacy of representation by the class representative and class counsel . . . determine the preclusive effect of a class action judgment . . . .").

> [T]he basic constitutional principle has been to permit unnamed class members to challenge the adequacy of their representation in a collateral trial. If the court finds that the class (or certain members within it) was inadequately represented, the judgment as to the class (or individual within it) will be invalidated under the Due Process Clause.

Lilly, *supra* note 13, at 1037 (citations omitted).

[19] *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042-43 (2002) (discussing conflicts of interest for class counsel).

> Although the class counsel has a duty to represent the interests of the class, agency costs may encourage attorneys to pursue their own self-interest. Agency costs exist when a principal hires an agent to perform a task but the agent's remuneration is not directly tied to the principal's gain such that the agent may increase her payoff by being faithless. . . . When the attorney has such a substantial financial stake in the outcome of the litigation, the class counsel arguably becomes the principal. As a

also within the adequate representation inquiry. Similarly, settlements disproportionately benefiting particular classes of claimants also suggest potential conflicts of interest and thereby present adequacy issues with respect to both the class representatives and class counsel.[20]

Rule 23 of the Federal Rules of Civil Procedure attempts to protect absent class members—unnamed class members who are not actively participating in the lawsuit but who will nevertheless be bound by any class judgment—by ensuring that their interests are adequately represented by the class lawsuit participants, particularly class counsel and the class representative,[21] with additional oversight protection from the court.[22] Recent Supreme

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result, class actions are rife with actual and potential conflicts of interest.

Id. at 1042-43 (citations omitted).

[20] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 854-59 (1999) (discussing conflicts and improprieties of unequal distribution of settlement proceeds among class members); *see also* Susan P. Koniak & George M. Cohen, *In Hell There Will be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 160-61 (2001) (noting that "conflicts of interest among class members translate into a conflict of interest problem for class counsel . . . .").

[21] The adequacy of representation prerequisite under Rule 23(a)(4) has two components: "Does the representative have any kind of a material conflict of interest with the class with respect to the common questions involved, and will counsel for the class vigorously prosecute the action on behalf of the class?" 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.13, at 3-73 (3d ed. 1992); *see also Ortiz*, 527 U.S. at 856 n.31 (observing that "the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel' "); ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 108 (2000) ("Although [Rule 23] speaks only of the adequacy of the 'parties,' courts have long extended the 23(a)(4) analysis to the attorneys representing the proposed class representatives."); 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1766, at 297-98 (2d ed. 1986) ("Quality of representation embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves."). Although the recent amendments to Rule 23 created a specific subsection addressing the adequacy of class counsel, the amendments provided no additional guidance with respect to the definition of adequate representation. FED. R. CIV. P. 23(g)(1)(B) (as amended Dec. 1, 2003) ("An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.").

[22] *See* FED. R. CIV. P. 23(c)(1), (d), (e) (authorizing wide court discretion in protecting absent class members).

Court cases[23] have emphasized the critical nature of adequate representation in assuring due process[24] in the class action context.[25]

Adequacy of representation may be challenged at any stage of a class action,[26] and it is a prerequisite both for class certification[27] and for a binding judgment.[28] However, the "adequacy of

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[23] *See, e.g.*, *Ortiz*, 527 U.S. at 848 (noting due process requirements of representation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26 (1997) (discussing adequacy requirements); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396-98 (1996) (discussing adequate representation).

[24] *See* Hansberry v. Lee, 311 U.S. 32, 43 (1940) (finding lack of due process due to inadequacy of representation); *see also Ortiz*, 527 U.S. at 848 & n.24 (reiterating *Hansberry*'s requirement of adequate representation to protect the interests of absent class members); Elizabeth J. Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 383 (1998) ("Adequacy of representation is the touchstone of due process . . . ."); Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of* General Telephone v. Falcon, 54 OHIO ST. L.J. 607, 635 (1993) (noting that adequacy of representation serves to provide due process protection for absent class members); Issacharoff, *supra* note 13, at 369 (noting that due process traditionally has been measured by adequacy of representation); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong With Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 15 n.48 (1995) (noting that adequacy of representation is "required by the Due Process Clause of the Constitution"); Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402, 424 (1996) (observing that Rule 23 "reflects due-process concerns through its requirement of adequacy of representation").

[25] *See, e.g.*, E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405-06 (1977) ("The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.").

[26] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"); *see also Matsushita*, 516 U.S. at 395 (Ginsburg, J., concurring and dissenting) ("As the *Shutts* Court's phrase 'at all times' indicates, the class representative's duty to represent absent class members adequately is a continuing one."); Woolley, *supra* note 13, at 399 (noting that "courts are obliged to monitor the adequacy of representation throughout the proceedings . . ."). Indeed, the Supreme Court has long held that adequacy of representation may be challenged by collateral attack after entry of judgment in the class action. *See Hansberry*, 311 U.S. at 44.

[27] *See Shutts*, 472 U.S. at 809 ("A plaintiff class . . . cannot first be certified unless the judge . . . conducts an inquiry into . . . the adequacy of representation . . . ."); *see also* Coffee, *supra* note 14, at 427-28 (noting that adequacy of representation "is a prerequisite before a class action can be certified or absent class members may be bound by the judgment").

[28] *See Matsushita*, 516 U.S. at 396 (Ginsburg, J., concurring and dissenting) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 41, cmt. a, at 394 ("[T]he represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings."); Woolley, *supra* note 13, at 384 ("May an absent class member who has been inadequately represented attack the class judgment in subsequent litigation? The traditional answer . . . has been a clear 'yes.' ").

representation" required by Rule 23 is not well defined. Neither Rule 23 itself[29] nor case law provides an effective definition,[30] and neither the 2003 amendments to Rule 23[31] nor the highly-touted

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[29] *See* FED. R. CIV. P. 23(a)(4) (stating that prerequisite to class action is that "the representative parties will fairly and adequately protect the interests of the class"). The advisory committee notes accompanying Federal Rule 23 are silent as to the meaning of subsection (a)(4).

[30] *See* Woolley, *supra* note 13, at 387 (observing that "the law remains remarkably unsettled with respect to what qualifies as inadequate representation"); *see also* Coffee, *supra* note 14, at 428 (noting that adequacy of representation "is not self-defining"); Koniak & Cohen, *supra* note 20, at 157-58 (discussing courts' attitudes toward class counsel).

> [C]ourts content themselves by summarizing class counsel's resume in the most laudatory terms and by making conclusory statements about how well-respected, talented and above reproach class counsel is. In most cases, in other words, courts are too busy heaping praise on class counsel to describe what they have done to represent the class, to elaborate on what the rule of adequacy demands of class counsel or to explain why it makes sense to hold that what class counsel did satisfies the law.

Id. See also id. ("[T]he courts manage not to create any law of adequacy, leaping as they do from the actions of counsel to the conclusion that those actions are adequate without pausing to explain the content of the standard they purport to be applying."); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 288 (2003) ("For all the agreement on the centrality of adequate representation to the modern class action—indeed, on its constitutional status—there remains remarkably little agreement on the content of that concept or how to enforce it.").

[31] The 2003 amendments to the Federal Rules of Civil Procedure made no changes to Rule 23(a)(4)'s adequacy of representation provision. However, the amendments added a new subsection (g), entitled "Class Counsel," which supplants Rule 23(a)(4) in evaluating the adequacy of class counsel. Rule 23(g)(1)(B) mirrors the language of Rule 23(a)(4), providing: "An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B). New subsection (g)(1)(C) provides some limited additional guidance:

> In appointing class counsel, the court
> (i) must consider:
> • the work counsel has done in identifying or investigating potential claims in the action,
> • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
> • counsel's knowledge of the applicable law, and
> • the resources counsel will commit to representing the class;
> (ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
> (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
> (iv) may make further orders in connection with the appointment.

FED. R. CIV. P. 23(g)(1)(C). However, the amendments place an undeserved focus on class counsel's experience, while avoiding any discussion of ethical considerations that might remedy the highly publicized and widely criticized conflicts and other ethical lapses.

"Class Action Fairness Act of 2003"[32] resolves this problem.

In fact, the cries for class action reform are largely misguided. The remedies for the most widely publicized[33] class action abuses[34]

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[32] Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003). Despite the Act's repeated references to "fairness," the Act was aimed primarily at providing new jurisdiction and removal provisions that would have rendered federal courts the primary forum for class actions. *Id.* (proposed 28 U.S.C. §§ 1453, 1711). Fairness concerns were addressed only in the provision requiring clearer and simpler language in class settlement notices; judicial scrutiny when a proposed settlement involved a noncash benefit; and judicial scrutiny when a proposed settlement resulted in a net loss to class members. *Id.* (proposed 28 U.S.C. §§ 1711, 1712, 1715).

[33] The inherent "newsworthiness" of atypical cases renders suspect any proposal motivated by, and offered in reaction to, media reporting. *See* Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 861 (1997) ("[T]he dislike of particular egregious high visibility cases should not be the sole engine that drives our processes. The landscape is richer than that, and I know there is more to know about class actions than what newspapers (themselves also with and responding to agendas) report."). For example, juries are a popular media target, "[d]espite repeated studies contradicting negative popular perceptions." Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1178 (2001). *See generally* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (discussing outrageous class actions).

> [A] substantial portion of the horror stories are stories of nutty claims that, if they are pursued at all, are quickly discarded by courts. Second, the stories invariably tell of a claim . . . against an institution, governmental body, or corporation. If grotesque or unfounded claims are brought against individuals by other individuals or by corporate entities, they do not ascend into the pantheon of horror stories, nor do accounts of grotesque or frivolous defenses. It is a universe in which corporations and governments are victims, and individuals (and their lawyers) are the aggressors.

Id. at 731; *see also* Bassett, *supra*, at 1178-80 (citing jury studies).

[34] *See* 3 NEWBERG & CONTE, *supra* note 21, § 15.02, at 15-5 ("Abuses of class actions concern themselves mainly with the improper use of the class action to increase litigation and settlement bargaining power for individual gain in disregard of or at the expense of claims of absent class members, and to compromise adequate representation of the class for individual purposes."). Some of the publicized abuses of class actions involve inherent risks:

> The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity. These incentives can produce settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society. For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case. For defendants, the rewards are a less-expensive settlement than they may have anticipated given the merits of the case.

DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, *Executive Summary* to CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, at 10 (Mar. 24, 1999),

are already available through the existing, but underutilized, tripartite system of adequacy safeguards: the class representative, class counsel, and court oversight.[35] Existing guidance with respect to each of these three safeguards has received insufficient attention in practice, particularly the same interest-same injury required of class representatives;[36] the considerations underlying the Model Rules of Professional Conduct in evaluating the adequacy of class counsel;[37] and the "rigorous analysis" required of court review.[38]

Part II analyzes the available guidance regarding adequacy of representation from the Supreme Court's decisions.[39] The Supreme Court's factors fit within the tripartite series of safeguards—the class representatives, class counsel, and court oversight—responsible for ensuring adequacy of representation. Part III analyzes the first of these safeguards—the class representative.[40] Part IV analyzes the guidance available from the Model Rules of Professional Conduct in reviewing the adequacy of class counsel.[41] Finally, Part

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available at http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf.

[35] *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30, at 229-30 (1997) [hereinafter MANUAL FOR COMPLEX LITIGATION] ("Once class allegations are made, . . . [t]he attorneys and parties seeking to represent the class assume fiduciary responsibilities, and the court bears a residual responsibility to protect the interests of class members, for which Rule 23(d) gives the court broad administrative powers.").

[36] *See infra* notes 156-65 and accompanying text (discussing same interest-same injury prerequisite for class representatives).

[37] The ethical rules are a type of model code, and they carry no independent power standing alone. However, the ABA Model Rules of Professional Conduct and their predecessor, the ABA Model Code of Professional Responsibility, form the basis for the ethical rules in forty-nine of the fifty states, as well as the District of Columbia and the Virgin Islands. *See* ABA COMPENDIUM OF PROF'L RESPONSIBILITY RULES AND STANDARDS 517-18 and inside back cover (1997) (providing history and status of ABA Model Rules of Professional Conduct); *see also* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 411 n.17 (1998) (providing detailed description of the jurisdictions that have adopted provisions identical to Model Rule 1.7 and those that have made minor modifications). California has adopted neither the Model Code nor the Model Rules. *See generally* CAL. RULES OF PROF. CONDUCT (2002). The Supreme Court has suggested that attorney ethics in the federal courts are governed by state rules. *See* Nix v. Whiteside, 475 U.S. 157, 166-67 (1986) (applying ABA Canons of Professional Ethics to criminal defense attorney in federal court). *But see* Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1316 (3d Cir. 1993) ("The ethical standards imposed upon attorneys in federal court are a matter of federal law.").

[38] *See infra* notes 264-89 and accompanying text (discussing "rigorous analysis" standard).

[39] *See infra* notes 43-123 and accompanying text.

[40] *See infra* notes 124-66 and accompanying text.

[41] *See infra* notes 167-259 and accompanying text.

V analyzes the role of the "rigorous analysis" standard in the court's determination of adequacy.[42]

II. ADEQUACY OF REPRESENTATION IN THE SUPREME COURT'S JURISPRUDENCE

Class actions[43] are a procedural device distinctive[44] from traditional individualized litigation.[45] Most class members never attend court proceedings. In fact, they may not even know that a lawsuit has been filed on their behalf.[46] A class action is representational litigation, in which the class members who are specifically named in the lawsuit represent both themselves and a class of similarly-situated others in pursuing a remedy.[47] As a representative action, a class action thus serves to bind every class member, including similarly situated individuals who did not actually participate in the class action lawsuit.[48] However, unless

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[42] *See infra* notes 260-89 and accompanying text.

[43] This Article assumes a plaintiff class. Defendant classes are possible, but uncommon. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties . . . .") (emphasis added); Coffee, *supra* note 14, at 388 (noting that "[d]efendant class actions are as rare as unicorns").

[44] *See* Lilly, *supra* note 13, at 1016 (noting "the unique features of class representation"); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150 (2003) (noting that class actions "are exceptional things"); Resnik, *supra* note 33, at 841 (noting "the distinctive features of class actions").

[45] *See* Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979) (noting that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"); *see also* Resnik et al., *supra* note 1, at 298 (noting that "[i]ndividualism pervades the traditional conception of civil litigation within the United States").

[46] *See* Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 359 n.26 (2002) ("Unnamed class members may have never met class counsel; they may have no idea that a lawsuit has been filed or that such a lawsuit was even contemplated; they may have no idea they are potential members of a class . . . ."); Leslie, *supra* note 19, at 1052 ("Non-class civil settlements are simply private contracts; but class action settlements bind class members who do not negotiate—and may be unaware of—the settlement.").

[47] *See* 1 NEWBERG & CONTE, *supra* note 21, § 1.02, at 1-5 ("The fundamental nature of a class suit is its representative status."); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 72, at 510 (6th ed. 2002) ("[A class action] provides a means by which, when a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.").

[48] *See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 910 (1995) (noting that "a court's judgment preclusively binds the plaintiffs as well as the defendants"); *see also*

those who actually participated in the lawsuit were adequate representatives of all of the diverse interests within the purported class, the class action judgment cannot be used to preclude a subsequent action involving the inadequately represented interests.[49] "Only through the device of adequate representation can there be reasonable assurances that absent class members are not being deprived of their claims without a day in court."[50]

Rule 23 expressly requires adequacy of representation as a prerequisite to a class action.[51] Despite its critical importance, however, such adequacy has proven difficult to define. Indeed, "the law remains remarkably unsettled with respect to what qualifies as inadequate representation."[52]

The classic adequacy case is the Supreme Court's decision in *Hansberry v. Lee*.[53] A judgment in an earlier case, *Burke v.*

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1 NEWBERG & CONTE, *supra* note 21, § 4.46, at 4-183 ("Generally, due process in the class action context must assure procedural fairness to absent members before they will be held bound by a final decision on the common issues involved."); Lilly, *supra* note 13, at 1009:

> [T]here has been relentless academic debate and increasing judicial disagreement over the res judicata effects of class action judgments. In particular, arguments have centered around the question of binding absentee class members. In one sense, the debate is ironic, considering the care with which the Advisory Committee for the 1966 amendments to Rule 23 addressed the extent and effect of class action judgments. It is abundantly clear that the Advisory Committee intended that unnamed members be bound when a class has been accurately certified and properly maintained throughout the suit.

Id. at 1021-22 ("[A] properly executed class suit . . . operates generally to bind the absent class members to the judgment. In fact, for a class action to function as a useful procedural device, it ordinarily must bind absent class members.").

[49] *See, e.g.*, Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161, 2161 (2003) (per curiam) (addressing issue of whether claims were precluded by previous class action settlement); Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented. . . .").

[50] Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179, 1187 (1998).

> Far from being a nice addition if it is available, adequate representation, along with notice and an opportunity to participate (and in some cases the right to opt out), are the essential elements that legitimize the class action and entitle the defendant to use a prior class judgment or settlement as a bar to future litigation by everyone who is part of the certified class.

Id.

[51] FED. R. CIV. P. 23(a)(4).

[52] Woolley, *supra* note 13, at 387.

[53] 311 U.S. 32 (1940).

Kleiman, had successfully enforced a racially restrictive covenant.[54] Subsequently, Anna Lee and others sought to enforce the same covenant against Carl Hansberry, an African-American. Hansberry defended against Lee's action by arguing that the covenant never became effective because its terms required, as a prerequisite, the signatures of ninety-five percent of the landowners within the designated area, and the requisite number of signatures had never been obtained.[55] Lee pleaded this issue was precluded by the *Burke* judgment; Hansberry countered that application of the preclusion doctrine against him would violate due process.[56]

The Supreme Court, characterizing *Burke* as a class action, noted that absent actually participating in an action, or standing in privity with one actually participating in an action, "members of a class . . . may [only] be bound by the judgment where they are in fact adequately represented by parties who are present."[57] The Court found that the purported class in *Burke* consisted of "dual and potentially conflicting interests."[58] Due to these conflicts, adequate representation did not exist, and thus the prior *Burke* action could not bind Hansberry.[59] *Hansberry* was notable for equating adequacy of representation with due process, thereby establishing adequacy as a prerequisite to a binding class judgment.

Although overshadowed by the Supreme Court's later opinions, another Supreme Court decision of particular importance in this area is *General Telephone Co. v. Falcon*.[60] *Falcon* was an

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[54] 277 Ill. App. 519 (1934).

[55] *Hansberry*, 311 U.S. at 38.

[56] *Id.*

[57] *Id.* at 42-43.

[58] *Id.* at 44.

> [A]ll those alleged to be bound by the [covenant] would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance.

Id.

[59] *Id.* at 45-46.

> The plaintiffs in the *Burke* case sought to compel performance of the [covenant] in behalf of themselves and all others similarly situated. . . . In seeking to enforce the [covenant] the plaintiffs in [the *Burke*] suit were not representing the petitioners here whose substantial interest is in resisting performance.

[60] 457 U.S. 147 (1982).

employment discrimination lawsuit filed as a class action against an employer, alleging discrimination against Mexican-Americans in hiring and promotion. The class representative was Mariano Falcon, a Mexican-American employee who alleged "that he had been passed over for promotion because of his national origin and that [his employer's] promotion policy operated against Mexican-Americans as a class."[61]

The Supreme Court reversed the class certification order,[62] finding that Falcon's complaint stated an individual claim for failure to promote and was not "typical of other claims against [the employer] by Mexican-American employees and applicants."[63] The Court reasoned:

> [T]he allegation that [across-the-board] discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [Falcon] to bridge that gap, he must prove much more than the validity of his own claim.[64]

However, *Falcon* was far more than a mere "typicality" case under Rule 23(a)(3). The Court stated that it had "repeatedly held that 'a class representative must be part of the class and possess the same interest and suffer the same injury' as the class members."[65]

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[61] *Id.* at 149.
[62] *Id.* at 161.
[63] *Id.* at 158-59.
[64] *Id.* at 157-58.
[65] *Id.* at 156.

Falcon's status as a Mexican-American employee denied promotion did not, standing alone, render him an adequate class representative as to Mexican-Americans who had been denied employment. The Court noted that the Rule 23(a) prerequisites of commonality, typicality, and adequacy of representation overlap:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.[66]

The error in *Falcon*, according to the Court, was "the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)."[67] Not only did *Falcon* emphasize the centrality of the adequacy of representation inquiry, but, of particular interest for the purposes of this Article, the Supreme Court also noted the necessity of "a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied."[68]

Adequacy of representation in the class action context was also mentioned in the important conflicts and personal jurisdiction case, *Phillips Petroleum Co. v. Shutts*,[69] but the Court made no attempt to give meaning to the adequacy concept. Involving a class action filed in state court under Kansas law, *Shutts* is notable for holding that the "minimal procedural due process protection[s]"[70] for class actions include notice, an opportunity to be heard, an opportunity to

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[66] *Id.* at 157 n.13.
[67] *Id.* at 160.
[68] *Id.* at 161.
[69] 472 U.S. 797 (1985).
[70] *Id.* at 811-12.

opt out, and adequate representation.[71] However, because adequacy of representation was not an issue in *Shutts*,[72] the Court had no occasion to provide additional guidance on this elusive topic, but only to reiterate the necessity of adequate representation in order to satisfy due process.[73]

Similarly, in *Matsushita Electric Industrial Co. v. Epstein*,[74] although the respondents "contend[ed] that the settlement proceedings did not satisfy due process because the class was inadequately represented,"[75] the Court declined to review the due process issue as "outside the scope of the question presented in this Court."[76] However, Justice Ginsburg's separate opinion, concurring in part and dissenting in part,[77] took the opportunity to emphasize "the centrality of the procedural due process protection of adequate representation in class-action lawsuits, emphatically including those resolved by settlement,"[78] noting that this issue remained "open for consideration on remand."[79] Justice Ginsburg's apparent concerns included the fact that the Delaware class settlement awarded class members only "2 to 3 cents per share before payment of fees and costs," while awarding class counsel $691,000 in fees,[80] as well as the Delaware judicial officer's refusal to reject the class settlement as collusive, despite noting that "suspicions abound."[81] Observing that "[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement,"[82] Justice Ginsburg clearly signaled her concerns with the Delaware settlement and her hope that the Ninth Circuit would address this concern on remand.

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[71] *Id.* at 812; *see also id.* ("Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.").

[72] *Id.* at 808-09 n.1 ("[I]n the present case there is no question that the named plaintiffs adequately represent the class, and that all members of the class have the same interest in enforcing their claims against the defendant.").

[73] *See id.* at 812 (discussing minimum due process requirements).

[74] 516 U.S. 367 (1996).

[75] *Id.* at 379 n.5.

[76] *Id.*

[77] *Id.* at 388.

[78] *Id.* at 399 (Ginsburg, J., concurring and dissenting).

[79] *Id.* at 389 (Ginsburg, J., concurring and dissenting).

[80] *Id.* at 392 (Ginsburg, J., concurring and dissenting).

[81] *Id.* at 393 (Ginsburg, J., concurring and dissenting).

[82] *Id.* at 396 (Ginsburg, J., concurring and dissenting).

The Supreme Court finally addressed the issue of adequacy of representation in class actions in a meaningful way in *Amchem Products, Inc. v. Windsor*,[83] in which Justice Ginsburg, whose separate opinion in *Matsushita* had indicated her concern with the caliber of inquiries into adequacy of representation, wrote for the majority. *Amchem* was, from the outset, a settlement class action—filed as such and certified as such, with no intention to litigate the matter.[84] The class action sought to achieve a global settlement of all current—and all future—asbestos-related claims involving more than twenty manufacturers of asbestos products.[85]

Among other problems, the Court found adequacy of representation lacking.[86] The Court described several purposes and prerequisites for the adequacy inquiry, including "uncover[ing] conflicts of interest,"[87] an alignment and interrelation of interests,[88] and an examination of the "competency and conflicts of class counsel."[89] In particular, the Court noted that a "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."[90]

The *Amchem* Court stated that the diversity of interests within the class required the use of subclasses.[91]

> In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of

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[83] 521 U.S. 591 (1997).

[84] *Id.* at 601-02 ("The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, . . . the settling parties . . . presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.").

[85] *Id.* at 597.

[86] *Id.* at 625.

[87] *Id.*

[88] *Id.* at 626 & n.20.

[89] *Id.* at 626 n.20.

[90] *Id.* at 625-26 (quoting E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977)); *see also id.* at 626 n.20 (inquiring into "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence").

[91] *Id.* at 626-27 (discussing subclasses).

> exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. . . . The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.[92]

The Court emphasized that although district courts need not consider manageability in certifying a settlement class,[93] all of Rule 23's other prerequisites remained intact and applicable.[94] In particular, the Court emphasized that courts cannot certify a settlement class based on a generalized belief that the settlement's terms are fair,[95] but instead, courts must duly and fully analyze adequacy of representation in an "undiluted, even heightened" manner.[96]

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[92] *Id.*; *see also id.* at 627 (noting that " 'the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups' ") (quoting *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992)).

[93] *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.") (citation omitted).

[94] *Id.*

> [O]ther specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

Id.; *see also id.* ("[C]ourts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. . . . Courts are not free to amend a rule outside the process Congress ordered . . . .").

[95] *Id.* at 621 ("[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."); *id.* at 622 ("Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper.").

[96] *Id.* at 620; *see also id.* at 621 ("Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.").

Justice Breyer wrote a separate opinion in *Amchem*, concurring in part and dissenting in part.[97] Stating that he would have reached a different conclusion,[98] Justice Breyer began by opining that "the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests."[99] With respect to adequacy, Justice Breyer appeared to suggest that adequacy of representation problems are unavoidable; that adequacy should be left to the sole discretion of the district court; and that a well-balanced settlement is less important than a comprehensive one.

> I agree that there is a serious problem [with adequacy of representation], but it is a problem that often exists in toxic tort cases. See [Jack Weinstein, Individual Justice in Mass Tort Litigation 64 (1995)] (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also [Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 34-35 (Mar. 1991)] ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' " (citation omitted)). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed. But this Court cannot easily

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[97] *Id.* at 629 (Breyer, J., concurring and dissenting).
[98] *Id.*
[99] *Id.*

> safeguard such interests through review of a cold record.[100]

Of course, the "consolation" that Justice Breyer would extend to plaintiff class members with respect to court oversight is cold comfort—an empty promise—in many class actions. District court judges may—or may not—provide the oversight and protection that Justice Breyer suggests.[101]

The opinions of Justice Ginsburg and Justice Breyer in *Amchem* highlight two of the tensions in seeking adequacy of representation in class litigation: (1) whether resolution of the class litigation is so critical that even an imbalanced, imperfect settlement is better than no settlement at all; or (2) whether the fairness of the settlement is really the ultimate goal and thus fairness, in effect, substitutes for the adequacy inquiry. These obvious and legitimate tensions have tempted some courts to defer to the achievement of a settlement generally or to the perceived fairness of the settlement specifically, and thus review adequacy of representation in only a cursory manner.[102]

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[100] *Id.* at 637 (Breyer, J., concurring and dissenting).

[101] *See* Koniak, *supra* note 15, at 1045 (discussing the problems with adequacy of representation in *Amchem*); Leslie, *supra* note 19, at 994 ("Coupon-based settlements illustrate how defendants have structured class action settlements to maximize the gains for the corporate defendant while minimizing any compensation to the class."); *id.* at 995 ("[J]udges usually focus on the face value of the coupons, not the restrictions on their use."); Geoffrey P. Miller & Lori S. Singer, *Non-Pecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 98-99 (1997) (discussing five types of non-pecuniary settlements, including coupon settlements); *Class Action Reform & An Assessment of Recent Judicial Decisions and Legislative Initiatives, in Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1806, 1818 (2000) [hereinafter *Paths of Litigation*] ("Defendants . . . often save substantial expense by settling in kind. The plaintiffs' attorneys are the only participants who actually receive money in such cases . . . ."); *see also* Thomas Geoghegan, *Warren Court Children: The Angst of an Aging Activist*, NEW REPUBLIC, May 19, 1986.

> The judge often reviews the settlement for fairness. That lasts about two seconds. You represent the Sandinistas and have settled your case for, oh, half of Florida. The judge, even a Reagan judge, will smile and say: "I want to congratulate you, Counsel, on your professionalism in settling this case."

Id. at 17.

[102] *See infra* notes 284-85 and accompanying text (citing authorities).

Amchem resolved the first of these two tensions in the negative, finding that the desirability of settling a difficult case did not reduce, much less eliminate, the adequacy inquiry.[103] The resolution of the second tension—whether evaluating the fairness of a settlement could substitute for a formal review of adequacy of representation—was addressed both in *Amchem* and again just two years later in *Ortiz v. Fibreboard Corp.*[104] In *Ortiz*, the Supreme Court cemented the resolution of the second tension in the negative, insisting upon the primacy of the adequacy inquiry and expressly rejecting the perceived fairness of the settlement's terms as a substitute for adequacy of representation.[105]

In *Ortiz*, the Supreme Court emphasized that a "settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b),"[106] thus criticizing the analytical shortcut employed by the lower court in that case. As the Supreme Court explained:

> [T]he District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its *post hoc* findings at the fairness hearing that these subclasses in fact had been adequately represented.[107]

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[103] *Amchem*, 521 U.S. at 620-22.

[104] 527 U.S. 815 (1999).

[105] *Id.* at 858-59, 863-64.

[106] *Id.* at 863-64.

[107] *Id.* at 831-32. This perspective has been a common one.

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir. 1981); *see also* Koniak, *supra* note 24, at 17 n.54 (characterizing this passage from *Corrugated Container* as "oft-cited").

The Supreme Court condemned both lower courts' "uncritical adoption . . . of figures agreed upon by the parties."[108] The Court emphasized that courts must "rigorous[ly] adhere[ ] to those provisions of the Rule 'designed to protect absentees,' "[109] and also noted that "the moment of certification requires 'heightened attention' . . . to the justifications for binding the class members."[110] Thus, when presented with a settlement with seemingly desirable terms, a court must nevertheless rigorously scrutinize whether class counsel and the class representatives have provided the adequacy of representation necessary to bind the absent class members.[111]

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[108] *Ortiz*, 527 U.S. at 848.

[109] *Id.* at 849.

[110] *Id.*

[111] Most recently, the Supreme Court granted certiorari in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *vacated in part, aff'd in part by*, 123 S. Ct. 2161 (2003). In *Stephenson*, the Second Circuit held that Daniel Stephenson and Joe Isaacson, two Vietnam War veterans exposed to Agent Orange, were not precluded by a previous global class action settlement, despite the fact that the settlement had purported to resolve all claims resulting from such chemical exposure. *Id.* at 260. *See generally In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (approving class action settlement). Holding that Stephenson and Isaacson's interests were inadequately represented in the prior action, the Second Circuit observed that the settlement funds from the original *Agent Orange* settlement had been depleted, and "neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds." *Stephenson*, 273 F.3d at 256, 257-58. The Second Circuit explained:

> Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson and Isaacson and the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994.

Id. at 260-61. Accordingly, the Second Circuit concluded, Stephenson and Isaacson "were inadequately represented in the prior litigation, [and thus] they were not proper parties and cannot be bound by the settlement." *Id.* at 261.

In a four to four per curiam opinion, the Supreme Court affirmed the Second Circuit's decision with respect to Mr. Stephenson, but vacated and remanded with respect to Mr. Isaacson. Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161, 2161 (2003). In its entirety, the per curiam opinion stated:

> With respect to respondents Joe Isaacson and Phyllis Lisa Isaacson, the judgment of the Court of Appeals for the Second Circuit is vacated, and the case is remanded for further consideration in light of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002).
>
> With respect to respondents Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, and Emily Elizabeth Stephenson, the judgment is affirmed by an equally divided Court.
>
> Justice Stevens took no part in the consideration or decision of this case.

Clearly there is much truth to the statement that "[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case."[112] However, the Supreme Court's decisions nevertheless provide perspectives and factors to consider in analyzing adequacy of representation. The relevant perspectives include a comparison of the benefits accruing to class counsel with those to the class representatives and other class members; a comparison of the benefits accruing to the class representatives with those to other class members; and an evaluation from each diverse perspective or subgroup within the class.[113] The factors include the competency of class counsel;[114] vigorous prosecution by the class representative[115] and class counsel;[116] conflicts of interest among class members, the class representatives, or class counsel;[117] and an alignment and interrelation of interests among class members and the class

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Id. The Supreme Court's puzzling partial affirmance provided no definitive guidance with respect to the adequacy determination. However, the issues posed in *Stephenson*, the Supreme Court's willingness to grant certiorari, and the affirmance as to Mr. Stephenson indicate at least that adequacy of representation remains an imprecise and unsettled area.

[112] 7A WRIGHT & MILLER, *supra* note 21, § 1765, at 271.

[113] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626-27 (1997).

[114] *Id.* at 626 n.20.

[115] *See, e.g.*, E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405 (1977) (stating that class representatives' failure to move for class certification before trial reflected failure to protect interests of class members and thus indicated inadequacy of representation). This factor may also encompass the ability to finance the action, although this does not appear to be a common problem. *See In re* Alcoholic Beverages Litig., 95 F.R.D. 321, 326 (E.D.N.Y. 1982) ("In general, the courts have shunned [inquiries into the moving party's ability to pay before certifying a class], especially where, as here, the attorneys representing the plaintiffs have indicated a willingness to advance all costs of litigation, and defendants have not disputed their ability to do so.").

[116] *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 n.30 (1999) ("In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.").

[117] *See Amchem*, 521 U.S. at 626 n.20 (noting that adequacy requirement factors in conflicts of interest); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 392 (1996) (Ginsburg, J., concurring and dissenting) (suggesting settlement agreement in which shareholder/plaintiffs received pennies per share and class counsel received more than $600,000 in fees presented conflict of interest); Murray & Harang, *supra* note 14, at 2092 ("Examples of conflicts that preclude service as a class representative are a difference in employment status, a family relationship with a defendant, and a financial interest in the outcome of the case that is antagonistic to the rest of the class.").

representatives.[118] Due to the lack of definitive substantive guidance, the process and procedures involved in ascertaining and protecting adequacy of representation are particularly important.

The process of ensuring adequacy of representation involves a tripartite system of safeguards—three levels of overlapping protection for absent class members: (1) the class representative,[119] (2) class counsel,[120] and (3) court oversight.[121] Adequacy of representation is a continuing duty,[122] and it is generally formally reviewed at least twice in class action lawsuits: at the time of class certification and again at the time of settlement.[123] When all three safeguards are operating optimally, adequacy of representation is most likely to be achieved. However, even the outright failure of one safeguard will not necessarily destroy adequacy if the remaining two safeguards remain diligent. It is when two (or more) safeguards fail that a serious risk of inadequacy arises. Examples of such safeguard failure include class representatives who are timid or unmotivated; class counsel who have unwittingly favored certain interests over others or who are focused only on recovering their fee; or judges who mistakenly place too much trust in counsels'

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[118] *Amchem*, 521 U.S. at 626 & n.20.

[119] *See* FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties . . . fairly and adequately protect the interests of the class").

[120] *See supra* note 21 and accompanying text (discussing adequacy requirement as applied to class counsel).

[121] *See* FED. R. CIV. P. 23(c)(1) ("When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action."); *id.* 23(e)(1)(a) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class."); *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 50-51 (2000) (noting that "the court must be heavily involved in certification, including relevant discovery, supervision of notice, ongoing monitoring of the adequacy of class representation, providing notice of and approving any settlement, and postjudgment determinations of the scope of class relief . . .").

[122] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (stating that Due Process Clause requires named plaintiffs to represent adequately interests of absent class members at all times).

[123] *See* Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 7 (1993) ("Courts monitor class representation primarily at the class certification and settlement phases of the case."). An exception is the settlement class, which conflates the certification and settlement stages. *See Amchem*, 521 U.S. at 601-02 (noting that settling parties presented proposed settlement agreement and motion for class certification in one day).

representations or who are lazy. The next Section analyzes the first of adequacy's three safeguards: the class representative.

III. THE TRIPARTITE BASIS OF ADEQUACY OF REPRESENTATION PART ONE: CLASS REPRESENTATIVES

Federal Rule of Civil Procedure 23 requires adequacy of representation with respect to the "representative parties,"[124] and the Supreme Court's decisions have regularly and consistently insisted that the named parties must adequately represent the interests of the class.[125] With respect to class representatives, the adequacy of representation inquiry is largely factual.[126] Courts tend to examine whether class representatives are actually members of the class;[127] whether they have some basic knowledge about the lawsuit;[128] and whether they will vigorously prosecute the action.[129] The courts also look to whether class representatives have any interests that significantly conflict with those of the rest of the class—such as whether they are similarly situated[130] and whether

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[124] FED. R. CIV. P. 23(a)(4).

[125] *See, e.g.*, *Amchem*, 521 U.S. at 625 ("Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties 'will fairly and adequately protect the interests of the class.' "); *Shutts*, 472 U.S. at 812 (holding that named plaintiff must "adequately represent the interests of absent class members."); E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 404-05 (1977) (concluding that named plaintiffs did not satisfy adequacy prerequisite).

[126] *See* Coffee, *supra* note 14, at 375 ("*Amchem* seems to have accepted an implicit theory of representation: A representative is entitled to bind only those persons whose interests and legal positions match those of the representative.").

> "[C]ohesion" within the class or subclass legitimizes representation that can bind absent class members. In short, only "likes" can bind "likes"—and only when the "like" representatives "understand that their role is to represent solely the members of their respective subgroups." . . . [O]nly a representative who shares the narrow, parochial interests of the subclass can be trusted to negotiate for their interests exclusively, rather than for the general good or best interests of the entire class.

Id. at 399.

[127] *Amchem*, 521 U.S. at 625-26 & n.20.

[128] *See, e.g.*, Dalton v. FMA Enters., Inc., No. 95-396-CIV-FTM-79D, 1996 U.S. Dist. LEXIS 9340, at *17 (M.D. Fla. July 1, 1996) (noting that class representative was not familiar with case); Sicinski v. Reliance Funding Corp., 82 F.R.D. 730, 734 (S.D.N.Y. 1979) (requiring knowledge of claim).

[129] *See supra* note 115 and accompanying text.

[130] *See, e.g.*, Scott v. Univ. of Del., 601 F.2d 76, 87-88 (3d Cir. 1979) (concluding that class representative—a professor—did not have sufficiently similar interests to class members who

they have any business,[131] family,[132] or personal[133] relationships with counsel on either side of the lawsuit. Despite these factors, however, both courts and commentators have observed that in practice, class representatives often serve as little more than mere figureheads.[134] Indeed, some of the remarks on this issue have been quite pointed. The Third Circuit has noted, "Experience teaches that it is counsel for the class representative, and not the named parties, who direct and manage these actions. Every experienced

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were seeking university employment); *see also* Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Feenes & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) ("[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.").

[131] *See, e.g.*, Lowenschuss v. Bluhdorn, 613 F.2d 18, 20 (2d Cir. 1980) (concluding that lawyer may not serve as both class counsel and class representative); Susman v. Lincoln Am. Corp., 561 F.2d 86, 88 (7th Cir. 1977) (quoting district court as stating "that when the class representative is a close professional associate with the attorney of record in the cause, the class representative cannot adequately and fairly represent the class and certification should be denied"); Brick v. CPC Int'l, Inc., 547 F.2d 185, 186 (2d Cir. 1976) (denying class certification because class counsel was class representative's sole law partner).

[132] *See, e.g.*, *Susman*, 561 F.2d at 90 (noting that majority of courts "have refused to permit class attorneys, their relatives, or business associates from acting as the class representative"); Latona v. Carson Pirie Scott & Co., No. 96C2119, 1997 U.S. Dist. LEXIS 2483, at *6 (N.D. Ill. Mar. 7, 1997) (denying class certification, in part, because class representative was class counsel's aunt by marriage); Stull v. Pool, 63 F.R.D. 702, 704 (S.D.N.Y. 1974) (wife of law firm partner who would act as class counsel could not serve as class representative). *See generally* Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1154-56 (8th Cir. 1999) (noting split in circuit courts in their approach to conflict of interest rules when class representative is related to class counsel).

[133] *See, e.g.*, Piambino v. Bailey, 757 F.2d 1112, 1144 (11th Cir. 1985) (disallowing attorney use of class action suits for personal gain); Seiden v. Nicholson, 69 F.R.D. 681, 687 (N.D. Ill. 1976) (stating that class attorney may not be class representative); Graybeal v. Am. Sav. & Loan Ass'n, 59 F.R.D. 7, 14 (D.D.C. 1973) (discussing "dual relationship" problem).

[134] *See, e.g.*, Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 896 (7th Cir. 1981) (opining that "the class representative's role is limited"); Coffee, *supra* note 14, at 384, 406 (noting that "in the class action, the class representative is usually a token figure" and that this role is "trivial"); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998) (observing that "class representatives often are recruited by class counsel, play no client role whatsoever, and—when deposed . . .—commonly show no understanding of their litigation"); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 27-28 (2002) ("Named representative plaintiffs have proven to be merely figureheads: ineffective, passive, unsophisticated, and completely disregarded by both courts and class attorneys."). *See generally* Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 165 (1990) (noting that, at times, the Supreme Court "in effect has reduced the [class] representative to nothing more than a figurehead with little or no function," and recommending their abolition).

federal judge knows that any statements to the contrary is [*sic*] sheer sophistry."[135]

Despite the disparities in power,[136] class representatives have not been discarded; the adequacy inquiry remains twofold.[137] In evaluating class representatives, adequacy of representation is more likely ensured when representatives satisfy four prerequisites: (1) the representative is genuinely a part of the class with the same interests and the same injury,[138] on the theory that in looking out for her own interests, the representative will also benefit others with the same interests;[139] (2) the representative is independent, meaning that the representative has no relationship with either class counsel or defense counsel that could compromise her effectiveness or motivation;[140] (3) the representative is assertive and is not afraid of lawyers or the legal process;[141] and (4) the representative

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[135] Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973).

[136] *See* Coffee, *supra* note 14, at 418 ("[Class counsel] is not simply an agent of the client. Rather, the attorney is also the creditor and joint venturer who is effectively financing their common undertaking and has much more at stake than any individual class member."); *see also supra* notes 134-35 and accompanying text (discussing class representatives as figureheads).

[137] *See* Coffee, *supra* note 14, at 394 (noting that "*Amchem* had largely focused only on the class representatives, [whereas] *Ortiz* recognized that representatives in fact rely on class counsel and hence different counsel for each subclass would be necessary").

[138] *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982).

[139] *See* 1 NEWBERG & CONTE, *supra* note 21, § 1.13, at 42 ("The heart of the rationale that the class representative must adequately represent the class is the notion that the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class."); Lilly, *supra* note 13, at 1021 ("Some observers note that the so-called 'personal stake' requirement in itself usually ensures adequate representation because the named class member's stake in the claim triggers self-interested behavior, thus ensuring the vigorous prosecution (or defense) of class claims."); *id.* at 1021 n.64 ("Some commentators have argued that it is precisely the self-interest of the class representative that ensures absentees adequate representation or due process.").

[140] *See supra* notes 131-33 and accompanying text (discussing class representatives' conflicts of interest).

[141] Courts consider potential language barriers in analyzing adequacy of representation. *See* Eugene J. Kelley, Jr. & John L. Ropiequet, *Actual Damages Under the TILA: Collapsing Class Actions*, 55 CONSUMER FIN. L.Q. REP. 200, 205 (2001) (reporting case in which named plaintiff was held inadequate class representative because, among other things, he did not speak English); John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101, 1106 n.31 (1996) (referring to case in which the named plaintiff "only reads, writes, and speaks Yiddish, not English"). *But see In re* Crazy Eddie Sec. Litig., 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (finding class representative was adequate, despite difficulties with English language). However, a class representative's lack

understands the seriousness of her responsibility[142] and affirmatively agrees in open court to take responsibility for the rest of the class, understanding that she is serving as a representative for the rights of others.[143]

When each of these four prerequisites is satisfied, class representatives serve a valuable, important role in ensuring adequacy of representation. For a variety of reasons, however, representatives will not always satisfy these requirements. Class counsel sometimes contribute to the problem by intentionally selecting representatives over whom they have control or power, so that the class representative remains mute and does not advocate for himself or others.[144] Also contributing to the problem is the reality that an individual who might be a superb class representative may refuse to serve—due to concerns about negative publicity or some sort of retribution;[145] fear of financial responsibility for legal fees or expenses;[146] fear of harassment during

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of assertiveness, especially if coupled with a lack of interest by class counsel and the court in the class representative's input, can have an equally paralyzing impact on the representative's ability to be a vocal advocate.

[142] The class representative bears a fiduciary responsibility to the class. *See* Shelton v. Pargo, 582 F.2d 1298, 1304-05 (4th Cir. 1978) (discussing fiduciary role of class representative); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1270 (1995) ("[T]he class representatives do not speak only for themselves but also are fiduciaries who speak for others . . . ."); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 437 (1999) (stating that most class representatives know "almost nothing about the role and duties of a class representative as a fiduciary").

[143] *See infra* notes 275-77 and accompanying text (discussing such a proposal).

[144] *See* Cooper, *supra* note 134, at 927 (noting that class counsel typically selects class representative); Koniak & Cohen, *supra* note 20, at 132 ("[C]lass counsel plays an important, and sometimes exclusive, role in selecting and controlling the class representatives"); Miller & Singer, *supra* note 101, at 109-10 ("The attorneys find the cases, locate the named plaintiffs, and control all aspects of the litigation, using the representative plaintiff as little more than the key to the courthouse door.").

[145] *See* Silver & Baker, *supra* note 14, at 1493 (noting that potential class members may include "timid employees who are afraid to [sue their employer]").

[146] *See* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413 (E.D.N.Y. 1989) (noting that named plaintiffs "have demonstrated a willingness to assume ultimate responsibility for the costs of this litigation. In such circumstances it is generally recognized that named plaintiffs may qualify as adequate class representatives."); Mechigian v. Art Capital Corp., 612 F. Supp. 1421, 1434 (S.D.N.Y. 1985) ("[P]laintiff has not provided adequate support for his claim that he is financially capable to function as a class representative."); *see also* Weber v. Goodman, 9 F. Supp. 2d 163, 174 (E.D.N.Y. 1998) (holding that class representative may pay pro rata portion of litigation costs if class suit is unsuccessful). *But*

discovery procedures;[147] or mere reticence.[148]

Of these four prerequisites, the first—requiring that the class representative is a class member with the same interest and injury[149]—is the most critical to the adequacy of representation inquiry. The failure of the class representative to have the same

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see In re Alcoholic Beverages Litig., 95 F.R.D. 321, 326 (E.D.N.Y. 1982) ("Although a few courts have thought it appropriate in certain situations to scrutinize the moving party's ability to pay before certifying a class . . . most courts have not adopted such a practice."); Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 REV. LITIG. 557, 558 (2003) ("A minority of states adhere to the rule that attorneys may advance court costs and litigation expenses only if the client remains ultimately liable for repayment.").

> Because few representative plaintiffs would pay costs and expenses for the entire class, the utility of the class action device could be severely undermined in these jurisdictions if the ethics rules are read broadly. Fortunately, these rules have not been strictly applied to the conduct of class action litigation. First, the client's ultimate liability for costs and expenses has generally been understood, at least in federal class actions, to mean that the client must pay only a share of the costs rather than the full amount. . . . Second, as a practical matter, even representative plaintiffs who profess willingness to pay their share of the costs and expenses are almost never required to do so. Class counsel bears the expenses. . . . [T]his accommodation has permitted class actions to go forward even in states that still cling to the traditional rule requiring clients to be ultimately liable for costs and expenses.

Miller, *supra*, at 558-59. Recent developments may reinvigorate this concern. *See* White v. Sundstrand Corp., 256 F.3d 580, 586 (7th Cir. 2001) (upholding imposition of $18,000 in defendant's costs jointly and severally on eight class representatives in class action challenging calculation of pension benefits); *id.* at 586 ("Plaintiffs have not cited, and we have not found, any case holding that responsibility for costs must be parceled out so that no member of a class pays more than a *pro rata* share.").

[147] In general, traditional discovery devices are available with respect to the class representative. *See* Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598 (N.D. Cal. 1993) ("Defendants must have leave of court to take depositions of members of a putative class, other than the named class members . . . ."); Am. Nurses Ass'n v. Ill., No. 84C4451, 1986 WL 10382, at *2 (N.D. Ill. Sept. 12, 1986) (referring to the taking of "depositions of the named plaintiffs"). *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.12, at 235 ("[T]he court should call for a specific discovery plan from the parties, identifying the depositions and other discovery contemplated and the subject matter to be covered.").

[148] *See* Coffee, *supra* note 14, at 375 (noting that "an entirely unconflicted representative" might still be ineffective because she is "undermotivated, indifferent, or uninformed").

[149] *See id.* at 394 (noting that courts must consider not only "gross differences in the nature of the plaintiffs' injuries but also . . . differences in the legal and negotiating positions of the class members"). Arguably, differences in choice of law may also constitute a difference in interest or injury. *See* Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 603, 623 & n.18 (1997) (noting various state law claims); *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.15, at 241 & n.692 (noting that differences in state laws may result in differences among class members' specific interests and legal theories).

interest and injury is an obvious basis for an adequacy challenge. Far from a new requirement, the Supreme Court has repeatedly cited the primacy of "same interest-same injury" for more than twenty years,[150] yet this requirement needs more attention, precisely because of its centrality to the adequacy inquiry with respect to the class representative.

Five factors contribute to the shortcomings in the same interest-same injury review: (1) the common practice of naming only a single class representative;[151] (2) the hesitancy to create subclasses;[152] (3) the tendency of some class counsel to define classes broadly rather than narrowly;[153] (4) the tendency of some courts to rely on counsel's representations;[154] and (5) the tendency of many courts to largely ignore the class representative as a general matter.[155] The first three factors are interrelated, as are the last two.

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[150] *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1981) (stating that class representative must have same interests and injury as class members).

[151] *See* Murray & Harang, *supra* note 14, at 2091 ("The one person, or named plaintiff, who actually appears before the court stands in the stead of all those deemed to have common interests and claims.").

[152] *See* Morawetz, *supra* note 123, at 19.

> Division of a class into subclasses is also a limited solution. Subclassing has all of the problems of class definitions as a method of circumventing the dilemmas of class counsel. It cannot address any interests that would not form a part of a class definition. In addition, as many commentators have observed, subclassing often is not feasible because of the costs associated with separate representation. Relying on subclassing for all of the myriad ways in which class members' interests could potentially differ could add substantial amounts to the cost of the litigation, and serve to bar relief altogether. Furthermore, while separate counsel for subclasses can protect against the sacrificing of the interests of a subclass, they can also act as an inhibitor to relief simply because of the sheer complexity of negotiations among large numbers of persons.

Id.

[153] *See* Koniak & Cohen, *supra* note 20, at 147 ("One strategy is to make the class as big and undivided as possible, which means bigger fees for class counsel, greater finality for defendants, and fewer competing plaintiffs' lawyers to muck things up."); Morawetz, *supra* note 24, at 415 (noting "the common presumption that attorneys have an interest in drawing a class as broadly as possible"). Of course, valid concerns may also arise when counsel draw class definitions too narrowly. *See* Morawetz, *supra* note 24, at 402 (discussing issues that arise when class definitions are drawn too narrowly).

[154] *See* Leslie, *supra* note 19, at 1063-65 (explaining that judges are likely to defer to class counsel in settlement agreements).

[155] *See supra* note 134 and accompanying text (discussing limited role of class representatives).

The uniformity of interests and injury necessary to render a single class representative appropriate will be uncommon; differences in interest or injury among the class members should motivate class counsel to name additional representatives.[156] Subclasses are an effective alternative means of both segregating and representing different interests or injuries within the class,[157] but there is a widespread hesitancy to employ them.[158] Subclasses have been praised as an effective control device, while simultaneously criticized as exponentially complicating class litigation.[159] No doubt there is truth to both contentions, and the point here is only that the hesitancy to create subclasses can contribute to diverse interests or injuries within a single class, which negatively impacts upon the cohesiveness necessary for adequacy of representation.[160]

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[156] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.15, at 240 ("The designation of several persons as representatives of the class is . . . often desirable to make plaintiffs more representative of the diverse interests involved . . . .").

[157] Subclasses are expressly authorized by Federal Rule 23. *See* FED. R. CIV. P. 23(c)(4) ("When appropriate . . . a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."); MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.15, at 241 ("The court may . . . certify more than one class or split a class into subclasses."); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) ("[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses . . . .") (citation omitted).

[158] *See Amchem*, 521 U.S. at 608 (reporting, with disapproval, that district court had held that "[s]ubclasses were unnecessary . . . bearing in mind the added cost and confusion they would entail . . .").

[159] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.15, at 240 ("Creation of unnecessary classes and subclasses to accommodate an excessive number of attorneys in the litigation leads to confusion, conflict, and excessive attorneys' fees and should be avoided."); *see also* Coffee, *supra* note 14, at 374-75.

> [T]he more that "cohesion" is required, the more the class must be fragmented into subclasses with their own separate counsel. Ultimately, if any material difference in the legal status, compensable injury, or negotiating leverage possessed by class members were to require subclassing in order to maintain sufficient "cohesion" among class members, the upshot would be what this Article will term the "Balkanization" of the class action: namely, its fragmentation into a loose-knit coalition of potentially feuding enclaves that could seldom litigate effectively as an organization.

[160] *See* Lilly, *supra* note 13, at 1022 ("[T]he class action must be structured so that the class represented (and each subclass) is sufficiently cohesive."); *id.* at 1024 ("Lack of shared identity among members of the class indicates that some members, if putatively precluded by the judgment, will not have been adequately represented by the named class representatives.").

Another variation on this same theme is the tendency to define classes broadly, thereby enveloping more class members within the lawsuit. Defining a class broadly is often seen as desirable by class counsel, defense counsel, and the court: by class counsel because the larger class translates to increased fees; by defense counsel because the larger class can be the subject of a global settlement; and by the court because the matter can be resolved in one proceeding rather than several.[161] However, as the size of the class increases, the risk of diverse interests and injuries correspondingly increases. Accordingly, smaller, more narrowly defined classes tend to enhance the likelihood of uniformity of interests and injury within the class, but powerful countervailing interests tend to push for a broader, more expansive class definition.

The remaining two factors involve an overlapping of the roles of class representatives with court oversight. There is a tendency by some courts to accept class counsel's assertions without question.[162] This tendency is an understandable one, especially in the early stages of the litigation or when the judge has had prior positive dealings with class counsel.[163] However, in relying on class counsel's representations, the court abdicates its oversight responsibility, instead inappropriately relinquishing that obligation to counsel in violation of Federal Rule 23.[164] Even the best of attorneys err, and thus the court must undertake the same interest-same injury inquiry, rather than relying on class counsel. In a similar vein, the tendency to ignore the class representative is an ongoing problem throughout the litigation.

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[161] *See* Koniak & Cohen, *supra* note 20, at 147 ("[M]ak[ing] the class as big and undivided as possible . . . means bigger fees for class counsel, greater finality for defendants, and fewer competing plaintiffs' lawyers to muck things up."); Morawetz, *supra* note 24, at 403-04 ("[A]ttorney fee incentives can be counted on to encourage attorneys to plead class actions broadly. . . . A broader class can mean more efficient litigation of issues that might otherwise subject the defendant to multiple litigation cases.").

[162] *See* Leslie, *supra* note 19, at 1063 (noting routine deference to class counsel representations regarding proposed settlements); *see also infra* note 281 and accompanying text.

[163] *See generally* Koniak & Cohen, *supra* note 20, at 151 (discussing pressures on judges by bench and bar).

[164] *See* FED. R. CIV. P. 23(e)(1) ("The *court* must approve any settlement, voluntary dismissal, or compromise . . . .") (emphasis added).

> [C]ourts do not treat class representatives as serious monitors of lawyer performance. Courts neither require class counsel to keep the named representatives up to speed on the status of the case, nor require that the lawyers seek the named representatives' consent to any particular course of action. Therefore, the courts might as well let lawyers serve as class representatives for all the good the rule [prohibiting class counsel from naming themselves as class representatives] does the class.[165]

There is no magic answer here. However, greater attention by both class counsel and the court to the class representative—who, after all, has a stake in the outcome[166]—will increase the likelihood of achieving adequacy of representation and reduce the possibilities for reversal on appeal or a subsequent collateral attack.

Accordingly, the class representative serves as the first line of defense. A knowledgeable, involved, articulate, assertive class representative helps to protect the interests of absent class members. When the class representative falls short in some respect, however, greater burdens then fall on class counsel and the court. As an officer of the court, class counsel owes a variety of duties to both her clients and to the court, and the court wields additional, more powerful, enforcement mechanisms over class counsel than over those who are merely parties to the action. In implementing this shift in focus, class counsel's ethical duties serve as a very fine guidepost for the adequacy inquiry.

IV. ADEQUACY OF CLASS COUNSEL: FEAR AND LOATHING OF THE ETHICAL RULES

The adequacy of representation inquiry with respect to class counsel involves similar factors, but the review is—or at least

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[165] Koniak, *supra* note 24, at 19.

[166] Professor Zacharias has stated that, "Class plaintiffs . . . often have little interest in the result . . . ." Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 843 (2002). I would respectfully suggest that class plaintiffs have little interest in the result only when the stakes are small, such as in cases involving modest bank overcharges.

should be—from an ethical perspective as set forth in the Model Rules of Professional Conduct.[167] In particular, lawyer self-interest is a significant potential danger.[168] Class counsel play a highly visible and very powerful role in class litigation with little accompanying oversight either from the class representative[169] or from the court.[170] The unusual combination of great power with little oversight means that the interests of absent class members rest primarily with class counsel.

Unfortunately, class counsel are widely perceived as abusing this power,[171] and as a result, class action settlements are viewed with

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[167] MODEL RULES OF PROF'L CONDUCT (2002).

> [A] lawyer cannot be 'adequate' by merely being sufficient, proficient, or competent. In class actions, more is required of class counsel. The filing of a class action suit raises not only the litigation stakes, but also the stakes of professionalism and ethics. Despite its importance, however, the scope of this fiduciary relationship is rarely discussed, and all too often goes unacknowledged by even the most experienced class action litigators.

Murray & Harang, *supra* note 14, at 2096. *But see* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 97 (1991) (asserting that ethical rules do not bear on adequacy inquiry).

[168] *See* JOHN F. SUTTON & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 530 (3d ed. 1989) ("One of the most dangerous conflicts a lawyer can face involves one in which the client's interest is in conflict with the lawyer's interest. Some conflicts arise because of the lawyer's financial stake in the litigation."); Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1905 n.51 (2002) (noting "[h]eightened concern" about class settlement fairness); Barry Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1 (providing examples of lawyers "sharing [a] fat fee" while winning plaintiff receives only coupons); Christopher Reynolds, *Coupon Settlements Offer Little Help to Consumers*, L.A. TIMES, Mar. 12, 2000, at L2 (same). *See generally* Zacharias, *supra* note 166, at 844 (characterizing as "fiction" or "delusion" notion that "once lawyers are advised of the professional standards, lawyers will follow the standards regardless of any personal incentives they have to violate the rules").

[169] *See* Coffee, *supra* note 14, at 413 ("The bottom line . . . is that class counsel is and will remain the sovereign of the class action with the class representative being largely a titular figurehead."); *id.* at 406 ("[E]xisting law gives the class representative very little, if any, real authority."); Downs, *supra* note 24, at 610 ("[Class r]epresentatives neither monitor nor are consulted by class counsel or the court on key decisions."); Macey & Miller, *supra* note 167, at 71 ("[T]he notion that the representative plaintiff exercises any significant leverage over the plaintiffs' attorney is dubious at best.").

[170] *See* Leslie, *supra* note 19, at 1063 ("Reviewing judges routinely defer to class counsel's representations that a proposed settlement is fair, adequate, and reasonable."); *id.* at 1070 ("Courts generally rubber-stamp proposed settlements, so bad settlements often survive judicial scrutiny.").

[171] *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1326 (2003):

suspicion,[172] even as efforts to collaterally attack such judgments are vigorously resisted.[173] The time has come to treat adequacy of representation as an ethical determination from the outset, rather than only in retrospect. Widespread use of the ethical rules and ethics experts would interject an ethics focus into class actions that currently is conspicuously absent. The ethical considerations underpinning adequate representation are largely unexplored[174] due

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> The current situation marks a dramatic change from the past, when class action employment discrimination litigation was thought to represent one of the hallmarks of public law litigation, brought by lawyers who were primarily interested in pursuing justice rather than profit. The recent cases reject this model in favor of a purely private dispute resolution system that is principally about money.

Professor Coffee has noted the same phenomenon:

> Where once [the class action] was seen as the plaintiff's sword, it is now increasingly recognized that it can be the defendant's shield. Where once it was viewed as empowering class members, increasingly, it is seen as entrapping them. Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest.

Coffee, *supra* note 14, at 371-72.

[172] *See* Coffee, *supra* note 14, at 371-72 (noting that financial interests of counsel cloud class action settlement process); John C. Coffee, Jr., *Class Action "Reform": Advisory Committee Bombshell*, N.Y.L.J., May 21, 1996, at 1 (noting "suspicious context of settlement class actions"); Patricia Manson, *Panel Blocks Accord on Tax Refund Loans*, CHI. DAILY L. BULL., Apr. 23, 2002, at 1 (discussing "suspicious" class action settlement).

[173] *See* Allen, *supra* note 13, at 1149 (criticizing application of adequacy of representation requirement to permit collateral attacks on class action settlements); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193 *passim* (1998) (same); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167, 1167 (1998) (arguing that some limits on collateral attack are appropriate); *see also* Kahan & Silberman, *supra* note 1, at 219 (arguing that challenging adequacy in collateral attack in another forum, instead of raising challenge directly, violates principle of finality).

[174] Courts have not totally disregarded the Model Rules. For whatever reason, the rules regarding advertising, solicitation, and communicating with unrepresented persons appear in class action decisions with regularity—but the traditional conflict of interest and other rules especially relevant to the adequacy of representation determination do not. *See, e.g.*, Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) (finding class counsel's pre-certification advertisements and mass mailings were "surely causing serious and irreparable harm" to defendant); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (affording protections of Model Rule 4.2 to potential class members); Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992) ("After the class has been certified, defendants' counsel must treat the unnamed class members as 'represented by' the class counsel for purposes of [the ethical rules]."); *see also* Bassett, *supra* note 46, at 353

to a tendency to underplay the applicability of ethical rules in the context of class action litigation and to assert that modifications to the Model Rules are necessary in the class action context.[175] However, the Model Rules have not failed; rather, the problem is that, for the most part, they have not been tried. Instead of seeking ways to exempt class action lawyers from the ethical rules,[176] courts need to apply the ethical rules to class action lawyers in evaluating adequacy of representation.[177] Class counsel's adequacy of representation is, ultimately, an ethical determination that includes consideration of the Model Rules provisions governing competence, diligence, communication, and conflicts of interest.[178] Accordingly, enhanced scrutiny for conflicts of interest has the potential to reduce collusion between class counsel and defense counsel;[179]

(addressing pre-certification communication ethics in class actions).

[175] *See In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 164 (3d Cir. 1984) (Adams, C.J., concurring) (stating that strict application of the ethics rules would allow intra-class conflicts of interest to undermine the use of class actions); *see also Class Actions and Professional Responsibility*, *in Developments in the Law: Class Actions*, 89 HARV. L. REV. 1577, 1593 n.67 (1976) (suggesting that if ethical rules governing conflicts of interest were applied to class counsel, no class actions could proceed); Downs, *supra* note 24, at 610 ("Ethical rules that protect the class concerning maintenance, solicitation, and fee splitting are largely ignored by the courts, and conflict of interest principles are narrowly construed."); Koniak, *supra* note 24, at 16 ("[I]n assessing the adequacy of representation under [Federal Rule of Civil Procedure] 23, the ethics rules are eschewed as unreliable guides."); Murray & Harang, *supra* note 14, at 2096 ("[T]he scope of [class counsel's] fiduciary relationship [to the class members] is rarely discussed, and all too often goes unacknowledged by even the most experienced class action litigators.").

[176] *See* Michael D. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817, 829 (1988) (asserting that "[i]n practical terms, the lack of guidance in the ethical framework provides class attorneys with almost unfettered control over the action").

[177] Among other reasons for employing the Model Rules is the unduly narrow construction that some courts have ascribed to adequacy of representation. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 811 (3d Cir. 1984) ("Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [representative] plaintiff must not have interests antagonistic to those of the class."); *see also In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992) (setting out same factors as *Weiss*); Ervin A. Gonzalez & Raymond W. Valori, *Considerations in Class Certification*, 72 FLA. B.J. 78, 80 (Mar. 1998) (same).

[178] This Article's scope is limited to examining the use of the Model Rules in the adequacy of representation determination. Accordingly, I leave for other articles whether the Model Rules have more widespread utility in class litigation generally. *See, e.g.*, Bassett, *supra* note 46, at 353 (arguing that all class members should be treated as class counsel's clients from outset of class litigation, and Model Rules should apply accordingly).

[179] *See* Hensler, *supra* note 168, at 1905 n.51 ("Critics charged that the GM Truck settlement, which offered coupons of questionable value to compensate owners of trucks

increase fairness in the treatment of different classes of claimants; keep fees more reasonable; and reduce the likelihood of a successful subsequent collateral attack.

A. THE MODEL RULES AND CLASS ACTIONS

In reviewing the Supreme Court's jurisprudence for guidance with respect to the factors bearing upon class counsel's adequacy, three primary factors emerge: vigorous representation, competency, and lack of conflicts of interest.[180] To a lesser degree, another issue with respect to class counsel has included keeping the class and class representatives apprised of developments.[181] All of these factors correlate directly with the ethical rules set forth in the ABA Model Rules of Professional Conduct.[182]

Although the Model Rules provide valuable guidance pertinent to adequacy of representation, this potential source of adequacy guidance has been largely disregarded for two reasons. First, some courts have viewed the Model Rules as primarily relevant to disciplinary proceedings, and second, many courts view the Model Rules as largely inapplicable to class actions.

One of the reasons for failing to apply the ethical rules in the class action context is the belief that ethical rules are intended for use in disciplinary proceedings.[183] Of course, the ethical rules do

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whose market value was allegedly diminished by accidents involving some vehicles of that model, was a product of collusion between class counsel and the defendant.").

[180] *See supra* notes 114, 116-17 and accompanying text.

[181] *See In re* Badge Mountain Irrigation Dist. Sec. Litig., 143 F.R.D. 693, 700-01 (W.D. Wash. 1992) (considering, in evaluating adequacy of representation, whether class counsel kept class members informed); *see also* Gonzalez & Valori, *supra* note 177, at 80 (communication is considered as part of adequacy inquiry). Communication issues generally arise in the adequacy context due to requirements concerning notice and settlement. *See In re* Lease Oil Antitrust Litig., 186 F.R.D. 403, 441 (S.D. Tex. 1999) (declaring that "[m]isleading communications . . . pose a serious threat to the . . . adequacy of representation").

[182] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4, 1.7 (2002) (setting forth Model Rule provisions with respect to competence, diligence, communication, and conflicts of interest).

[183] *See, e.g.*, Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977) ("Of the four provisions restricting communication in the December 17 order, paragraphs a and b clearly are concerned with potential abuses of ethical norms rather than of the class action device and, thus, . . . the district court lacked power to impose them."); Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 330 (E.D. Pa. 1994), *vacated by* 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591

indeed constitute the basis for disciplinary action. However, their use is not restricted to that context.[184] Although the Model Rules state that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer,"[185] employing the ethical rules as behavioral guidelines in evaluating adequacy of representation does not amount to imposing civil liability, but instead is well within the uses contemplated by the Model Rules: "[S]ince the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[186] As Professor Menkel-Meadow has observed, "Although

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(1997) ("This Court need not decide . . . whether or not a state bar disciplinary board would conclude that these provisions technically violated [the ethical rules], since that issue is not before this Court in determining the adequacy of counsel."). The ethical rules are underutilized as a general matter, even without considering the class action context.

> [P]rofessional discipline is not all it is cracked up to be. The resources of the disciplining bodies are limited. They must choose among the policies of pursuing violations they consider to be the worst, pursuing a random assortment of code violations, or targeting prosecutions that will produce the most general deterrence. . . . In practice, most jurisdictions have focused on lawyer mishandling of client funds, to the exclusion of most other misconduct.

Zacharias, *supra* note 166, at 861.

[184] Zacharias, *supra* note 166, at 862 ("[The professional rules] may provide a basis for civil suits or consequences enforceable in judicial proceedings."); *id.* at 862 n.186 ("The conflict-of-interest rules, for example, have been used as a basis for lawyer disqualification from participation in judicial proceedings.").

[185] MODEL RULES OF PROF'L CONDUCT, Scope cmt. 20 (2002). This provision states in full:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[186] *Id.*; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52, at 375 (2001) [hereinafter RESTATEMENT] ("Proof of a violation of a rule or statute regulating the conduct of [a] lawyer . . . may be considered by a trier of fact as an aid in understanding and applying the standard of [care for malpractice].").

judges are using experts on the ethical issues in mass tort class action settlements they don't need to. The ethics rules are 'law' which could appropriately be interpreted by judges, as any law."[187]

The reason most commonly cited for disregarding the ethical rules involves the rules' purported inapplicability to class actions.[188] Both courts and commentators have been quick to dismiss the ethical rules' viability in the class action context.[189] "In general, the ethics rules were devised to address problems that arise in a traditional litigation setting; they often have no relevance in the context of large-scale, small-claim litigation, despite the fact that such litigations fall within the rules' literal language."[190] As with

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[187] Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1189 n.126 (1995).

[188] *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 85 (1995) ("The traditional ethical rules . . . are inadequate [in mass tort lawsuits]."); Koniak, *supra* note 24, at 16 ("[I]n assessing the adequacy of representation under Rule 23, the ethics rules are eschewed as unreliable guides. The argument is that the ethics rules were not written with class counsel in mind. By and large, this is a true claim."); Menkel-Meadow, *supra* note 187, at 1172 ("The current ethical rules . . . were not drafted with the special issues of mass tort class action settlements in mind, and do not, in my view, provide adequate guidance . . . ."); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 150-52 (1999) (noting that some commentators have suggested that ethical rules are insufficiently flexible for use in class actions and mass tort litigation); Ricciuti, *supra* note 176, at 828-29 ("[T]he existing ethical standards for traditional forms of litigation do not fully apply [to class actions]. . . . There thus exists no set of ethical rules to guide the conduct of class action attorneys . . . .").

[189] *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 326 (E.D. Pa. 1994), *vacated by* 83 F.3d 610 (3d Cir. 1996), *aff'd* 521 U.S. 591 (1997) ("As many courts have recognized in a variety of different contexts, . . . 'courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context . . . .' "); Harris v. General Dev., 127 F.R.D. 655, 662 (N.D. Ill. 1989) ("Although the fee arrangement may give rise to a technical deviation from ethical standards, denial of class certification is unwarranted."); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413 (E.D.N.Y. 1989) ("A federal court is not bound to enforce New York's view of what constitutes ethical professional conduct [when ruling on class certification]."); 3 NEWBERG & CONTE, *supra* note 21, § 15.01, at 15-3 ("The class action device was designed to serve unique purposes. Categorical application of ethical precepts developed for the individual action, without accommodation of the fundamental goals of the class action rule, dilutes both the ethical standards and the effectiveness of class litigation."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 471 (1994) (arguing that conventional ethical rules do not adequately address distinctive ethical problems arising in mass tort litigation). *But see* Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643, 662 (N.D. Ill. 1986) (noting that class counsel's violation of ethical rule "requires a finding that he may not represent the class").

[190] Macey & Miller, *supra* note 167, at 96-97; *see also* Koniak, *supra* note 24, at 16 ("[I]n assessing the adequacy of representation under Rule 23, the ethics rules are eschewed as

most overly broad claims, there is some truth to this assertion, but it obscures the larger reality. Nothing in Federal Rule 23 exempts counsel from the ethical rules, and the rules' applicability to all practicing attorneys does not take a holiday when an attorney chooses to represent a class rather than an individual.[191]

It is indeed true that the Model Rules were not specifically drafted for class action litigation, but instead were originally drafted from the perspective of, typically, one known client approaching an attorney for assistance.[192] On this point, two comments are in order. First, some of the deficits in the original Model Rules have since been covered through amendment,[193] as well as through commentary and guidance in the *Restatement of the Law Governing Lawyers*.[194] Second, this same accusation has regularly been leveled at the Model Rules by practitioners in other areas. The eagerness to circumvent the ethical rules is not restricted to the class action context; many practitioners routinely rail against the ethical rules as impractical and unrealistic, arguing that the Model Rules focus

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unreliable guides. The argument is that the ethics rules were not written with class counsel in mind. By and large, this is a true claim."); Menkel-Meadow, *supra* note 187, at 1172 ("[T]he settlements of mass torts raise ethical issues of a different magnitude and quality than those raised by the idealized version of individual attorney-client representation on which the current rules are based."); Zacharias, *supra* note 166, at 854 ("With few exceptions, the professional rules rely upon the paradigm of lawyers advocating the cases of individual clients within an adversary system.").

[191] *See* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 588-89 (1994) (arguing that ethical problems arising in mass tort cases are really no different from ethical issues arising in other types of cases and asking, "[W]hy [do mass tort] cases have a special claim for special rules?").

[192] *See* WEINSTEIN, *supra* note 188, at 85 ("The traditional ethical rules . . . rel[y] on the single-litigant, single-lawyer model."); Menkel-Meadow, *supra* note 187, at 1188 ("[T]he Model Rules still represent an ethics for lawyers who are presumed to be engaged in a generic practice, with a focus on litigation—even transactional problems are analyzed with an assumption of the adversary model."); Weinstein, *supra* note 189, at 481 ("[The ethical rules assume] a Lincolnesque lawyer strongly bonded to an individual client."). *But see* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5:101, at 765 (2d ed. 1990) (noting " '[the] single lawyer, single client' assumption which animated the [Model Code of Professional Responsibility], [is] an assumption no longer comporting with modern realities and accordingly abandoned in the Rules of Professional Conduct").

[193] Although there are no class action-specific Model Rules, several comments to the Model Rules now refer to class action concerns. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 25 (2002); *id.* R. 1.8 cmt. 13; *id.* R. 7.2 cmt. 4.

[194] *See, e.g.*, RESTATEMENT, *supra* note 186, § 128 cmt. (d)(iii) (addressing conflicts of interest between lawyer and client in class actions).

upon ethics in litigation and thus are not relevant to lawyers in non-litigation practice areas,[195] and similarly, that the rules simply do not reflect marketplace realities.[196] These assertions are a variant on the "ivory tower" argument: "[A]cademic criticism can be—and often is in the class action area—dismissed as idealistic musing by people not sufficiently grounded in the 'real world.' "[197]

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[195] *See, e.g.*, Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 341 (1992) (arguing that realities of representing longstanding elderly clients require changes in Model Rules); Lawrence G. Baxter, *Reforming Legal Ethics in a Regulated Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181, 204 (1994) (arguing that Model Rules are "anachronistic, insofar as they fail to address the realities and needs of modern regulatory practice"); Michelle Grant, *Legislative Lawyers and the Model Rules*, 14 GEO. J. LEGAL ETHICS 823, 828 (2001) ("[T]he *Model Rules* were designed to guide lawyers in adversarial settings and offer little guidance to the legislative lawyer, who must deal with legislative and political realities. There are many instances in which the *Model Rules* provide insufficient or even undesirable guidance."); Brenda Marshall, *In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge?*, 14 GEO. J. LEGAL ETHICS 871, 876 (2001) (noting that "the attorney-client relationship, as codified in the *Model Rules* . . . misses the economic realities that constrain and influence the attorney who acts as in-house counsel"); Menkel-Meadow, *supra* note 187, at 1195 ("Several groups of lawyers who commonly work with groups or limited sets of clients, such as entertainment lawyers, suggest that the current conflicts rules don't reflect the reality of their practices."); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 47 (1998) ("Acceptable ethical behavior *outside* the realm of bankruptcy often doesn't work *inside* the realm of bankruptcy, and vice versa."). *See also* Zacharias, *supra* note 166, at 865 ("Many types of advice and transactional representation simply do not call for the fierce partisanship that the codes envision.").

[196] *See* Howard J. Berlin et al., *Pro: Facing the Inevitability, Rapidity, and Dynamics of Change*, 74-Mar FLA. B.J. 12, 31 (2002) (reporting that, according to Multidisciplinary Practice Commission, "[T]he Model Rules fail to reflect the marketplace realities imposed by the modern law practice, irrespective of size or scope. Many of the protections in the current Model Rules are unnecessary and inappropriate in a consumer-driven society."); *see also* Zacharias, *supra* note 166, at 842 ("The catalyst for the proposals of the Commission on Multidisciplinary Practice was the desire of large American law firms representing sophisticated global clients to respond to accounting firms' ability to offer an array of legal and nonlegal services."). Moreover, the eagerness to disregard existing guidance in favor of so-called practical realities is not restricted to the ethical rules.

> [A]dequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class. . . . [T]he economics of the class action suit often are such that counsel have a greater financial incentive for obtaining a successful resolution of a class suit than do the individual class members. It is not surprising, then, that the subjective desire to vigorously prosecute a class action . . . quite often is supplied more by counsel than by the class members themselves.

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 727 (11th Cir. 1987).

[197] Koniak & Cohen, *supra* note 20, at 151; *see also* Fred C. Zacharias, *Understanding*

These arguments all follow a similar theme and a similar line of logic, and they all seek the same result for the same reason. First, these arguments are generally asserted in a context in which the critics seek to avoid a particular rule's application. Second, the arguments all follow the approach that because the Model Rules were originally drafted from a small-firm-with-a-single-client-facing-litigation perspective, the fact that their situation involves something somehow "different" should exempt them from the purview of the rules. In each instance, the argument proves too much: those seeking special dispensation assert they are merely requesting rules recognizing the practical realities of law practice[198] when, in fact, individually-tailored rules often would function as little more than exceptions to the fundamental core values[199] of the ethical rules.[200]

Recent Trends in Federal Regulation of Lawyers, 2003 Symposium Issue PROFESSIONAL LAWYER (2003), *available at* http://ssrn.com/abstract=449121 (noting recent efforts by federal agencies to modify state professional mandates).

[198] *See Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 15 LAWS. MANUAL ON PROF. CONDUCT: CURRENT REPORTS 250 (June 9, 1999) (statements by former ABA president, arguing that changes in multidisciplinary practice rules are "inevitable" due to realities of legal practice).

[199] *See* Zacharias, *supra* note 166, at 831 ("When drafting committees meet to amend existing rules, they rarely have reason to question core paradigms in the professional standards.").

[200] Perhaps it really is all about the money. Professor Wolfram has suggested as much, noting the "big-money rewards" in class litigation. *See* Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228 (1995).

> I am reminded of what one of the most notorious of gangsters of the thirties, Willie Sutton, is supposed to have replied when asked why he robbed banks, "Because that's where the money is." We can demonize Sutton, and we can demonize sell-out lawyers who, for millions in fees, are willing to sign away the rights of tens of thousands of faceless and lawyerless class members. But there are reasons (I will suggest, irreducible under the present state of law) why fees, rather than favorable class outcome, drive too much of the thinking of too many class-action lawyers. Given the opportunities, surely it cannot be surprising that in a legal profession of almost one million members there is a sizable number of lawyers who are attracted to the big-money rewards of morally compromised (but legal) professional work. . . . I doubt whether righteous ethical fulminating alone will cause them to abandon the short cuts, the lack of industry in genuinely effective pretrial preparation for realistically contemplated trials, and the endless maneuvering of class claims toward a maximum-fee award. . . . The prize is easy money—a great deal of it. The legal skills required to achieve it are rather ordinary, even minimal. Indeed, the actual amount and quality of classical lawyering work the

In their haste to evade application of the Model Rules by characterizing them as "impractical" in the class action context, courts and practitioners have been shortsighted. For example, consider the rules on conflicts of interest. Far from being impractical or incapable of application to class actions, judicial review for conflicts of interest is an essential part of the adequacy of representation inquiry—an inquiry that determines: (1) whether the class action lawsuit as composed and configured may proceed (at the class certification stage), and (2) whether the class action lawsuit may terminate (at the settlement stage). By focusing solely on a push to get the class certified followed by a push to get the lawsuit settled, however, the effort to dodge the conflict of interest examination fails to consider the reality that adequate representation, as a due process right, extends to each individual class member.[201] A subsequent collateral attack upon a class action judgment will not be rejected simply by asserting the seeming overall fairness of the previous judgment,[202] but instead will examine the prior judgment from the specific vantage point of the individual challenger.[203] Accordingly, refusing to acknowledge the importance of avoiding conflicts of interest during the class litigation does not make the inquiry disappear—it merely postpones the inquiry, thereby increasing the likelihood of a collateral attack,

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> typical class action requires is probably low. Instead, what one needs to succeed in the field of class action plaintiff lawyering are: (1) a plaintiff; (2) capital; (3) political skills; and (4) luck.

Id. at 1231.

[201] *See* Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978) (stating that class counsel owes fiduciary duties to each member of class); Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835 (9th Cir. 1976) ("The class is not the client. The class attorney continues to have responsibilities to each individual member of the class . . . ."). *See generally* John C. Coffee, Jr., *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, 678 n.25 (1986) ("It is generally recognized that counsel's fiduciary obligation runs to the class and not simply to the named plaintiff.").

[202] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.").

[203] *See* Dow Chem. Co. v. Stephenson, 123 S. Ct. 2161, 2161 (2003) (permitting collateral attack against class judgment with respect to one challenger but not another).

and concomitantly increasing the likelihood of such an attack's success.[204]

These impracticality arguments are built on both a misapprehension of the duty owed to class members and a misapprehension of the flexibility already inherent in the Model Rules.[205] The current ethical rules provide more helpful guidance than the courts and commentators recognize. "[C]ommentators fail to recognize that the traditional [ethical] rules are already more flexible than is often suggested and that this flexibility can do much to accommodate the legitimate needs of clients."[206] One cannot help but wonder whether class action practitioners and commentators, in continually downplaying the role of ethical rules in class litigation, have actually facilitated the ethical lapses embodied in some recent class settlements.[207] Instead of ignoring ethical rules, the next Section of this Article argues exactly the reverse: the ethical rules should inform and guide the adequacy of representation inquiry.

B. EVALUATING ADEQUACY OF REPRESENTATION UNDER THE MODEL RULES

The adequacy of representation inquiry implicates concerns regarding competency, vigorous representation, conflicts of interest, and communication with class members. The Model Rules provide guidance in each of these areas.

1. Competency. Courts have long associated the competence necessary to satisfy the prerequisite of adequacy of representation

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[204] Although a court cannot predetermine the preclusive effect of a class judgment, avoiding inquiry into potentially problematic areas at the district court level increases the likelihood of a subsequent finding of inadequacy. See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring and dissenting) ("A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.").

[205] The Model Rules do not operate in a vacuum. *See* Zacharias, *supra* note 166, at 863 (noting that "if the various purposes of the [ethical rules] are to be fulfilled, the [ethical rules] must rely on other law to help accomplish their goals").

[206] Moore, *supra* note 188, at 152.

[207] *See, e.g.*, Koniak, *supra* note 15, at 1045 (describing ethical issues raised by class settlement in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 256 (E.D. Pa. 1994)).

with experience in class actions or other complex litigation.[208] Reflecting that understanding, the recent amendments to Rule 23 of the Federal Rules of Civil Procedure added new subsection (g) which, among other things, requires the court to consider several factors with a direct bearing on competence when appointing class counsel. These factors include "the work counsel has done in identifying or investigating potential claims in the action"; "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action"; and "counsel's knowledge of the applicable law."[209]

Model Rule 1.1 directly addresses competence, requiring attorneys to provide "competent representation . . . [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[210] A comment to the Rule explains that "relevant factors include the relative complexity and specialized nature of the matter, . . . the lawyer's training and experience in the field in question . . . . Expertise in a particular field of law may be required in some circumstances."[211]

Model Rule 1.1's construction of competence is entirely consistent with the interpretation of competence as class action experience in the case law and the amendments to Federal Rule 23. The nature of class actions as a form of complex litigation warrants consideration of counsel's experience and expertise under Model Rule 1.1 in evaluating counsel's competence. Combining the guidance of Model Rule 1.1 with new subsection (g) of Federal Rule 23[212] provides a more helpful framework with which to evaluate competency.

Importantly, however, competence encompasses more than experience. "If experience alone constitutes the controlling factor in the selection process, then a small group of lawyers will be perpetuated in these roles to the unfortunate exclusion of other

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[208] *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 811 (3d Cir. 1984) (listing attorney experience as factor in determining adequacy of representation).

[209] FED. R. CIV. P. 23(g)(1)(C)(i).

[210] MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2002).

[211] *Id.* cmt. 1.

[212] *See supra* note 31 (setting forth text of amendment).

lawyers who are equally qualified, but not as experienced."[213] The broader notion of competence inherent in the Model Rules, encompassing legal knowledge, skill, thoroughness, and preparation, is much more helpful to the adequacy inquiry than a limited focus on counsel's previous litigation experience. For example, the comments to the Rule expressly recognize that adequate preparation is a component of competency—a component overlooked if the court is preoccupied only with counsel's class action experience.[214]

2. *Vigorous Representation.* Vigorous representation implicates notions of zeal and diligence. The recent amendments to Federal Rule 23 are again relevant here, requiring the court to consider, in appointing class counsel, "the resources counsel will commit to representing the class."[215]

The Model Rules do not include a rule denominated as "vigorous representation," but the underlying concept appears in several places. The Preamble to the Model Rules observes that when an attorney is acting as an advocate, "[the] lawyer zealously asserts the client's position under the rules of the adversary system."[216] The Preamble also notes "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law . . . ."[217]

Model Rule 1.3 states, in a single sentence, "A lawyer shall act with reasonable diligence and promptness in representing a client."[218] The comments to the Rule continue:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or

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[213] Murray & Harang, *supra* note 14, at 2101.

[214] MODEL RULES OF PROF'L CONDUCT, R. 1.1, cmt. 5 (2002).

[215] FED. R. CIV. P. 23(g)(1)(C)(i).

[216] MODEL RULES OF PROF'L CONDUCT, Preamble cmt. 2 (2002).

[217] *Id.* cmt. 9. Similar language appeared in the Model Rules' predecessor, the Model Code of Professional Responsibility. *See* ABA MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .").

[218] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

> endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[219]

These Model Rule provisions are entirely consistent with the case law's requirement of vigorous representation. It has been suggested that Model Rule 1.3 also comes into play when collusion is alleged between class counsel and defense counsel.[220] Encouraging the use of the Model Rules in evaluating vigorous representation provides some additional guidance through the references to commitment, dedication, and zeal, while increasing the ethical focus.

3. Conflicts of Interest. The third of the major concerns inherent in the adequacy of representation inquiry is that of conflicts of interest. Conflicts of interest bear on class counsel's adequacy of representation both with respect to conflicts directly involving class counsel and conflicts that seem to involve class counsel only indirectly: within the conflicts of interest area are concerns regarding conflicts among class members[221] (including conflicts between the class representative and other class members[222]), conflicts between class counsel and class members, and a variant on the latter—concerns regarding attorney fees. These concerns implicate Model Rules 1.5 and 1.7.

a. Intra-Class Conflicts and Conflicts Between the Class and Its Representatives. Intra-class conflicts have traditionally been the most troublesome conflicts areas in terms of reconciling class action practice with the language of the Model Rules. Model Rule 1.7 prohibits lawyers from undertaking a representation involving a

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[219] *Id.* cmt. 1.

[220] *See* Menkel-Meadow, *supra* note 187, at 1198 (noting that collusion raises issues of what constitutes zealous representation); *see also* Sofia Adrogué, *Mass Tort Class Actions in the New Millennium*, 17 REV. LITIG. 427, 456 (1998) ("Although no specific ethical rule is attached to collusion, the claim implicates an attorney's violation of the duty to represent a client zealously under [Model] Rule 1.3 . . . .").

[221] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 855-56 (1999); *see also Paths of Litigation*, *supra* note 101, at 1816 ("The *Ortiz* Court . . . found that class counsel did not address intra-class conflicts in a manner sufficient to ensure adequacy of representation.").

[222] *See* Coffee, *supra* note 14, at 388 ("Although class action conflicts usually involve the interests of class counsel, the class representative can also have its own conflicts with the other class members.").

concurrent conflict of interest.[223] A concurrent conflict of interest is deemed to exist when "the representation of one client will be directly adverse to another client,"[224] or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[225] Comments to the Rule explain: "The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."[226]

Model Rule 1.7's definition of a concurrent conflict of interest initially would appear to preclude multiple representation generally as well as class actions specifically.[227]

> [T]here are conflicts of interest whenever a lawyer purports to represent multiple clients in a mass tort lawsuit arising from the same incident or series of incidents. There are numerous differences between these clients, including degrees of injury, strength of claims, and need for immediate or delayed compensation. Moreover, when the lawyer can fairly predict that an aggregate settlement offer will be made or sought, there are certainly going to be differences arising from the need to allocate damages among the clients as well as different attitudes toward settlement generally.[228]

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[223] MODEL RULES OF PROF'L CONDUCT, R. 1.7.

[224] *Id.* R. 1.7(a)(1).

[225] *Id.* R. 1.7(a)(2).

[226] *Id.* R. 1.7 cmt. 8.

[227] I have previously criticized the widespread practice of multiple representation due to the inherent potential for a disqualifying conflict of interest, the inadequacy of consent, and the lawyer self-interest underlying the practice. Debra Lyn Bassett, *Three's A Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387 (2001). In that article, I expressly exempted class actions from my proposal due, among other reasons, "to [class actions'] well-documented unique role in enabling individuals to institute legal action to obtain relief that otherwise would be unavailable to them." *Id.* at 445-46 n.238.

[228] Moore, *supra* note 188, at 177-78.

However, Model Rule 1.7(b) permits the representation to proceed, despite a concurrent conflict of interest, if the lawyer secures informed written consent from each affected client,[229] and the comments to the Rule make clear that multiple representation is ethically permissible, subject to certain limitations.[230] Accordingly, despite the accuracy of the observation that the Model Rules were drafted with an eye toward individualized rather than class litigation, the language of Model Rule 1.7 does not preclude its use in class actions—indeed, the comments briefly but expressly refer to class actions.[231] The Rule does not provide clear, unerring advice for addressing the myriad conflict of interest issues that can arise in class actions,[232] but, and without meaning to trivialize the

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[229] MODEL RULES OF PROF'L CONDUCT, R. 1.7(b).

[230] *Id.* cmts. 29-33. In particular, "because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained." *Id.* cmt. 29.

[231] *Id.* cmt. 25:

> 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.

Id. The language of the above comment is very specific, and it certainly does *not* appear to suggest that a class action lawyer, although without question subject to the Model Rules when representing a single client, becomes exempt from those Rules when representing many clients. *See id.*

[232] *See* Moore, *supra* note 188, at 177.

> [C]onflict[s] surface[ ] not only at the time clients come to vote on a particular offer of settlement, but also at the time they agree to be bound by majority vote, or to waive other rights in an attempt to facilitate collective action, or even earlier, when they agree to pursue collective action through multiple representation by a single lawyer. Unfortunately, there is little discussion in the literature of the circumstances under which lawyers may properly agree to represent hundreds or thousands of plaintiffs simultaneously or the nature of the disclosures lawyers must make in order to do so.

Id. Professor Moore's most recent article suggests that one way of bringing class actions within the reach of Model Rule 1.7 more comfortably is by treating the "class" as an entity client. *See* Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (proposing that classes should be treated as entity clients and drawing analogy to organizations as clients under Model Rule 1.13); *see also* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 16 (1996) (suggesting "conceptual

problem, the Rule does not provide clear, unerring advice for addressing conflicts in non-class litigation either. Conflicts of interest generally, and conflicts in multiple representation in particular, are troublesome, murky areas with few clear answers.[233]

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change" that "would recognize openly that the class—amorphous, defined in the end only by judicial fiat—is an entity apart from those who volunteer (or may be coerced) to speak for it"); Koniak & Cohen, *supra* note 20, at 143 (referring to classes as "entity-clients"). However, the suggestion that the "class" is an entity client analogous to the "organization as client" under Model Rule 1.13 falls short in two respects. First, the "class" is a "special purpose" entity, whereas an organization has an existence independent of litigation. Second, an organization has interests apart from those of its directors and employees, whereas a "class" has no interests apart from those of its constituent members. *See* Koniak & Cohen, *supra* note 20, at 132-33.

> [C]lass-clients differ significantly from partnership-clients and corporation-clients . . . . For example, class counsel plays an important, and sometimes exclusive, role in selecting and controlling the class representatives and shaping the size and purpose of the enterprise. By contrast, lawyers representing other entities typically do not select or control the managing agents, nor do they define the nature of the firm. Other entities typically have chains of command, and they have agents authorized to hire and monitor the entity's lawyers; classes typically have neither.

Id.; *see id.* at 143 ("[T]he class is entirely a creation of the lawyer: class counsel control its beginning, its end, its shape, and its conduct."). Indeed, the "class as entity client" argument is circular. Class counsel is the self-appointed creator of the class—and a class, by definition, requires a commonality of interest. FED. R. CIV. P. 23(a)(2) (requiring commonality as prerequisite to class certification). Under a "class as entity" theory, however, the interests of the "class" become untouchable from a Model Rules perspective: the class possesses the interests ascribed to it by class counsel, and any varying interests are irrelevant. Professor Moore's proposal undoubtedly would make it easier to ignore intra-class conflicts and thus easier for a single attorney to serve as class counsel. I suggest, however, that evaluating a "class" as a separate entity ultimately does class litigation no favors. Varying interests within the class are precisely the source of many of the conflicts of interest that have resulted in findings of inadequate representation. In order to address many of the most offensive problems in class litigation, we need a more literal application of Model Rule 1.7, which, in turn, likely would require an increase in the use of subclasses. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) (discussing requirement that class be divided into homogenous subclasses to avoid conflict of interest); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626-27 (1997) (noting role of subclasses in achieving adequate representation).

[233] *See* Geoffrey C. Hazard, *A Conflict Isn't Always So Obvious*, NAT'L L.J., Feb. 15, 1988, at 13 (discussing avoiding conflicts); *Conflicts of Interest*, TRIAL, Aug. 1986, at 17 (noting need to avoid conflicts). *See generally* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982) ("One of the most fertile sources of confusion has been the rules dealing with multiple representation of clients with conflicting interests."); *see id.* at 238 ("The legal profession itself cannot agree upon the propriety of multiple representation even in the most common situations."). *See also* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 16.1, at 689 (5th ed. 2000) ("Formulae for full disclosure and consent are appealing theoretical solutions to allow multiple representation.

Model Rule 1.7 offers informed written consent as an antidote to concurrent conflicts of interest. So long as "each affected client gives informed consent, confirmed in writing," the representation may proceed.[234] The conflict does not disappear—it still exists—but it is not disqualifying. Whatever the shortcomings of informed consent,[235] its availability provides the means for representing multiple clients ethically.[236] Despite the resistance to the ethical

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Pragmatically, however, few lawyers can foresee all conflicts that arise out of multiple representation, and consent will not avoid for the clients the consequences of actual adversity."); HAZARD & HODES, *supra* note 192, § 1.7:101, at 221 ("Some of the most difficult problems in the law of lawyering are problems of conflict of interest. These problems are not only pervasive, but intractable; many of them can at best be ameliorated—not 'solved.' ").

[234] MODEL RULES OF PROF'L CONDUCT, R. 1.7(b)(4).

[235] I have addressed the fallacy of relying on informed consent in the multiple representation context previously. Bassett, *supra* note 227, at 439-46.

> [T]he current ethical rules and case law ascribe far too much credit to the curative power of waiver. In theory, client consent empowers clients to make informed choices. However, client consent is based on erroneous underlying assumptions, which renders consent illusory. Waiver in the joint representation context suffers from three flaws: client understanding, possible coercion, and lawyer self-interest.
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> As an initial matter, most individuals simply do not understand the legal significance of conflicts of interest. How could they when lawyers themselves do not? In light of the rampant confusion that exists among practicing attorneys regarding the implications of conflict of interest rules, it is sheer fantasy to assume practitioners are explaining these principles with clarity to laypersons. . . .
>
> [T]he idea of full disclosure and informed consent regarding conflicts of interest in joint representation is illusory. Clients are not examining the lawyer's disclosures and making an informed decision; they are relying on the lawyer's assurances that the lawyer believes there is no problem and the representation may proceed.

Id. at 440, 442.

[236] Creative methods exist for obtaining consent, ranging from an opt-in, rather than opt-out, approach to class membership; to postage-paid response cards included in the class notice; to the ability to consent by clicking the appropriate bar on a litigation web site. Perhaps the most difficult hurdle posed by an insistence upon some form of consent involves future claimants, who may not yet have demonstrable injuries and may not even be aware of their hazardous exposure. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 611-12 (1997) (discussing issues with respect to exposure-only claimants). In some instances, such future claimants may not even be self-identifiable, thus rendering consent impossible. Such circumstances are problematic for many reasons, and this Article argues that both fairness and ethical propriety suggest that in such instances the court should exercise its discretion to require claimants to opt into (b)(3) class litigation. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 74 (1986) ("In appropriate circumstances, Rule 23(d) may give the court discretion to require that claimants opt in rather than out, as a means of insuring the fair conduct of the action even though the opt-out procedure would satisfy due process

rules in the class action context, there is nothing precluding Model Rule 1.7's use in class actions, and its use would provide an enhanced ethical focus.

b. Conflicts Between Class Counsel and the Representatives or Class Members. In the class action context, perhaps the most criticized practice is the case resolution in which class counsel appears to benefit to a far greater degree than the class members.[237] The problem is fees. It has been said that a conflict of interest is inherent in every legal representation involving the payment of attorney fees,[238] whether the lawyer is paid hourly, at a flat rate, or on a contingent fee basis, because the lawyer will thereby have a financial incentive to maximize his or her fees (or, in the flat rate situation, by minimizing the time invested). The potential for financial benefit in the class action context has long been recognized.[239] Accordingly, this area invokes both Model Rule 1.5,

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minima."); *see also* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 596 (1997) (noting settlement involving both Rule 23(b)(3) opt out class and Rule 23(b)(3) opt in class); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry Into the Appropriate Standard*, NYU Center for Law and Business Research Paper No. 03-16, at 7 n.13 (2003) (observing that "if clients were required to opt-in rather than opt-out, consent could be obtained rather readily"), *available at* http://papers.ssrn.com/abstract=446942. For a recent example of a (b)(3) opt-in class, see *In re* Ski Train Fire in Kaprun, Austria on November 11, 2000, Nos. 01MDL1428(SAS), 01 Civ. 3103, 01 Civ. 6554, 01 Civ. 10776, 02 Civ. 2492, 2003 WL 22319577 (S.D.N.Y. Oct. 9, 2003). *See also* 29 U.S.C. §§ 216(b), 256 (setting forth opt-in requirements for employees wishing to sue their employers under Fair Labor Standards Act). Under the Fair Labor Standards Act, a class member who is not "named in the complaint is not a party unless she affirmatively 'opts-in' by filing a written consent-to-join with the court." *In re* Ski Train Fire, 2003 WL 22319577, at *11 n.27.

[237] *See Paths of Litigation*, *supra* note 101, at 1811 ("[T]he class action creates a powerful incentive for defendants and class counsel to collude at the expense of class members' interests."); *see also* Robert Mauk, *Lawsuit Abuse: Public's Welfare Hurt When Lawyers Help Themselves*, CHARLESTON GAZETTE, Apr. 28, 1997, at A5 (criticizing coupon settlements).

[238] *See* Koniak & Cohen, *supra* note 20, at 90.

> 'All lawyer-client relationships create [conflicts] . . .' Lawyers have a keen interest in the size of their fees, while '[c]lients are interested primarily in the size of their recovery.' To the degree lawyers dominate the lawyer-client relationship, there is a danger that they will 'engage in conduct that increases their fees . . . at the expense of the client's recovery.'

Id.

[239] *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941) ("It is thus seen that the class suit is a vehicle for paying lawyers handsomely to be champions of semi-public rights.").

addressing fees generally, and Model Rule 1.7, addressing conflicts of interest arising due to "a personal interest of the lawyer."[240]

Model Rule 1.5 expressly authorizes the use of contingent fee agreements,[241] requiring written consent as to how the fee will be calculated,[242] and subject to the general admonition that the fee shall not be unreasonable.[243] The Rule sets out "factors to be considered in determining the reasonableness of a fee"[244] and authorizes deductions for "litigation and other expenses."[245] The Rule also authorizes dividing a fee between lawyers in different firms.[246] Although the "lodestar" and the "percentage of the fund" are the two predominant methods by which fees are awarded in class actions,[247] both have been subject to criticism[248] and there is no facial reason as to why Model Rule 1.5 could not apply to class actions.[249] Lawyers could submit their proposed fee agreement to

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[240] MODEL RULES OF PROF'L CONDUCT, R. 1.7(a)(2).

[241] *Id.* R. 1.5(c).

[242] *Id.*

[243] *Id.* R. 1.5(a).

[244] *Id.*

[245] *Id.* R. 1.5(c).

[246] *Id.* R. 1.5(e).

[247] *See* Resnik et al., *supra* note 1, at 339-40 (noting that "the case law and commentary have come to rest on two approaches, the 'lodestar' and the 'percentage of the fund' (POF)" as the methods by which courts award fees in class actions); *see also* Issacharoff, *supra* note 14, at 827 ("Basically, all courts except the Florida Supreme Court and, to some extent, the Fifth Circuit, have abandoned the failed lodestar experiment.") (citations omitted).

[248] *See* Resnik et al., *supra* note 1, at 342-44.

> Each method of fee calculation . . . has its own critics. Reliance on the lodestar, with its hourly rates, may create incentives to "pad" hours, waste time, or prolong the litigation.
>
> Percentage of the fund recovery, while simpler to administer, rests entirely on judicial discretion. Judges select a figure whose arbitrariness is cushioned only by reference to other similarly arbitrary decisions.
>
> The percentage method may also create undesirable incentives, such as prompting lawyers to settle too soon to "cash out."

Indeed, Professor Alexander has argued that, in application, the "lodestar" formula is really only a fiction. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 541 (1991) ("Courts claiming to follow the lodestar method use many different formulas and choose a wide range of multipliers under those formulas. Coincidentally, however, all of these arcane arithmetical calculations just happen to yield fee awards of about 25 to 30 percent of the recovery most of the time.").

[249] *See* Resnik et al., *supra* note 1, at 352 ("The distinguishing feature between the contingency fee and the POF is whether the percentage is set in a contract in advance between client and lawyer or before/after the fact by the court."); *see also* Coffee, *supra* note 14, at 390 (stating that class counsel "receive a median contingent fee that is typically

the court for review at the time of filing the complaint or the motion for class certification, subject to a second review in the context of Federal Rule 23(e)'s requirement of court review of any class action settlement or dismissal.[250]

With respect to Model Rule 1.7, the "personal interest of the lawyer" includes a broad range of potential "personal interests."[251] Similar personal interests can be implicated in the class action context, but of perhaps greater general concern are the lawyer's personal interests as they are implicated with respect to facilitating a generous financial result for the lawyer, with a comparatively less generous financial result for the class members.[252] The Model Rule

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between 27% and 30% of the class's recovery, plus their expenses . . . ."); *id.* at 390 n.48 ("While median fee awards ranged only between 27% and 30% of the recovery fee, average awards ranged more broadly between 20% to 40% of the recovery."); HENSLER ET AL., *supra* note 1, at 78 ("The most widely cited standard is 25-30 percent.").

[250] Indeed, it has been suggested that the failure to set fees before settlement contributes to collusion among counsel. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1112 (1996)

> Collusion between class counsel and defendants and their lawyers to sell out the class is facilitated by the fact that class counsel typically does not bargain in advance of the settlement with the class representative or the court over the fee arrangements. . . . Because class counsel's fee is not set in advance, collusion can occur no matter how this fee is structured.

Id. See also Brian J. 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, 1069 n.110 (1981) ("Simultaneous negotiation for the settlement fund and for individual counsel fees creates an inherent conflict of interest.").

[251] *See* MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. 10 (warning against employment discussions with opponent); *id.* (disallowing undisclosed financial interests); *id.* cmt. 11 (addressing family relationships); *id.* cmt. 12 (prohibiting sexual relationships).

[252] *See* Issacharoff, *supra* note 14, at 829-30:

> [T]he most effective way to police class action practice is to provide the proper incentives for class counsel to diligently prosecute the class's interests. Although every system of principal-agent relations is fraught with difficulty, the best arrangement is one in which the attorneys function as partners of the class. The attorneys' recovery should be tied to that of the class; to the extent the attorneys hope to prosper in the representation, that reward should be a direct product of what they return to the class. The optimal mechanism for creating this partnership is to establish a quasi-contractual relationship at the beginning of the litigation in which the attorneys are provisionally awarded a percentage of the class's recovery should they prevail.
>
> [This approach] impedes sweetheart deals by insuring that attorneys' recoveries are directly tied to the actual return to the class and by providing an incentive for attorneys to maximize the size of the pot from which they will draw their fees. Such an approach simply reproduces in

permits review for all of these concerns, and again provides a broader ethical focus.

In addition to the areas of competence, vigorous representation, and conflicts of interest, class counsel's communications with class members can also play a role in the adequacy of representation determination. The Model Rules provide guidance in this area as well.

4. Communication. Communicating with class members to keep them informed, although mentioned with less regularity in the case law, is occasionally—and should always be—a factor considered in the adequacy of representation inquiry.[253] Model Rule 1.4 requires "reasonably consult[ing] with the client about the means by which the client's objectives are to be accomplished" and "keep[ing] the client reasonably informed about the status of the matter."[254]

It has been suggested that the Model Rules require lawyers to deal with clients on a one-to-one basis: "The traditional ethical rules, I believe, are inadequate [in mass tort lawsuits] due to their reliance on the single-litigant, single-lawyer model. The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation."[255] However,

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the class action context the typical attorney-client relationship that exists in individual representation.

[253] *See supra* note 181 and accompanying text (discussing communication issues evaluated as part of adequacy inquiry).

[254] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2)-(3). In its entirety, Model Rule 1.4 provides:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

[255] WEINSTEIN, *supra* note 188, at 85.

although worded in terms of a single lawyer and single client, there is nothing in Model Rule 1.4 mandating that all communication between lawyer and client take place in a one-on-one fashion.[256] An attorney may keep his or her client reasonably informed through any number of methods.[257]

> Some lawyers have successfully kept clients well-informed of the progress of a case by using not only paralegals and group meetings, but also such creative devices as newsletters, phone banks (including the use of 800 numbers for long distance calls), electronic mail, and the development of videotapes to be viewed in the clients' homes.[258]

Web sites, whether open or password-protected, can also provide a means of keeping clients reasonably, yet inexpensively, informed.

Again, nothing in Model Rule 1.4 precludes its application to class actions,[259] and the Rule's insistence on keeping clients reasonably informed is beneficial to the class generally while providing more emphasis on counsel's duties to class members.

The Model Rules are an existing ethical framework providing additional guidance in determining whether class counsel satisfy the adequacy of representation prerequisite. In particular, employing

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[256] *See* Moore, *supra* note 188, at 161 n.77 ("While it is certainly true that both [Model Rule 1.4] and [the] Comment[s] appear to contemplate a single lawyer personally informing a single client, the clear purpose of the Rule is to provide clients with reasonably adequate communication.").

[257] One creative proposal for enhancing communication is a court-created "clients' committee" that would "facilitate client-attorney communication and . . . ensure client knowledge about the litigation." Resnik et al., *supra* note 1, at 391-92.

[258] Moore, *supra* note 188, at 161.

[259] *See* Weinstein, *supra* note 189, at 495-96:

> The language of the [ethical] rules does not appear to create an insurmountable problem [with respect to meeting the ethical requirements of effective communication]. A lawyer who is careful to establish mechanisms for communication with clients, such as mass mailings, newsletters, large group meetings, use of client leaders to speak for other clients, and phones staffed by paralegals, theoretically can give clients enough information to let them make the important strategic decisions for which the rules require client direction and consent . . . . I have no doubt that some attorneys do maintain appropriate contact with their clients even in mass cases . . . .

a Model Rules-based analysis of adequacy would reduce courts' reliance on prior complex litigation experience as the primary, if not sole, determinant of class counsel's adequacy. The broader range of inquiry enhances the likelihood of actual adequacy and interjects an ethics component at an early stage in the class litigation, sending the message that the court expects an ethical approach to the litigation.

V. ADEQUACY OF REPRESENTATION: COURT OVERSIGHT

The success of the class action device depends on the threefold effort embodied in the integration of the class representative, class counsel, and court oversight. As is so often the case, the ultimate responsibility for adequacy lies at the final stop: the judiciary.[260] A conscientious judge can greatly increase the likelihood of adequacy of representation and a subsequent binding judgment.[261] The power of this oversight, however, has been undercut to some degree by the inherently misleading standard suggested by the term "adequate."[262] Because the dominant model of class action process—Federal Rule 23—refers to "adequately" representing the class, there has been an unfortunate tendency by some courts, whether consciously or unconsciously, to take a more literal approach to the concept of adequacy of representation, thereby mistakenly affording the concept a superficial definition roughly approximating "good enough."[263] However, the prerequisite of "adequacy of

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[260] *See id.* at 1027 ("Judicial oversight of class litigation is the critical procedural check to keep class suits within the outlines of the representative model and the bounds of due process. . . . [C]lass litigation calls upon the judge to actively manage the suit in order to protect the rights of absentees.").

[261] *See* HENSLER ET AL., *supra* note 1, at 32 (urging, as its principal recommendation, that judges scrutinize class settlements more closely).

[262] *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 36-37 (1999) ("Rule 23(a)(4) requires only *adequate* class representatives and counsel; there is no obligation that the best possible plaintiffs and counsel be selected."); *see also* Peil v. Nat'l Semiconductor Corp., 86 F.R.D. 357, 366 (E.D. Pa. 1980) (stating that "class representative need not be the best of all possible representatives").

[263] *See* Issacharoff, *supra* note 14, at 805 ("Nowhere else [than in class actions] do we find courts so routinely determining that there is sufficient or adequate representation to provide good enough protection to litigants far removed from the courtroom, yet bound to its outcomes."); Murray & Harang, *supra* note 14, at 2089 ("Typically, when a suit is filed seeking certification as a class action, the parties and the court perfunctorily assume that the lawyer

representation" in class actions requires much more than merely "adequate" representation.

Largely overlooked, perhaps due to the distraction afforded by the lightweight nature of the term "adequacy," is the Supreme Court's express contrary admonition that "adequacy," as a Federal Rule 23(a) prerequisite, is subject to "rigorous analysis."[264] Rigorous analysis is consistent with both the essential, due process nature of the adequacy inquiry[265] and the greater judicial scrutiny that the Supreme Court's recent decisions require.[266]

A shift in terminology—from a mere "review" of adequacy of representation to a requirement that the court engage in a "rigorous analysis" of adequacy of representation—has two major effects. First, the insistence on rigorous analysis highlights the importance of the court's oversight in determining adequacy of representation, a responsibility that has been characterized as a fiduciary duty.[267] A mere trivial or secondary matter would not be subject to "rigorous" scrutiny. Second, "rigorous analysis" clearly requires the

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or lawyers who filed the suit are 'adequate' to represent the members of the class seeking to be certified."); *see also* Koniak, *supra* note 15, at 1116-23, nn.333 & 355 (asserting that courts are too quick to approve class counsel as "adequate").

[264] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (noting necessity of "a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied"); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 849 (1999) (requiring "rigorous adherence to those provisions of the Rule 'designed to protect absentees' "); Weber v. Goodman, 9 F. Supp. 2d 163, 167 (E.D.N.Y. 1998) (citing "rigorous analysis" standard). Indeed, a prominent class action treatise uses the term "substantial scrutiny," which arguably may constitute a lesser standard than "rigorous analysis." *See* 3 NEWBERG & CONTE, *supra* note 21, § 15.03, at 15-9.

[265] *See supra* note 24 and accompanying text (emphasizing that adequacy requirement provides due process protection).

[266] *See* Lilly, *supra* note 13, at 1028 ("In at least three recent cases, the Supreme Court has strongly endorsed close judicial oversight. This requirement of careful supervision is, moreover, quite consistent with the Court's historical recognition of the representative nature of class actions.").

[267] *See* Koniak & Cohen, *supra* note 20, at 150 ("[T]he court stands in for the client as a fiduciary to ensure that the settlement is fair to the client and does not merely serve the lawyer's interest."); Leslie, *supra* note 19, at 1053 ("Judges serve as fiduciaries to absent class members."); *accord* United States v. City of Miami, 614 F.2d 1322, 1331 (5th Cir. 1980) (discussing situations in which judges take on more active roles in appraising settlements); Int'l Union of Elec. Workers v. Unisys Corp., 858 F. Supp. 1243, 1264 (E.D.N.Y. 1994) (assessing fairness of proposed settlement).

judge's personal, first-hand involvement.[268] A court cannot claim to have engaged in a rigorous analysis of adequacy of representation by relying blindly on the representations or analysis of counsel.[269] Nor can the court merely fall back upon the adage that "a bad settlement is almost always better than a good trial."[270] The court's greater personal involvement in class litigation clearly is anticipated, expected, and presupposed by the language of Federal Rule 23;[271] indeed, the court's mandatory oversight of any class settlement or dismissal is worthless if the judge merely acquiesces in counsel's proposals or recommendations without independent personal involvement and analysis.[272]

Rigorous analysis comes into play not only at the time of settlement, but also at the time of class certification—in fact, the *Falcon* decision, which is the source of the "rigorous analysis" language, involved the reversal of a class certification order.[273] Accordingly, the court must take an independent, active role in assuring that the adequacy of representation prerequisite is satisfied at both the class certification and the settlement stages.

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[268] Commentators have criticized the nature of judicial oversight and management in class actions as a general matter. *See, e.g.*, Issacharoff, *supra* note 14, at 829 ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.").

[269] *See* Morawetz, *supra* note 123, at 7-8 ("Although the courts have an obligation at both [the class certification and settlement] phases to ensure that class counsel are representing class interests adequately and fairly, courts frequently defer to the expertise of the lawyers once the class is certified."); *see also* Issacharoff, *supra* note 14, at 807 (reporting case in which court certified settlement class approximately twenty minutes after parties filed their initial paperwork); Leslie, *supra* note 19, at 1053 ("[F]or many class action settlements, court approval is a mere formality.").

[270] *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 926 (2000) (noting that the phrase "a bad settlement is almost always better than a good trial" is found in published decisions); *see, e.g.*, Hispanics United v. Village of Addison, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997); Strong v. BellSouth Telecomm., Inc., 173 F.R.D. 167, 172 (W.D. La. 1997); *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

[271] *See* Lilly, *supra* note 13, at 1027-28 ("[T]he drafters of Rule 23 provided a significant measure of judicial oversight for all class actions . . . . [I]t is critically important that the court assume an active supervisory role.").

[272] *See* Leslie, *supra* note 19, at 1060-61 ("In general, courts appear unwilling to reject settlement agreements that have been proposed by counsel for defendants and for the class. . . . [T]rial judges often defer to the parties submitting the proposed settlement. . . . Judges generally approve proposed settlements, whether based on currency, coupons, or conduct.").

[273] Gen. Tel. Co. v. Falcon, 457 U.S. 148, 161 (1982).

"Implicitly or explicitly, the march of recent Supreme Court cases is toward a strict requirement: judicial control is essential to ensure that the interests of absentees are protected."[274]

There are some specific steps the court can take at the class certification stage to assure the adequacy of the class representative.

> [I]t does not suffice that the class representative has claims similar to the unnamed class members or that other typical class action prerequisites, such as numerosity, are present. These alone do not ensure adequate representation, which depends upon both meeting the necessary cohesiveness of a proper class and faithful and vigorous representation throughout the litigation.[275]

In particular, the judge should ask brief questions of the class representatives, such as how they came to be involved in the lawsuit; if they were acquainted with class counsel or defense counsel before the lawsuit; an inquiry into each representative's specific circumstances and injuries; and a brief explanation of the unique responsibility imposed upon class representatives to protect the interests of the absent class members, encouraging class representatives to speak up and to ask questions of class counsel to make sure that they and others like them are treated fairly.

Psychological studies have shown that making expectations express, and obtaining express consent in front of others, increases the likelihood that the requested behavior will occur.[276] Judges regularly employ this widely-recognized concept, especially in criminal matters where, for example, pleas and waivers are taken in open court. Accordingly, such an inquiry of the class representatives in open court increases the likelihood that representatives will take their responsibilities seriously. In

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[274] Lilly, *supra* note 13, at 1029.

[275] *Id.* at 1027.

[276] *See, e.g.*, John H. Hallaq, *The Pledge as an Instrument of Behavioral Change*, 98 J. SOC. PSYCHOLOGY 147-48 (1976) (noting phenomenon that making oral commitment leads to behavior consistent with that pledge).

addition, making these inquiries in open court necessarily draws the attention of both class counsel and the judge to the importance of the adequacy inquiry, thereby increasing the likelihood that they will pay more attention to potential adequacy issues.[277]

Similarly, the court must carefully scrutinize the adequacy of class counsel. For example, some courts have narrowly focused their adequacy of representation inquiry upon counsel's prior class action or complex litigation experience.[278] Prior experience is an objective, easy criterion; with one quick look at the papers the judge is done and the case keeps moving. However, the Supreme Court has repeatedly noted that adequacy of representation encompasses the "competency and conflicts of class counsel"[279]—terms found in the ethical rules. The review of competence and conflicts necessary in the adequacy inquiry renders adequacy of representation a broad-based ethics inquiry, rather than a cursory examination of counsel's resume.[280]

Finally, at the settlement stage, the court must again employ a rigorous analysis to ensure that the adequacy of representation prerequisite is satisfied. Nothing in Federal Rule 23 or the Supreme Court's jurisprudence suggests that a court may engage in any presumptions or deference in scrutinizing proposed class

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[277] The questioning of class representatives is not intended to provide defense counsel with opportunities to harass class representatives and thereby attempt to obtain denial of class certification. *See* Macey & Miller, *supra* note 134, at 93-94 (noting, in different context, tendency of defense counsel "to harass and invade the named plaintiff's privacy," resulting in "reduc[ing] artificially the supply of representative plaintiffs"). Indeed, the judge should ensure that defense counsel does not harass the class representative. Under some circumstances, it may be appropriate, when a class representative is deemed inadequate, to locate a substitute class representative rather than to dismiss the class litigation. *See* Johnson v. Am. Credit Co., 581 F.2d 526 (5th Cir. 1978) (concluding that trial courts should consider locating new representative instead of dismissing action); *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 35, § 30.16, at 243 ("Later replacement of a class representative may become necessary . . . . If replacement is needed, the court may permit intervention by a new representative. . . . To protect the interests of the class, class counsel should make reasonable efforts to recruit a new representative.").

[278] *See* Murray & Harang, *supra* note 14, at 2101 ("Although experience in complex or class action litigation is an important factor in the selection of class counsel, it certainly should not be the sole factor.").

[279] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 n.31 (1999) (citing *Amchem*).

[280] *See supra* notes 167-259 and accompanying text (discussing applicability of Model Rules to determination of class counsel's adequacy of representation).

settlements. Accordingly, many widely-used practices are improper—including deferring to representations of counsel regarding the fairness and adequacy of a settlement;[281] using a reduced adequacy standard in reviewing settlement classes;[282] or relying on the prior adequacy determination rendered when the class was initially certified.[283] Nor does the desirability of settling a case[284] or the seeming fairness of a settlement's terms[285] excuse

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[281] *See* Leslie, *supra* note 19, at 1063 ("Reviewing judges routinely defer to class counsel's representations that a proposed settlement is fair, adequate, and reasonable."); *id.* at 1065 ("For courts to defer to class counsel lets the fox guard the henhouse, the precise result that Rule 23(e) is supposed to prevent.").

[282] In *Amchem*, the Supreme Court noted that although some courts "have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements," such an approach does not comport with due process. *Amchem*, 521 U.S. at 618 (noting that federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper"). Although *Amchem* held that a settlement class need not meet the "manageability" standards that courts ordinarily review at class certification, this holding cannot legitimately be construed as permitting a lesser review of adequacy of representation at the settlement stage. *See id.* at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial.").

[283] Indeed, the Supreme Court has noted one of the potential impacts upon the adequacy of class counsel. *See Ortiz*, 527 U.S. at 852 n.30 ("In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.").

[284] *See* Coffee, *supra* note 14, at 389 ("[O]nce a potential settlement of complex litigation is in view, federal trial courts tend to tolerate almost any conflict in order to achieve a settlement that brings litigation peace—but at a cost paid by the class members."); Koniak & Cohen, *supra* note 20, at 151 ("Rejecting a settlement that clears not only one's own docket but the dockets of colleagues is not apt to win a judge the praise of fellow judges. Nor should a judge expect to win praise from the bar for rejecting the efforts of lawyers and firms."); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 214 n.73 (1987):

> [T]he trial judge knows that if he or she approves the settlement there is little likelihood that the decision will be appealed, whereas if he or she rejects it there is certain to be an appeal. If the judge approves the settlement, the case will be removed from the docket, whereas if he or she rejects the settlement the case will continue to clog the docket and may even eventuate in a trial.

Id.; Selmi, *supra* note 171, at 1327 (noting that "judges have routinely signed off on the settlement agreements proposed by the parties without engaging in any serious inquiry").

[285] *See Amchem*, 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and the court would be disarmed."); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1379 (1995) (noting some tendency "to conflate the issue of class certification with that of

the court from a thorough, independent adequacy of representation analysis. The "rigorous analysis" approach precludes any presumption that the proposed settlement satisfies the adequacy inquiry,[286] and courts should review proposed settlements with particular care when a class representative objects to the settlement's adequacy.[287]

There is no question that a "rigorous analysis" approach imposes more work on the court than does a cursory review.[288] However, court oversight, especially at the settlement stage, is the rough equivalent of the last clear chance doctrine: the court, which is mandated by Federal Rule 23 to protect the interests of absent class members, has the last opportunity to discover and correct any deficits in adequacy of representation and thus ensure a final, binding class judgment.[289]

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settlement adequacy: if the settlement seems fair, then the court assumes that the class can be certified (on the apparent theory that the predominant common issue for purposes of Rule 23 is the fairness of the settlement)").

[286] Before the *Amchem* and *Ortiz* decisions, many courts stated they employed "a presumption in favor of finding that a settlement is fair and adequate." Morawetz, *supra* note 123, at 8 n.21 (citing cases).

[287] *See* Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422, 1430-33 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995) (court approved settlement despite filing of objections by class representatives and 2,700 class members); Coffee, *supra* note 14, at 406-08 (describing "the relative powerlessness of the class representative" in context of Third Circuit decision in which district court approved settlement, even though three out of four named representatives and 384 class members filed objections to it); *id.* at 409-10 ("Although individual objectors are frequent, dissent by a majority of the class representatives is rare and probably telling."); Leslie, *supra* note 19, at 1063 ("Although it is tempting to characterize objectors [to class action settlements] as isolated obstructionists, the opposition to proposed settlements often exhibits considerable breadth. Yet even when over 20 percent of the class members opposed a coupon-based settlement, trial courts have approved such settlements."). Objections by a class representative, as contrasted with objections by unnamed class members, should command particular attention. *See* Miller & Singer, *supra* note 101, at 120 (noting that "objectors sometimes earn a great deal of money by intervening").

[288] *See* Leslie, *supra* note 19, at 1062 (noting that full dockets, combined with judicial resources required of class actions and praise judges receive for concluding cases quickly, conspire to "suppress[ ] judicial scrutiny of proposed [class action] settlements").

[289] *See* Klement, *supra* note 134, at 27 ("Courts have repeatedly failed to guarantee class members their rights and have kept approving collusive settlements that award class members mere coupons while providing attorneys with large monetary fees.").

VI. CONCLUSION

As the benchmark of due process in class actions, adequacy of representation is crucial to the fairness of the result and the finality of the class judgment. In light of its essential nature, adequacy of representation is a surprisingly unsettled concept; as a result, some courts treat the adequacy determination in a cursory manner. As recent successful collateral attacks on prior class judgments illustrate, the risks of inadequacy are high. These risks can be reduced by according greater attention to existing guidance in each of adequacy's three safeguards: class representatives, class counsel, and court oversight. With respect to class representatives, the same interest-same injury prerequisite needs a more careful application to ensure that diverse interests are recognized and represented. With respect to class counsel, adequacy is, at its core, an ethical inquiry. As such, the Model Rules are a logical and appropriate means of conducting the adequacy analysis, thereby decreasing the opportunities for collateral attack and for settlements tainted by conflicts of interest. Finally, with respect to court oversight, the necessity for rigorous analysis in the adequacy determination has been largely overlooked, leading some courts improperly to conduct a cursory review or to rely on representations of counsel. Only by undertaking an independent, proactive and rigorous analysis can courts provide the level of supervision and oversight necessary to ensure adequacy of representation and due process.