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Class Action Lawyers: Fools For Clients?

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Introduction

A litigation attorney is a person who represents another in a case pending before a neutral tribunal. If this statement is guilty of self-evidence, it is also not totally accurate. For example, assume that Hercule Marple, an attorney, slips and falls on a banana peel while shopping at the Spend & Save Market. Hercule's representing himself in a suit he files against the Market for negligence raises nary a legal eyebrow. True, Hercule is representing himself, not another. But one's status as an attorney does not cause a person to lose his basic right to represent himself in court.¹ Hercule has challenged the old adage about lawyers who represent themselves, but he has not thrown any great wrench into the legal system. In this situation, it is most proper to think of Hercule's suit as one in which there is no attorney of record. Rather, a litigant is merely representing himself, and the litigant happens to be an attorney.

This article is devoted to the reverse of the above hypothetical: the case in which there is a lawyer, but no actual client. It focuses on that much-loved, much-hated and oft-debated procedural device, the class action. In a class action, a single person, designated the class representative, brings an action on behalf of himself and all other persons who are roughly in an equivalent legal position.² Of course, the single person can, instead, be a num-

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¹ 7 C.J.S. Attorney & Client § 43 (1980).
ber of people who file the action as class representatives. If a court finds that the requirements of filing as a class are met, the case will be permitted to proceed as a class action. The validity of the class action rests on an assumption that the interests of the class representatives, at least as they pertain to the substantive issue before the court, mesh with those of the non-appearing class members. Indeed, in only one type of class action brought under Federal Rule 23, a Rule 23 (b)(2) class action, do the individual non-appearing members have an opportunity to "opt out" of the litigation. If a class representative is determined to have interests that conflict with those of the class members he is representing, then he is forbidden to act as a representative.

Thus, on its surface, the class action appears benign enough. An individual decides that his legal rights are being or have been violated, but realizes that his claim alone is not worth the trouble and expense of a lawsuit. The aggregation of his claim with those of other people in similar position, however, gives it added strength and importance. As a result, a person functions not merely as individual but as champion of a cause; the claim becomes substantial enough for an attorney to become involved, and the alleged violator of rights must pay attention. It may be somewhat surprising, therefore, that the class action has earned a central postion in law journals and in reported appellate court decisions as an allegedly illicit way to line the pockets of plaintiff's attorneys; and as a method of transforming courtrooms into mini-legislatures.

The Class Representative: A Mere Formality?

The purpose here is not to add more fuel to these already heated issues. Rather, its focus is on an aspect of class actions that has been the subject of much less attention: the relationship between the class representatives and the class attorney. One's con-

5. There are, of course, cases involving class defendants. However, they are by far in the minority and the problems addressed in the essay are unlikely to arise in them. For those reasons, this essay focuses entirely on plaintiff class actions.
6. See, e.g., Detroit v. Ginnell Corp., 495 F.2d 448, 468 (2d Cir. 1974); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (dissent).
ceptions of that relationship will be based in large part on one's image of the more typical relationship between an individual client and his lawyer. Though those images may vary, they all have in common the notion that the lawyer's actions are in some way responsive to the expressed wishes of the client. When the relationship is moved into the context of class actions, in which the class representative has obligations to the members of the class he represents, the courts have recognized that the attorney-client relationship is somehow different. The parameters of that difference are, however, largely undefined and vague. The Fifth Circuit has stated, for example, "no clear concept of the allocation of decision making responsibility between the attorney and the class members has yet emerged." The Fifth Circuit has stated, for example, "no clear concept of the allocation of decision making responsibility between the attorney and the class members has yet emerged." This Article explores one way in which the relationship is different: the metamorphosis of the class attorney himself into the class plaintiff. Its thesis is that in many class action cases, the class representative at some point is transmuted into a mere formality, and the attorney becomes in effect the client. This interferes with values that are inherent in the relationship between a client and attorney, and which should be preserved to the extent possible in class actions. Suggestions to protect and preserve these values will be made at the conclusion of the Article.

The next part of this Article will describe the problem in more detail, and assess its magnitude. Following that, there is an analysis of how the judiciary has recognized and dealt with the problem, and the inadequacy of that response. The succeeding section will describe the harms that are done by the class attorney taking over and becoming synonymous with the role of the class representatives. Finally, certain techniques will be suggested for dealing with the problem in order to assure, to the extent possible, an active and vigorous class representative.

The focus of this article is on civil rights cases. These cases do, after all, constitute a majority of the class action cases on court dockets. The problem does occur in other types of class actions: stockholder derivative suits, aggregation of consumer claims for damages, and other types of class actions which have as their primary purpose a monetary recovery for the class. In such cases, the interests of all class members are narrow and clear; any rational

individual would, if forced to choose, want more of the world's wealth than less of it. Moreover, judicial powers to supervise class actions to ensure that the interest of the class members are protected function more responsibly in class action damages cases, for the money furnishes the judge with an objective yardstick by which to determine the adequacy of a proposed settlement. But, since class representatives in civil rights actions have little economic motive to sustain their interest, they are more likely to turn the entire case over to the class attorneys. Second, civil rights actions for injunctive relief truly tax the powers of a court to determine whether a proposed settlement is "fair." For example, is a proposed settlement in a school desegregation case which allocates more funds to the improvement of racially isolated minority schools than to busing capable of being labeled fair or unfair? Because of the absence of an objective yardstick by which a judge can determine the fairness of proposed settlements in such cases, the absence of actual class representatives becomes more pernicious.

The Nature of the Problem

Courts have often been confronted with the situation of the attorney who seeks to act both as class representative and as attorney for the class. In the great majority of these cases, the courts have forbidden the attorney to act in this dual capacity. Thus, in almost every class action, there is in fact a class representative who is separate and distinct from the class attorney. Nonetheless, is the court's insistence on a class representative who is independent of the class attorney a sufficient protection of the absent class member's interests? Usually not. While the judicial rulings have ensured that every class action is brought in the name of a nominal class representative, they have little focused on the actual relationship between the class representative and the class attorney throughout the litigation. Yet, it is this continuing relationship which bears most critically upon the interests of each class member. In the great majority of cases, that relationship becomes one in which the class attorney becomes synonymous with and functions as the class representative. At some time after the inception of the class action, the class attorney finds himself not recommending strategy, but adopting it. Negotiations are based on his perception of what the best result should be, not based on what the members of the class may actually desire. His acceptance of a settlement offer is based on its congruence with his perceptions,
not those of the class. All of this occurs quite naturally because of the nature of class actions themselves: they tend to be lengthy, procedurally complex and legally esoteric. In addition, despite the fact that the interest in and commitment to the claim by the legal system and by the plaintiff's attorney has been expanded by the class aspect, that of the individual has increased little, if at all. The individual is still left with his individual, small claim. Thus, it is likely that even one who agrees to become a class representative will cease to be actively involved in the case as it wears on. In effect, a vacuum is created and the class attorney quite naturally steps into the shoes formerly occupied by the individual representatives of the class.

The fact that the class attorney is commonly becoming the class client can be gleaned for a variety of sources. The least scientific, although perhaps most persuasive method, is to address the question to attorneys and judges who are familiar with class action litigation. The opinion that, in most cases, the class is in fact the class attorney is inevitable. There may be differences of opinion as to whether this is good or bad as a matter of policy; but there is little debate on the central issue of whether the phenomenon occurs frequently.

However, exclusive reliance need not be placed on such folk wisdom. In an article devoted to the contention that the attorney of record should have the right also to be the class representative, it was pointed out that, "Indeed, it is often a mere fiction that the lay class representative exercises any significant control over the attorney in the interest of absent class members. Even if the lay plaintiff desires to perform this time consuming function in spite of his small personal stake in the litigation, being untrained in the law he will be easy prey for the class counsel's arguments as to why a particular settlement is the best obtainable under controlling legal precedents. Consequently, an attorney may be a better class representative than a layman." 10 Thus, an article espousing the merits of class actions contains the admission that the named class representative is often in fact little more than a convenient fiction.

Moreover, the very nature of civil rights class action cases often guarantees that the named class representatives will have no significant control over their attorneys. For example, in the Los

Angeles school desegregation case, *Crawford v. Board of Education*,\(^{11}\) the named class representatives were the guardians *ad litem* of young school children when the case was first filed in 1963. In 1980, when the case was still before the court for the formation of an appropriate desegregation remedy, those class representatives had long since grown and left the school system. Those class representatives were a formality needed to start the action; they in reality had no significant impact on the progress of the case. Rather, the lawyers became the real parties in interest, prosecuting the suit to secure the remedy which in *their* opinions was required for the minority school children.\(^{12}\) The issue, of course, is not whether the class attorneys are correct or incorrect in their opinions. The issue is who should be making that determination in our legal system.

Finally, the takeover of cases by class attorneys has been noted in some judicial opinions. In *Greenfield v. Villager Industries, Inc.*, the court noted that, “Experience teaches that it is [the] counsel for the class representative and not the named parties, who direct and manage these [class] actions. Every experienced federal judge knows that any statements to the contrary is (sic) pure sophistry.”\(^{13}\) And, in *Hernandez v. United Fire Insurance Co.*,\(^{14}\) a class action involved alleged discriminatory and deceptive practices in the sale of credit property insurance. The defendants claimed that the class representatives were inadequate because of their lack of familiarity with the underlying bases of the suit. The court was untroubled by the fact that class counsel was proceeding without significant advice from the class representatives, and held the defendants’ claim to be without merit. Thus, these kinds of federal cases furnish additional support for the conclusion that in many civil rights class action cases, the actual liti-

\(^{11}\) 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

\(^{12}\) Compare *Crawford v. Board of Educ.*, *supra*, n.11, with *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), in which the Supreme Court decided that the NAACP was not engaged in the unauthorized practice of law when it conducted meetings to inform minority persons of their rights to desegregated education, and secured clients as a result of such meetings. In so holding, the Court noted that the litigation which resulted from these meetings was not actually controlled by the NAACP, even though the attorney of record was paid by the NAACP. The Court did not in that case explore the relationship between the attorney and the client, except to note that the litigation was under the control of the attorney. That was a sufficient finding to protect the NAACP in that case, but it left unresolved the issue presented in this Article.

\(^{13}\) 483 F.2d 824, 832 n.9 (3d Cir. 1973).

\(^{14}\) 79 F.R.D. 419 (N.D. Ill. 1978).
gant is the attorney for the class, not the class members speaking through their named representatives.

The Judicial Response:
The Attorney as Class Representative

You will recall that at the beginning of the last section, it was pointed out that the practice of having the class attorney named also as the class representative has been nearly universally condemned. But, by the end of the section, it was clear that in many civil rights class action cases, the class attorney does nevertheless end up as the class representative. To forestall the cynics, who expected such a result all along, some understanding of how this process came about may be aided by a review of the cases.

Recall the hypothetical with which the article began—the attorney who slips and falls in a market and represents himself in a suit for damages. Following the same rationale which permits the attorney to represent himself in that case, we would expect that if the attorney were a member of a large class of people, each of whom had slipped and fallen under identical circumstances at the same market, he could bring suit for damages on his own behalf and as the representative in a class suit. However, our expectation would not be met. Although it has been contended that attorneys who are members of the class should have the right to act both as class representative and as class attorney, the overwhelming weight of judicial opinion holds to the contrary. The courts' articulated reason for this rule tends to run along traditional “conflict of interest” lines:

These dual roles are inherently fraught with potential conflicts of interests. In any class action there is always the temptation for the attorney to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain . . . . Thus plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class.17

17. Graybeal v. Am. Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973). There are some decisions to the contrary, holding that the attorney for the class may be an adequate class representative. These decisions are in the minority, and confined generally to the context of securities violations, in which courts have been especially tolerant of class actions. See also Clark v. Cameron-Brown Co., 72 F.R.D. 48 (M.D.N.C. 1976); Byrnes v. IDS Realty
Even this narrow holding provides an interesting resting place in the search for an appropriate attorney-client relationship in a class action. For many would urge that a class action should be treated like any other case, and the attorney-client relationship should be examined no differently than it would be in a non-class case. As we will see, this argument cuts in favor of additional controls on the class attorney-class representative relationship, not against them. Moreover, even as to the simplest rule of law—that the class attorney cannot also be the class representative—the courts have already shown that class actions will be treated differently from non-class cases. In a non-class case, there would be no issue regarding an attorney's right to represent himself in a case alleging a violation of the attorney's personal rights. Finally, the rationale for the courts' ruling must also be noted. It is a traditional conflict of interest analysis. That is, the attorney cannot also be class representative because in any particular case the interests of those roles may not be congruent.18 This analysis, while perhaps a sufficient answer to the issue posed by the class attorney who would also be class representative, has unfortunately been hoisted as the standard to judge most questions raised concerning the adequacy of the class representative. The approach of determining adequacy of the class representative in the context of conflict of interest has led the courts to eliminate as potential class representatives those persons who possess certain disqualifying attributes. But that approach does little to produce a class representative who is truly independent of the class lawyer and who plays an active role in the case. Thus, if the courts are unable to find a conflict of interest between class representatives and class members, perhaps it is because there are no real class representatives.

With this background, we can turn to some of the other decisions which have examined the relationship between class attorney and class representative. After the situation in which the class attorney has attempted to function as class representative, the next easiest type of case for the courts to resolve has been that in which too close a personal relationship has been found to exist between class attorney and purported class representative. In these cases, the courts have assumed that the class representative was an

18. See also Saylor v. Lindsley, 456 F.2d 896, 900-01 (2d Cir. 1972), containing remarks of Judge Friendly on this point.
obvious front for the lawyer, and ruled that the class representative was inadequate. In effect, the class lawyers have been punished for being too transparent in their selection of a class representative. For example, in *Seiden v. Nicholson*, one Fred Lowenschuss was an attorney-at-law as well as one of the class representatives. Although Mr. Lowenschuss did not actually file any appearance as attorney of record for the class, he was an associate in the law firm which was the attorney of record for the class. Because of his close connection to the legal aspects of the case, he was held not to be an adequate representative of the class. Similarly, in *Stull v. Pool*, the court held a woman not to be an adequate class representative because she was the wife of the attorney representing the class. Thus, while the courts may be generally somewhat tolerant of a class representative who is closely aligned with the attorney for the class, in these situations the class representative will be deemed to be inadequate.

Cases in which the class attorney attempts to serve as class representative and cases in which the class attorney is too closely aligned either personally or professionally with the class representative furnish the outer limits of the courts' search for representative parties who will fairly and adequately protect the interests of the class, a search required by Rule 23(a)(4) of the Federal Rules of Civil Procedure. Within those limits, however, the trend of authority is far less clear. In general, the courts have addressed the question of the adequacy of class representatives on a case by case basis. While the resulting pattern is thus rendered somewhat amorphous, two lines of decision seem to have emerged. One line, which is becoming increasingly out of fashion, takes a fairly limited look at the adequacy of the class representative, ascertaining little more than the representative's choice of attorney and the representative's lack of any overt conflicts of interest with the members of the class. The second, and perhaps more modern line, looks not only at these factors but also at the personal characteristics of the class representatives themselves, in an attempt to secure vigorous

22. *See also* Turoff v. May Co., 531 F.2d 1357 (6th Cir. 1976).
and active representatives. This second line of cases has moved greatly in the direction of insistance upon a client who is independent of the class counsel.

**Adequacy of Representation: The Older Cases**

The line of cases which make a limited investigation into the adequacy of representation is represented at the outset by that most venerable of class action cases, *Eisen v. Carlisle & Jacqueline*. The *Eisen* court was one of the first to address the issue of adequacy of representation under the then-new Rule 23. That case, for those readers who have successfully avoided it entirely until this moment, was brought by a single investor on behalf of himself and all other “odd lot” traders of New York Stock Exchange securities against two major brokerage houses, alleging the two houses conspired to monopolize odd lot trading and to charge excessive prices. Responding to the defendants’ argument that the investor was not an adequate representative of the class, the court stated:

> What are the ingredients that enable one to be termed an adequate representative of the class? To be sure, an essential concomitant of adequate representation is that the party’s attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.

Thus, the *Eisen* court determined that adequacy of representation could be judged by the quality of class counsel selected by the class representative, and by the lack of a conflict of interest between the class representative and the other members of the class.

This twin test quickly became accepted by other courts. For one thing, it gave major emphasis to the role of class counsel—note that that was the first factor mentioned by *Eisen*. This emphasis fit the image of class action cases as “lawyers’ lawsuits,” a new breed of litigation which was complex and beyond the ken of the average general practitioner. Second, the investigation into conflict of interest was a familiar one, and one which was amenable to rapid decision-making. That is, no in-depth factual investigation into the actual adequacy of the class representative was needed.

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25. 391 F.2d at 562.
The allegations of the complaint could simply be measured against the assumed interests of absent class members, and a conflict of interest found to be either present or absent. Rather than focusing on whether the named class representative was an active force independent of class counsel, this line of cases instead insisted simply on a class representative who did not possess any negative disqualifying characteristics. If class counsel was adequate, and the class representative did not have a conflict with the unnamed class members, he would be deemed by the court to be acceptable. It was not required that he also take a vigorous part in the prosecution of the suit. In other words, the burden was on the opponent to prove some specific feature making a class representative inadequate. In the absence of such proof, adequacy was presumed; a class representative did not have to show positive proof of his adequacy. For example, a named class representative in one case was held to be inadequate on the ground that he had failed to comply with reasonable discovery requests of the defendant.

Another ground of inadequacy was that a class representative had been improperly solicited by the class attorneys. Similarly, class representatives were disqualified when their activities indicated that they had a tendency towards deceit and disregard of their duties as class representatives. And class representatives who, during a pretrial phase of a class action, presented incredible testimony were held to be inadequate. These cases are not cited as a suggestion that they were wrongly decided. Rather, they demonstrate the approach of one set of cases towards the question of the adequacy of a class representative. Cases which adhere to this outlook require no more of the class representative than that he not possess a negative disqualifying characteristic.

This principle was pushed to the limit in the case of *Chevalier v. Baird Savings Association*. That was a class action claiming

that certain banking practices of defendant banks regarding interest charges on mortgage balances were violative of the Truth In Lending Act\(^\text{32}\) and constituted prohibited antitrust actions. After disposing of the defendants' claim that the named class representatives had interests which conflicted with those of the unnamed class members, the court dealt with the defendants' claim that they were inadequate because they were merely nominal parties and that the real parties were plaintiffs' counsel. The court stated:

There is no doubt that the named plaintiffs have a very sketchy view of what this litigation is all about. We also do not doubt that counsel are proceeding in this case without significant restraints from the named plaintiffs. Nevertheless, we cannot agree that this thereby renders a class action inappropriate.

First of all, it strikes us as at least partially unrealistic to expect the named plaintiffs to have any significant personal knowledge of the facts in a case like this, involving an antitrust conspiracy. This is something which, if it can be established, will only be done after a great deal of investigation and discovery by counsel against a background of legal knowledge . . . .\(^\text{33}\)

The court went on to state that it was not troubled by the “supposed unfettered discretion of counsel,” because of the court's supervisory powers. The court in Chevalier relied on its power to approve any settlement of the case, to award fees to counsel, and to take “appropriate action pursuant to Rule 23” as sufficient protection for the unnamed class members.\(^\text{34}\)

This language and reasoning demonstrates the extent to which the Chevalier court was locked into a narrow inquiry into the adequacy of the class representatives. First, the quoted language purports not to discuss a charge of conflict of interest between the named representatives and absent members, but rather a broader charge that the real parties are plaintiffs' attorneys. Nevertheless, the court responds to this charge by stating that its supervisory powers will alleviate any danger of conflict of interest. Second, its language clearly indicates that in reality, it is the attorneys who will control the entire lawsuit. In such a setting, the adequacy of the named representatives does not appear to be of much significance, anyway.


\(^{33}\) 72 F.R.D. at 146.

\(^{34}\) Id. at 147.
However, in civil rights class actions seeking injunctive relief, the supervisory powers of the court are far less significant. These cases do not result in the creation of a monetary award fund, and settlements in civil rights injunctive actions are extremely difficult for a judge to characterize as "fair" or "unfair." Since they are grounded so deeply in personal philosophy, and since the objective yardstick of amount of damages gained versus amount of damages sought is missing, "fairness" is an almost impossible judgment for a court to make. Moreover, in a class action seeking damages, unnamed class members have a right to "opt out" of the proceedings. Thus, there is at least a notion that the unnamed class members can be said to have consented to class counsel's actions. However, in class actions seeking injunctive relief only, unnamed class members have no right to opt out. If one is a member of the class described in the complaint, there is little opportunity for that person to indicate her attitude to the court by opting out of the case. For all of these reasons, the court's general supervisory powers over class action cases are generally unable to cope with the problem presented by "the supposed unfettered discretion of counsel."

In sum, then, Eisen spawned a line of cases which measure the adequacy of the class representatives primarily by the adequacy of the counsel chosen by the representatives. To protect the interests of the absent class members, a court must be satisfied that a case will be vigorously prosecuted. As the above discussion shows, many courts simply presume that there will be vigorous prosecution when a class representative who does not have interests that conflict with absent class members chooses competent counsel. The clear import of such cases is that a class action is in the hands of the attorney, not the client.

**Adequacy of Representation: The Modern Cases**

In partial response to this type of analysis, a second line of cases has developed. These cases do place more weight on the role of the class representative in the conduct of a class action. However, they remain tied, by and large, to a conflict of interest analy-

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35.1 Id.
sis. As will be shown in the next section, the harms of the attorney who substitutes himself for the client are far broader than the existence of a conflict of interest. Therefore, this Article insists that deeper analysis of the class representative-class attorney relationship is warranted. As a prelude to that, however, let us examine this second line of cases.

As the first line can be traced back to Eisen, so this second seems to have emanated from In re Goldchip Funding. In Goldchip, two shareholders sued under the Securities Exchange Act of 1934, alleging a fraudulent transfer of the assets of a company in which they owned stock. In the suit, the shareholders asked that the case be certified as a class action, with themselves as class representatives. In affidavits filed with the court, the shareholders admitted that they lacked business experience, and that they were relying on their attorneys to investigate the case and to advise them as to a proper course of action. Plaintiffs claimed that they were qualified as adequate class representatives, since as shareholders their interests were not adverse to those of other class members and since they had retained adequate counsel. The defendant claimed they were not adequate class representatives, because they lacked sufficient knowledge about the case to fairly and adequately protect the interests of the class. The court held that class representatives must be more than pro forma representatives:

The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives. A proper representative can offer more to the prosecution of a class action than mere fulfillment of the procedural requirement of Rule 23 . . . . An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.

By so stating, the Goldchip court became the first to clearly articulate the problem posed by the class counsel becoming the class representative. It establishes the power of a court to determine that a class representative is inadequate because of his insufficient interest or lack of experience. Thus, Goldchip authorizes a more searching inquiry into the personal characteristics of class representatives than do those cases which adhere to the more narrow Eisen stan-

38. Id. at 594.
dard. This type of inquiry has become accepted as the majority rule, and most courts will, at least when the defense puts the matter in issue, inquire into the personal characteristics of the named representatives in order to assure that the suit will be vigorously prosecuted.39

The Continuing Problem

Seemingly, then, the quest to ensure active class representatives who are independent of class counsel could begin and end with Goldchip and its progeny. After all, it authorizes an examination into the personal attributes of the representatives, and suggests that they should be found to be inadequate if their presence leaves class counsel with "unfettered discretion." Yet, earlier in the Article, it was emphasized that the instances in which class attorneys become class representatives are numerous and continuing. Why, then, has not Goldchip been sufficient to eliminate the problem?

One reason may be the harm of the unfettered discretion which was identified in Goldchip. According to Goldchip, the harm caused by a class attorney who becomes the class representative is the "possible conflicts of interest involved."40 On the one hand, then, the court authorized an in-depth examination of the attorney-class representative relationship. But on the other, it retreated to the familiar standard of conflict of interest. Therefore, despite its broader language, Goldchip really did not move the scope of analysis much further than searches for conflict of interest. And, as will be shown in the next section, there are harms of the class attorney acting as the class representative that have nothing to do with conflict of interest.

Second, Goldchip has been given a rather narrow reading in later cases by judges who are more comfortable searching for potential conflicts of interest than they are probing the quality of the attorney-representative relationship. While this is understandable, it does permit unfettered discretion in all those situations that do not involve conflicts of interest. This judicial attitude is exempli-

40. 61 F.R.D. at 595.
fied by the case of Morgan v. Laborers Pension Trust Fund. The case of Morgan v. Laborers Pension Trust Fund. That was a class action alleging that certain hourly laborers were unfairly excluded from pension benefits. Discussing the adequacy of the named representatives, the court cited Goldchip and noted that a named representative had to display ability to assist in decision-making with regard to the conduct of the litigation. Focusing on whether this ability had been shown to exist in Morgan, the court stated:

The requirement that the individual plaintiffs be adequate representatives of the class has also been met here . . . . The named plaintiffs share the same interests as those held by the other members of the putative class. Moreover, because the representatives seek the right to a lifelong pension, it can be assumed that they are keenly interested in the vigorous prosecution of this suit. That is all that is needed.

In effect, the absence of a conflict of interest gives rise to a presumption that the representatives will vigorously prosecute the suit. The result of such a presumption is that the court still need not look beyond conflict of interest to determine the adequacy of the named representatives.

A final reason that Goldchip had not prevented class counsel from becoming class representatives is exemplified by the factual situation with which the Goldchip court was faced. In that case, the named plaintiffs were shareholders who alleged that certain unlawful securities practices had caused their shares to lose value. After noting that a class representative need have sufficient interest in and knowledge about the class claim to provide a check on counsel’s discretion in controlling the case, the court decided it did not have sufficient factual information to rule on the adequacy of the shareholders. In dictum, however, the court stated, “Even unknowledgeable and inexperienced plaintiffs might meet the requirements of . . . . [adequate representation] by demonstrating a keen interest in the progress and outcome of the litigation.”

The requirement of “keen interest” was amplified in Hernandez v. United Fire Insurance Co. That was a class action alleging discriminatory and deceptive practices in the sale of credit property insurance. Defendant argued that the named plaintiffs

41. 81 F.R.D. 669 (N.D. Cal. 1979).
42. Id. at 680.
43. 61 F.R.D. at 595.
44. 79 F.R.D. 419 (N.D. Ill. 1978).
were inadequate because of their unfamiliarity with its alleged factual basis. The court rejected the claim, although admittedly the named plaintiffs had little information about the sales practices of the defendant insurers. It was enough, however, that the plaintiffs were aware of their own particular dealings, and that by cooperating in discovery they demonstrated a keen interest in the litigation. To require more, the Hernandez court felt, "would unduly inhibit legitimate use of the class action device." \(^4\)

Again, the point of this Article is not to take issue with the precise holding of cases like Hernandez. After all, that case involved complex business relationships between retail sellers and providers of credit property insurance which, as the Hernandez court found, consisted of "information far removed from the affairs of everyday life." Insistence on a named representative who was familiar with this information would be tantamount to forbidding a class suit to go forward. On the other hand, the insistence merely on a plaintiff with no conflicts of interest and a keen interest in the pursuit of the action has not been enough to prevent class counsel from taking over the entire conduct of class actions, particularly those seeking injunctive relief in civil rights actions. As noted previously, these cases typically are contested over a period of years; a plaintiff who demonstrates keen interest at the outset may soon demonstrate lean interest. Since the issue of the adequacy of the class representatives is not often raised once the class has been initially certified, the class attorney moves in as the named representative moves out. \(^5\)

Against this background emerges the tension which is at the heart of the cases attempting to develop a rational rule to govern attorney-class representative relationships in class actions. The unfettered discretion of the attorney for the class has been identified as an evil to be avoided. At the same time the courts, in an effort

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45. Id. at 426-27.

46. The question of the adequacy of the class representatives is not one that is always determined finally at the time of the initial certification of the class. See Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978). In Pettway, the class action concerned primarily issues of employment discrimination. After numerous appeals and lower court proceedings, the trial court issued a judgment which, among other things, awarded back pay to one group of employees, but not to another group. Though the class representatives had provided excellent representation of the class during the prior ten years of litigation, the court found that they were inadequate in refusing to appeal the portion of the judgment which decided that certain employees were not entitled to back pay. Id. at 1178.
to avoid frustrating the legitimate social purposes of class actions, require little more than that a class representative have a keen interest in the case and be free from certain disqualifying characteristics to be deemed adequate. As many courts are willing to infer adequacy from the absence of a conflict of interest, the actual relationship between the attorney and representative goes unexamined. Moreover, since the relationship changes over time in favor of more influence and control by the attorney and less by the representative, the courts are too often confronted with the very evil their policy set out to prevent.

This tension is particularly acute in class action cases seeking injunctive relief for civil rights violations. In such cases, the policy of the law to encourage actions for redress of basic human rights is most strong. In a civil rights class action, then, the court is likely to be more concerned about the substantive violations alleged than about attorney-representative relationships. Also, since only injunctive relief is sought, the members of the class have no right to actual notice of the suit, nor to the right to opt out of the suit. They are nevertheless bound by whatever result is reached. Further, there is generally no conflict of interest present which prevents the named representatives from being adequate. For example, assume that a woman files a class suit on behalf of all women of childbearing years claiming that a particular federal regulation or statute is an unlawful abridgment of women's right to have an abortion. Though undoubtedly the interests of the named plaintiff would be in conflict with those of many women in the purported class, this conflict would not prevent the suit from going forward. Instead, the court would simply form a subclass to represent each such interest if other interests wanted to intervene and were not already represented. Finally, civil rights injunctive actions are generally lengthy and tortuous lawsuits. Although grounded on specific legal principles, they revolve more around matters of personal and public philosophy. For example, as of 1980 the Los Angeles School Desegregation case, Crawford v. Board of Education, was in its seventeenth year; and in Pettway v. American Cast Iron

Pipe Co., the court authorized another appeal for a case already in its thirteenth year. A short glance at reports of class action cases will reveal that these cases are by no means atypical in civil rights cases. Taken collectively, these factors combine to produce an overwhelming tendency for the class attorney to become the class representative in civil rights injunctive class action cases.

Thus, despite its reiteration as an evil, all too common remains the situation in which "the attorney for the plaintiff is the dominus litis and the plaintiff only a key to the courthouse door dispensable once entry has been effected." This is by no means attributable to unscrupulous plaintiff's attorneys. Rather, it results from counsel filling an inevitable void, and from courts which, notwithstanding the broad language of Goldchip and its successors, look for little more in an adequate representative than keen interest and the absence of a conflict of interest. An examination of a few recent cases which explore the adequacy of class representatives will illustrate the limitations of the reported decisions.

Wofford v. Safeway Stores, Inc., was a class suit alleging that Safeway discriminated in the hiring and promotion of women and minorities. Citing Goldchip and other cases, the court stated, "A Court can and should insist on a named plaintiff who takes some active interest and has some ability to contribute to the action." Nevertheless, in discussing the adequacy of Ms. Wofford to represent the class, the court looked at no factor other than her alleged conflict of interest with the members of the class. She was held to be adequate because any potential conflict was neither "substantial" nor related to "the subject matter of the action."

In Long v. Thorton Township High School District 205, plaintiff challenged the expulsion policies of the school district that he attended on behalf of all students subject to expulsion. Discussing the adequacy of the named plaintiff, the court stated the general requirement to be that the representative must not have interests antagonistic to those of other class members, and he must have selected qualified counsel. The court added as an addi-

50. 576 F.2d 1157 (5th Cir. 1978).
52. 78 F.R.D. 460 (N.D. Cal. 1978).
53. Id. at 487.
54. Id. at 488.
55. 82 F.R.D. 186 (N.D. Ill. 1979).
tional requirement that the representative have a claim that will lead him to prove the claim of the rest of the class. The court held that the named representative was adequate because his interests were aligned with those of the class members.

In *Linder v. Litton Systems, Inc., Amecon Div.*, plaintiff filed an employment discrimination class action on behalf of all black applicants for employment, all present black employees, and all potential black employees of the defendant. The court noted that the question of the adequacy of the representative had been reviewed thoroughly, and that a representative who would vigorously prosecute the action was required for a finding of adequacy. The court then listed the factors it used to determine adequacy:

1. the nature and extent of the named party's stake in the outcome;
2. the named party's "nexus" with the class;
3. the named party's familiarity with the conditions he seeks to challenge; and
4. the quality of representation, including the competence of counsel and the stature and character of the named representative.

The named plaintiff in that case was held to be inadequate. But note that none of the factors cited delve into the actual relationship between the class attorney and the class representative. Plaintiff was held to be inadequate because of his almost total lack of familiarity with the policies he was challenging, and the fact that he had been an employee only briefly, eight years before the suit was filed.

What can be concluded from all this? First, it clearly substantiates the quotation from *Pettway*, that there is not a clear concept of the allocation of decision-making power between attorney and representative in class action cases. We start out with a small handful of cases, whose validity is very questionable, which almost frankly recognize that class action suits are lawyers' lawsuits, and that class representatives are little more than technical formalities. We then find a large body of cases with continuing though declining vitality which do look at the named plaintiffs, but only to ensure that their interests do not conflict with those of the class members. Finally, we arrive at the majority and growing view that the personal characteristics of the named representatives are im-

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57. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973).
important not only to avoid conflicts of interest with class members, but also to help determine the course of the litigation and to prevent counsel from exercising unfettered discretion. As has been shown, however, even those cases which adhere to the last view still tend to determine adequacy based on the lack of conflict of interest and a sufficient nexus with absent class members. New directions are needed, then, to assure named representatives who are independent of class counsel and who will play an active role in the course of class litigation. Some thoughts concerning these possible new directions are contained in the last section of this Article. Before arriving at that section, it will assist to evaluate more thoroughly the harms caused by the class attorney who takes over the role of representative. The cases have tended to characterize that harm solely as one of conflict of interest. As will be shown, in fact the range of harms are far wider than that.

At least one case which engages in the suggested type of analysis is Charal v. Andes.58 That case had three named plaintiffs to represent a class of persons who were shareholders of Franklin Mint Corporation. They sued a number of individuals and accounting firms. Two of the named plaintiffs were inadequate because of obvious conflicts of interest with the members of the class. The other named plaintiff had testified in a deposition that he had agreed in writing with the class attorney not to agree to any settlement except upon the advice of the attorney. As the court stated:

The aforementioned arrangement is nothing more than a total abdication of a client's independence to the judgment of his lawyer. If the client chooses to fill such a role in his private litigation, that is his business; but to do so as a class representative is another matter . . . . Because of close association with counsel in a subordinate capacity or because of a psychological and/or contractual inclination to accept without question the advice of counsel, the proposed class representative will not adequately, much less vigorously, protect the interests of the absent class members.59

The deposition testimony of the named representative in Charal perhaps made the substitution of the class attorney for the class representative more obvious than it would be in most cases. But that is a question which may be obviated in most cases by the remedy proposed later in the Article. For now, it is sufficient to iden-
tify Charal as a case which bases inadequacy not on a conflict of interest, or on lack of information about the case, but rather on the fact that the class attorney had become the class representative.

The Harms of Counsel Becoming Representative

Discussing the cases in which a class attorney sought to be certified also as class representative, the courts have identified what they see as the evils of that practice in fashioning the overwhelming rule that such a dual role is not permissible. The primary harm which has been identified, is, of course, a conflict of interest between the attorney's role as attorney and her role as class representative. Other harms which have been specified are the creation of an appearance of impropriety and the potential of harm caused to the class should resign as class counsel.60

Conflict of Interest

The harm of conflict of interest created when the attorney attempts to be named as class representative appears to be readily identifiable. Judge Friendly put it succinctly in Saylor v. Lindsley,

[T]here is a difference in every case. The plaintiff's financial interest in is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and appeal. We say this not in criticism but in simple recognition of the facts of class action life.61

If this rationale appears compelling, it may nevertheless be urged as not applicable to civil rights injunctive class actions. For here it may be argued that the plaintiffs' attorneys have no economic motive at all.62 Even if it is recognized that the attorneys will expect to be awarded attorneys' fees by the court, it still may be pointed out that there is no economic conflict of interest between the attorney and the class members. The reason would be that the class members are seeking no direct financial gain, and therefore any fees that the attorney may be awarded would not be at the

61. 456 F.2d 896, 900-901 (2d Cir. 1972).
financial expense of the class members. This argument may not refute totally the conflict of interest analysis, but it is certainly strong enough to force further analysis to determine if there are other harms that might exist.

**Appearance of Professional Impropriety**

A second harm which has been identified in connection with the class attorney acting as class representative is the violation of the ethical duty to avoid even the appearance of professional impropriety. Those cases which have discussed this harm have essentially applied an “evidence of reputation” test to the same conflict of interest standard: the harm is the same—a conflict of interest—except the public knows about it and thinks less of lawyers for placing themselves in such obvious conflicts. This same duty is applicable to civil rights injunctive actions. Members of the public are undoubtedly aware that the class attorneys expect to gain a fee for their efforts. If they also get a sense that the lawyers are the representatives in fact, the nicety that the attorneys’ fees will not come out of class pockets may be lost on them. Thus, this harm is fully applicable to class action injunctive cases.

**Possibility of Forced Withdrawal**

The third harm identified is that caused to the class if the attorney must withdraw as counsel upon being called as witness during the trial. However, this harm is not relevant to class action civil rights injunctive cases. For one thing, very few of them actually go to trial. Also, since the situation under review in this article is one in which the attorney is not actually a class representative, but rather acts as though he were, the potential that the attorney will be a witness is slight.

Therefore, of the three harms which have been identified in cases in which the which the class representative also seeks to represent the class as attorney, only one is applicable to a civil rights injunctive action. From this, it might follow in such a case that there is little harm caused by the class attorney having unfettered discretion to litigate the case as he sees fit.

However, there are harms associated with an attorney becom-

ing the class representative which are far more pervasive than those which have been identified. Some of these harms are grounded in specific ethical considerations, but others grow out of the function of lawyers in our society and in our legal system. They have in common an attitude that the lawyer's role is a limited one; when all the trappings of the lawyer's trade are put aside, the attorney is revealed as nothing more than an agent for another. When an attorney also becomes the principal, he does more than create a potential conflict of interest. He then functions with more power than society intended to grant him by admitting him to the bar. The courts' recognition of this unwillingness arose in Goldchip, and became more pronounced in Charal. Below, let us examine some of the other harms that result when counsel seeks to become representative.

Attorneys Acting Outside Scope of Expertise

Society has always perceived a distinction between representation of one's own interests and representation of those of another. When a person is granted a license to appear in court on behalf of another, that right is granted against the background of this distinction. The system simply was not designed to deal with a lawyer's taking over another's case as his own.

Nor is the lawyer's training sufficient to enable him to do so. A lawyer is trained to recognize legal issues, and to advocate the resolution of those issues in a manner desired by a client. Through anti-solicitation laws, the legal system requires that the client first determine that he may have a legal problem. And through its insistence that a lawyer represent another, the legal system recognizes that the type of adequacy of relief should be decided by the client. The latter decision involves a weighing of personal values which is for the client to make. The lawyer may be trained to counsel a client as to that weighing process, to make sure that the client is fully informed of all relevant considerations before making a decision. However, no amount of training can make a lawyer into an expert on someone else's personal values. When an attorney in a class action assumes the role of class representative, he also presumes to weigh personal values which belong to someone else.

64. 7 C.J.S. Attorney & Client § 2 (1980).
This is more than a mere conflict of interest. It is an attorney performing a role for which he is not trained, for which no amount of training is possible, and which society requires to be performed by someone else—the client.

This broad philosophy has crystallized into black letter law concerning the respective powers of attorney and client. That law recognizes that basic decisions concerning a lawsuit are for the client to make. Certain decisions must be left to the attorney. For example, it would be ludicrous if the attorney had to consult his client before making evidentiary objections during trial. But such matters aside, it is the client who is the ultimate decision-maker:

The broad powers of an attorney with respect to the conduct or control of litigation are limited to matters which relate only to the procedure or remedy. The employment itself confers upon the attorney no implied or apparent power over the subject matter of the cause of action or defense . . . . the power to deal with or surrender these matters is regarded as remaining exclusively in the client.66

Frustration of Other Ethical Demands

As discussed earlier, the courts have focused on Canons 5 and 9 as being violated when an attorney seeks also to be certified as class representative. However, the Ethical Considerations which have been enacted pursuant to Canon 7 are directly frustrated when the class attorney acts as class representative. That Canon provides, “A lawyer should represent a client zealously within the bounds of the law.”67 Ethical Consideration 7-7 sets forth the respective duties of counsel and client:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own, but otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the


67. ABA CANONS OF PROFESSIONAL ETHICS No. 7.
client to decide what plea should be entered . . . .

This emphasis on the role of the client is carried forward in Ethical Consideration 7-8. There, after setting out the lawyer’s duty to make sure that a client’s decision is a fully informed one, it is provided:

In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

However, the class action attorney who becomes the class representative cannot possibly obey these ethical considerations. When the client has ceased to function, the client’s right to make the ultimate decision is non-existent. The attorney may be able to represent what a class member should desire as the outcome of a case. But in our system of justice, as reflected in the Code of Professional Responsibility, the client makes this decision. The reason, again, is that the decision will be based on alternative considerations which reflect personal values which cannot be quantified or ranked rationally.68 That the class representative is called upon to exercise his personal values on behalf of the absent class members does not detract from this point. The court’s finding that a valid class exists, together with its certification of an individual as adequate, is a sufficient basis to allow the representative to exercise this judgment on behalf of both the representative and the absent class members.

Effectiveness

Finally, there is a very utilitarian reason why there should be an insistence on an active representative who is independent of counsel. A study for the Russell Sage Foundation examined the basic premise of the traditional model of lawyer-client relations—which was that the best results are obtained when a passive, trusting client places his case in his attorney’s hands and from then on follows orders. The study proved that quite the opposite was true: clients that took an active role in a lawsuit achieved significantly better results than did passive clients. The study concluded that clients should be active participants in a lawsuit, and

should fully share in the decision making process.69

Class Actions v. Non-Class Actions

The problem addressed in this Article is by no means unique to class actions. Certainly there are many lawyer-individual client relationships in which the lawyer takes over the decision-making process from a passive client.70 Indeed this occurs so often that one author has termed it the "traditional model."71 If remedies are necessary to lessen its occurrence in the class action context, are they not equally required in non-class cases as well? While they may be, non-class cases simply are not appropriate for the imposition of the costs which remedial action would impose.

First, the entire subject of class actions is already infected with judicial intervention into the attorney-client relationship. The Federal Rules of Civil Procedure, for example, give the court power to reject a proposed settlement if it finds it is not in the interest of the class.72 In this context, the additional intervention to carry out the necessary remedies is minimal.

Second, the relationship between the attorney and his individual client is private and protected by hundreds of years of legal doctrine. Unless there is a charge by the client of some impropriety by the lawyer, the social interest in maintaining this confidentiality outweighs the need for a foray into relative decision-making powers between attorney and client. In the class action situation, the interest in confidentiality is not as high. Indeed, far from protecting communications between attorney and class members, some class action rules forbid communications unless they are first shown to the court and approved. As confidentiality diminishes, a more searching inquiry into the attorney-client relationship is permissible.

Third, if an attorney takes over for a client in a non-class case, only the interests of that client will generally be affected. But in a class action, by definition a whole class of people is affected by the attorney's conduct. Nor is this effect limited only to those people

70. In specific instances, this takeover is implicitly sanctioned by the Code of Professional Responsibility. See ABA Canons of Professional Ethics No. 7, Ethical Consideration 7-11.
who are part of the class. Many class actions constitute broad attacks concerning fundamental social issues, and they ask the courts to make sweeping changes in the social structure. For example, a class action brought to desegregate a school district may affect not only the class of persons who brought the suit, but all people who have children in the school district. A class action seeking to force a large employer to change its employment practices will affect all employees of the company. Given the potential impact of these kinds of cases, there is a greater need to review critically a class action attorney who becomes the client.73

Finally, in the non-class context it is usually the client who chooses his own lawyer. If the client chooses a lawyer who makes the kinds of decisions which should be left to the client, and fails to communicate with the client, then to some extent the client must suffer from his choice of a lawyer. But class action lawyers are not selected by members of the class. In civil rights injunctive class actions, a class member does not even have a right to “opt out” of the class litigation. For all of these reasons, it is legitimate for the court to intrude into the attorney-representative relationship in civil rights injunctive class actions, even though such intrusion is generally not warranted in non-class cases.

Suggested Remedies To the Problem

The enemy of the active, independent class representative is time. Able to qualify as a representative with a little bit of knowledge about the case and a dash of keen interest, the representative wearies over the course of the litigation. The class attorney slides into the vacuum thus created, and becomes in fact the class representative. The remedy, therefore, must be one that is designed to turn the class representative from a sprinter into a marathon runner.

One of our societal responses to the erosion of energy by time has been the creation of organizations. How do you keep a business going after the genius who invented the patented widget is no longer active? Form a corporation. How do you keep the momentum in a movement to stimulate social change? Form an organization. This same societal response translates very well to the class action context. Thus, to ensure the maintenance of an active, inde-

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pending class representative, form an association to act as the representative.

There is no particular required legal form to which the association must adhere. It may be a corporation, an association, or any other recognized legal entity in a particular jurisdiction. The form should be broad enough to allow the organization to elect officers, hold regular meetings, solicit and maintain members, and act as a party to a lawsuit. The creation of an organization allows an original instigator to become inactive while leaving the class attorney with an ongoing client. The organization should have the duty of assuring the court before which a case is pending that it remains active, such as by keeping a list of officers on file with the court, and by sending agenda to the court regarding its regular meetings. The court could also monitor written communications between class counsel and the organization, to be sure that counsel informs his client fully on matters pertaining to the suit. All of this will insure that at least the forms are obeyed—that there is ongoing contact between client and attorney, and that the client is likely to endure. True, in some cases, a "nominal" organization will slip through to inactivity. However, at this point any legal system will have to admit to its imperfections and be satisfied with having done all it can to provide an active, vigorous client.

The requirement that an organization be created thrusts upon the courts no need for the exercise of additional judicial powers; under the Federal Rules of Civil Procedure, courts already have broad supervisory powers over class actions. The courts have broad power to monitor class litigation, closely supervise pretrial and trial activities, create subclasses, and appoint new or additional class representatives.74 The court may restrict or censor the communications that are sent by class attorneys to class members.75 What is required, then, is a more specific exercise of the powers that the courts already possess. The court has a duty under Rule 23 to assure that a class representative is adequate, and the formation of an organization to act as representative is a way to put force into that requirement.


75. 2 NEWBERG, CLASS ACTIONS, § 2720e, at 1194 (1977).
It is recommended, then, that a court require that the class members in a civil rights suit seeking injunctive relief be represented by a recognized legal entity formed to act as the class representative. The purpose of this demand is to produce an active, independent client which will remain in existence over the course of litigation, and which will direct the conduct of the litigation. The purpose of the demand is not to weed out unpopular class actions. The inability of a purported class representative, however, to put together a sufficient group of people to form an association may indicate that a class action is not warranted. Nevertheless, a court would certainly have the power to postpone or even eliminate the requirement of an association class representative for good cause shown. During the pendency of a class suit, the court would monitor the association. The duty to monitor might also result in a motion by defense counsel to decertify the class for lack of an active and independent client, or even in a motion by plaintiff’s counsel to reform the association if it becomes apparent that it is inactive or not in the best interests of absent class members.

The benefit of this requirement, particularly in the broad civil rights context, is that the issues will be debated not only in the judges’s chambers, between the attorneys, or by the public at large, whose members have no legal standing in the litigation. Rather, they will be debated by a group of concerned people, who are in the position to directly affect the litigation. It will, it is hoped, return class actions to the class members. By way of contrast, examine the case of Gill v. Monroe County Department of Social Services, in which discrimination was alleged under Title VII in the hiring and promoting of public employees. Twenty eight people sought to act as class representatives. The court recognized its authority to control the size and composition of the class representative. However, it exercised its authority by identifying the types of claims involved, and limiting the class representative to one for each type of claim. The court’s stated reason was to make the case less complicated. However, the actual effect of the ruling was undoubtedly to increase the powers of the class counsel. It is simply

76. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), in which the Court allowed a class claim to go forward with one representative from a class of 70,000 people pending further proceedings in the suit.
77. See Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978).
78. 79 F.R.D. 316 (W.D.N.Y. 1978).
unrealistic to believe that an interest can be identified, and then one person chosen who can represent the wishes of a large class of people with respect to that issue. The court may have artificially simplified the proceedings, but it did so at the expense of fully airing the class concerns to the class counsel. Instead, the court could have required the individual representatives to organize a group to act as the class representative. The officers of the group could have spoken for the group during the proceedings. In this way, there would be more assurance of an active client, the class would speak with a voice of consensus, and there would have been more likelihood for the issues to have been aired fully among the people most directly affected.

The court’s duty to monitor the relationship between the class attorney and the representative association should not result in an impingement into the confidentiality of that relationship. As we have seen, confidentiality is modified in the context of class actions already. The monitoring need not be concerned with the substance of the advice which the attorney is giving, but with the concerns raised during regular meetings of the class association. It is enough that there is regular communication between the attorney and an independent class representative. If the court is assured of that, the legal system should interfere no further.

One potentially troublesome situation which might confront a court is that of the organization already in existence which seeks to be certified as class representative. For example, the NAACP might ask to be certified as class representative in a school desegregation case; or the National Organization of Women might seek representative status in a class case involving abortion rights. In such cases, it is well to remember that no change in the law of standing is intended, nor in laws which define an adequate class representative. To be eligible to be a member of the organization which is the class representative, one must be a member of the class defined only by the complaint. Furthermore, the purpose of the requirement of an association representative is to put before the court a group of people with an active interest in the issues being litigated, and who have a sense of responsibility with regard to those specific issues. Notwithstanding the existence of an ongoing organization, therefore, the preference should be strongly in favor of a new association organized to prosecute a particular case.

As long as an association is constituted legitimately, the courts
will have broad power to approve associations of various types. For example, there is no requirement that all officers of the association live in the same locale and attend meetings personally. Far flung class members are capable of participating fully in the conduct of litigation. A layman who by himself is deemed not capable of representing a class may be adequate as part of an association of laypeople. Finally, the formation of an association to act as class representative may make class actions more economically feasible. The cost of giving notice to prospective class members, which has occupied the attention of many judges, is not an issue in civil rights injunctive actions since no class members can opt out. Nevertheless, a class representative in such an action is still responsible for the costs of suit. The court's finding that a representative does not have the financial ability to finance the costs of a class action may prevent the person from being certified as a class representative. The formation of an organization to act as class representative, together with its ability to offer memberships for small fees, will obviously give a sturdier financial base to many class suits.

Conclusion

All courts condemn the practice of a person attempting to act both as class representative and as attorney of record for the class. Nevertheless, much evidence suggests that in many civil rights injunctive class actions, the named representative is that in name only, and is nothing more than a formality necessary to get the action underway. In reality, it is the attorney who determines the entire thrust and scope of the litigation.

To the extent the courts have perceived this occurrence, it has been viewed in traditional conflicts of interests terms. That is, even where the class representative is nominal, a court is unlikely to act in the absence of a conflict of interest between the representative and the unnamed class members. However, the harms of the attorney becoming the class representative are far wider than issues of

81. See Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975).
83. 2 NEWBERG, CLASS ACTIONS §§ 2350, 2375, 2780 (1977).
conflict of interest. They extend to the fundamental concept of what an attorney is and does in our society. In these terms, an attorney who takes over a case from the class representative is acting outside his sphere of expertise, and impinging on areas that involve personal values, not legal rules. Therefore, a mechanism must be found to ensure the continuance of an active and independent class representative throughout the duration of the class action. The formation and certification of an organization to act as the representative is such a mechanism.