ETHICAL OBLIGATIONS OF THE ATTORNEY UNDER RULE 23—ABUSES AND REFORMS

The increased use of the class action device for the prosecution of multiple claims has brought with it special ethical problems for the attorneys involved. This comment will examine the ethical problems which have arisen as a result of the maintenance of class actions under Federal Rule 23,[1] and will discuss the effect of a breach of ethics by the attorney on the members of the class. The specific problems to be considered are those of claim solicitation, attorney's fees, problems involved in the dismissal or compromise of class actions, and some of the ethical questions involved in adequate representation of the class.

CLAIM SOLICITATION

The problem of claim solicitation has long been a topic in any discussion of professional ethics and responsibility.[2] The *Code of Professional Responsibility* points out that claim solicitation is a disreputable practice and was an indictable offense at common law.[3] In *Buford v. American Finance Co.*,[4] the court stated that ". . . the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."[5] Claim solicitation problems arise in the period prior to the filing of the action and under the provision requiring notice to the unnamed members of the class.

The problem of claim solicitation can arise prior to filing the action as a class action under Rule 23. This situation was discussed in *Halverson v. Convenient Food Mart. Inc.*[6] Plaintiffs in this ac-

1. FED. R. CIV. P. 23(c)(2).
2. Korn v. Franchard Corp., CCH FED. SEC. L. REP. ¶ 92845 (D.C.N.Y. 1970).
3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Cannons 2,28, Ethical Consideration 2-3.
4. 333 F. Supp. 1243 (N.D. Ga. 1971).
5. *Id.* at 1251.
6. 458 F.2d 927 (7th Cir. 1972). [Hereinafter referred to as Halverson.]

tion were a group of franchisees of the defendant, Convenient Food Mart. Prior to the filing of the anti-trust suit, an association was formed and a lawyer was hired to negotiate for advertising rebates. The attorney was invited to a meeting where he discussed the possibility of bringing an anti-trust suit against the franchisor. The association voted in favor of the suit and, the following day the attorney and the president of the association discussed sending a letter to the other store owners requesting them to join in the suit. The letter, which stated that there would be no fee if the suit were not a success, was accompanied by an authorization form to be completed and returned by the franchisee. In determining whether these actions were misconduct, the court concluded that even though the lawyer committed a slight breach of ethics, his misconduct was of small importance in comparison to the rights of his clients.[7]

The *Halverson* case presents a situation in which the attorney has knowledge of a situation which could be a potential class action. One commentator, however, suggested that:

> Any suggestions to the effect that class action litigation provides plaintiffs' counsel with a means of engaging in client solicitation is simply not meaningful. In fact, he may be restricted in a number of ways from furthering the Rule's objectives because of certain strictures which govern his conduct in other kinds of practice. For example, could plaintiff's counsel, in an effort to firm up the class prior to any class determination, properly suggest to the class representatives that they attempt informally to solicit others interested in the litigation? Probably not. But to accomplish the basic purposes of the rule should he not be allowed to do this?[8]

In one case, which was not a class action, the court suggested that restricting communications among association members would be contrary to the First Amendment.[9] To reach these conclusions the authors must have assumed that there is no substantial danger of claim solicitation in the use of the class action device. It was further asserted that a lawyer should be able to suggest to the class representatives that they solicit others who might have a potential claim. These assertions will be dealt with in order.

First, it is necessary to examine the presupposition that there is

7. *Id.* at 931.
8. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 514 n. 64 (1969).
9. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

no problem with claim solicitation in class actions. Although there have been assertions to the contrary, there is at least one recent case which was dismissed partially because of the attorney's conduct prior to the filing of the action.[10] In this case the attorney sought proxy votes from a group of stockholders, in order to attend a stockholders meeting. After attending the meeting the attorney conferred with another attorney and disclosed to him that he had discussed with others the possibility of filing an action against the defendant corporation. He told the shareholders, from whom he had obtained the proxies, that he was filing the action and if they "wanted to be represented, the suit could be filed in the form of a class action."[11] In addition to representing the stockholders, the attorney sought to file an action on behalf of the class of bondholders. He testified in his deposition that he had contacted a friend, who was a bondholder, in regard to participating in the suit as a representative. The court in this action held that the attorney's "activity constitutes an abuse of the class action, which courts should not permit."[12] In regard to this supposition it should be noted that the *Manual for Complex and Multi-District Litigation* states that "[a]mong the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action. . . ."[13]

It has been asserted that the lawyer should be able to suggest to the class representatives that *they* attempt to solicit others for the litigation and that this would comport with the objectives of Rule 23. The intention of the Advisory Committee was to create a procedural device

> . . . which would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[14]

It is suggested that pre-filing solicitation is an "undesirable result"[15] and that this possibility for abuse should be eliminated so as to achieve the full objectives of the Advisory Committee.

The problem of claim solicitation is not restricted to the time be-

10. Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972).
11. *Id.* at 239.
12. *Id.* at 240.
13. § 1.41 (1973).
14. Proposed Rules of Civil Procedure, Advisory Committee Note, 39 F.R.D. 69, 102-103 (1966).
15. Buford v. American Finance Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971).

fore the class action is filed, but has also manifested itself in regard to the notice required by Rule 23(c)(2).[16] It has been said that ". . . the giving of notice pursuant to Rule 23(c) may always arguably create a problem of solicitation by the very nature of the Rule, nevertheless such should be avoided whenever and to the extent possible."[17] The difficulty is to determine the distinction between notice and claim solicitation. The complexity of multi-party litigation makes this task even more difficult. Before proceeding, it should be made clear that in a Rule 23(b)(3) class action there are two types of notice, that which is prepared by the court, and that which is prepared and sent by the attorney.[18] In *School District of Philadelphia v. Harper & Row Publishers, Inc.*,[19] the court found that notice which was prepared by the attorney would seriously impair the court's "appearance of detached impartiality."[20] They went on to note that further complexities were involved when inquiries were directed to the court regarding the notice. To answer the inquiry would place the court in the position of being in correspondence with prospective litigants; to ignore the inquiry would "cast doubt and suspicion upon the judicial process."[21]

There are several cases where the use of unapproved notice has been challenged. In *Korn v. Franchard Corp.*[22] the court ordered a proof of claim to be mailed to the members of the proposed class. The court's purpose was to ascertain the size of the class and determine how many members had bought security interests, relying on the prospectus which was being challenged as misleading. The

16. FED. R. CIV. P. 23(c)(2). The full text reads:
> In any class action maintained under Subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified with reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel.

17. State of Minnesota v. U.S. Steel Corp., 44 F.R.D. 559, 576-77 (D.C. Minn. 1968).

18. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 327 (1973).

19. 267 F. Supp. 1001 (E.D. Penn. 1967). [Hereinafter referred to as School District v. Harper & Row.]

20. *Id.* at 1005.

21. *Id.*

22. CCH FED. SEC. L. REP. ¶ 92845 (D.C.N.Y. 1970).

court furnished the names and addresses of the proposed class members to plaintiffs' counsel who were to send the notice. The attorney utilized these names and addresses to mail a letter under the name of "Protective Committee, 63 Wall Associates."[23] The letter, which solicited investors involved in another action filed by the same attorney, contained two phone numbers. One of the numbers was to the attorney's office, the other to a firm employed by him. The court held that these actions revealed "a lack of any respect for basic principles of professional ethics and responsibility."[24] In *Taub v. Glickman*,[25] a similar case involving the same attorneys, the court stated:

> Although I do not pass nor comment upon whether or not the conduct of counsel was ethically impermissible, I do note my disapproval of counsels' unauthorized attempt to indirectly communicate with parties concerning a matter that was then sub-judice before me.[26]

The problem of sending communications other than the prescribed notice to members of the class arose in *Kronenberg v. Hotel Governor Clinton, Inc.*.[27] In that case the attorneys sent a misleading communication along with the notice, and the court held that this activity was improper.[28]

Each suggestion relative to curbing the problem of claim solicitation and unapproved notice has been the subject of attack and controversy. Kaplan stated that ". . . it should be recognized that court-controlled notice is an alternative to private activities that can be quiet impalatable."[29] In *School District v. Harper & Row*, the court attacked this alternative saying:

> We are loath to impose upon the already overburdened clerical facilities of this Court the onerous task of preparing and forwarding to all the proposed members of the class the notices required by new Rule 23(c)(2), and the ensuing detail of the consequent record-keeping.[30]

Although hiring more clerks might help solve the problem, there are more effective ways of doing so.

The *Manual for Complex and Multi-District Litigation* has sug-

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23. *Id.* at 90,168.
24. *Id.* at 90,169.
25. 14 F.R. Serv. 2d 847 (S.D.N.Y. 1970).
26. *Id.* at 849.
27. 281 F. Supp. 622 (S.D.N.Y. 1968). [Hereinafter referred to as Kronenberg.]
28. *Id.* at 625.
29. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 398-99 (1967).
30. 267 F. Supp. 1001, 1004-1005 (E.D. Penn. 1967).

gested that a local rule be adopted forbidding direct or indirect written or oral communication by existing parties or counsel with potential and actual class members who are not formal parties to the action, unless the communication has prior court approval.[31] The *Manual* does, however, recognize the need for some communication with class members for routine factual inquiries and among class members to dispel misunderstanding on various phases of the suit.[32] This solution could eliminate some of the problems but it does not deal with the pre-filing claim solicitation difficulties. The rule could be extended to cover this situation, counsel being permitted to ask questions of class members to determine if any pre-filing claim solicitation was present. By utilizing the recommendations of the *Manual* and extending them, it is submitted that many of the problems discussed previously could be overcome.

Rodman Ward, Jr. and Wayne N. Elliott have suggested a procedural approach to utilize the courts to notify the members of the class, but which would not overburden them.[33] These authors noted that the position taken by the court in *School District v. Harper & Row* has been criticized, and that the preparation of notice need not be done by the court.[34] They recommend the approach taken in *Brennan v. Midwestern Life Insurance Co.*[35] which directed that the notice be prepared by the plaintiff's counsel and submitted to the court for approval.

The last question to be resolved is whom to task with sending out the notice. Ward and Elliott seem to feel that a cautionary paragraph would be sufficient to eliminate the possibility of abuse occurring when the attorney sends out the notice.[36] In looking at the problems in *Kronenberg* and *Korn*, however, it is apparent that they developed after the court relinquished final control over the notice. It is submitted that the most viable alternative would be for the court to have final contact with the notice prior to distribution, for it is unlikely that a layman would recognize an abuse even

31. § 1.41 (1973).
32. *Id.*
33. Ward and Elliott, *The Contents and Mechanics of Rule 23 Notice in the Class Action—A Symposium 1969*, 10 B.C. IND. & COM. L. REV. 557 (1968-69).
34. *Id.* at 562.
35. 259 F. Supp. 673 (N.D. Ind. 1966).
36. *See* Ward and Elliott, *supra* note 31, at 564.

if warned against it. With this requirement of court supervision, the notice problems associated with claim solicitation could be eliminated.

Within the class action device there is a potentiality for abuse in the area of claim solicitation, both prior to the filing of the action and post filing of the action by way of unapproved communications. There is also the problem of solicitation in giving notice pursuant to Rule 23(c). It is suggested that by adopting the reforms discussed in this section, the problems related to claim solicitation could be deterred.

Attorneys' Fees

Of the ethical problems involved in a class action, the question of attorneys' fees has been one of the most troublesome. One court commented that:

> [s]ubstantial questions have been raised whether the Rule, intended to benefit the small consumer or investor who would otherwise have no means of redress, has really achieved its promise, or rather whether it has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees.[37]

In any discussion of attorney's fees it is important to understand the relationship that exists between the attorney and the named and unnamed parties. It has been held that counsel is in a fiduciary relationship with both the named representative parties and the unnamed parties,[38] which means that the attorney owes the same degree of care to both the named and unnamed parties.

The major issue in the consideration of fees is the determination of when a fee becomes excessive. The American Bar Association suggests that a fee is clearly excessive when a prudent and reasonable lawyer reviewing the situation would be left with a firm belief that the fee was unreasonable.[39] The *Code of Professional Responsibility* specifies several guidelines for determining when a fee is excessive. The first consideration discussed is ". . . the time and labor required, the novelty and difficulty of questions involved, and the skill requisite to perform the legal services properly."[40] Second is the likelihood that the attorney would have to preclude other employment to continue with the action. Another is customary fees

37. Free World Foreign Cars v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972).
38. Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963).
39. ABA Code of Professional Responsibility, Disciplinary Rule 2-106.
40. *Id.*

in the locale. Still other related factors are the amount of money involved in the outcome of the litigation, and any time limits that might have been imposed on the attorney. A sixth consideration concerns the "nature and length of the professional relationship with the client."[41] Seventh is the experience, reputation and ability of the attorney, and last is whether the fee is fixed or contingent. Whereas, these have been the traditional factors used in evaluating the fairness of a fee, it has been noted that:

> As the form, nature and substance of the relationship between the class members and class counsel are different from those which characterize the relationship between counsel and an individual party capable of contracting for the payment of attorney's fees, so also is the standard measuring the attorney's fees different.[42]

In dealing with the situation there are two areas which have produced the greatest numbers of ethical problems. The first is the contingent fee contract; the second is the solicitation of fees from class members and potential class members.

The contingent fee contract has presented special problems when used in class actions and has caused the greatest controversy. The two most prominent areas of concern are: (1) Whether the contract itself is being abused; and (2) Whether the provisions of the contract extend to those members of the class who did not sign it, but who have benefitted as a result of the suit. As has been discussed, one of the criteria for determining attorney's fees has been whether the attorney was paid a fixed fee or whether the fee was contingent on the successful prosecution of the action. The traditional view, that an attorney working on a contingent fee is entitled to greater compensation, has led to what one judge has called the "contingent fee syndrome," where courts will enforce the contract without determining its fairness.[43] The class action has been compared to the Italian proverb: "A lawsuit is a fruit tree planted in a lawyer's garden."[44] It has led others, such as Justice Lombard in his dissent in *Eisen v. Carlisle & Jaqueline,* to remark that "[o]bviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them."[45]

41. *Id.*
42. Kiser v. Miller, 364 F. Supp. 1311, 1315 (D.C. 1973).
43. State of Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 223-24 (N.D. Ill. 1972).
44. *Id.* at 224.
45. 391 F.2d 555, 571 (2d Cir. 1968).

The criticism launched at the class action device has led some recent courts to reappraise the agreements between counsel and the parties. In *Kiser v. Miller*,[46] a contingent fee contract was held unenforceable. A brief look at the facts that led to this decision reveals that the original class of plaintiffs sought pension benefits that had been denied to them by their employer and that two additional groups of plaintiffs intervened in the action. All three attorneys involved had contingent fee contracts with the members of their respective groups, the provisions varying with each group. The court's target of attack was the contingent fee agreement between the plaintiff class and counsel in the original action. One of the problems with these agreements was that they were sent out *after* the judgment had been entered.[47] The court acknowledged that the contingent fee agreement had served a useful purpose in other types of actions but remarked that it was inappropriate in the class action.[48] The court adopted the view expressed in *Illinois v. Harper & Row Publishers*, that Rule 23 must be preserved and that a solution must be found for this problem.[49]

The *Illinois v. Harper & Row*[50] case focused on another important issue in the contingent fee area, that is, determining if the contingent fee contracts can be extended to those members of the class who did not sign it. The facts indicate that the plaintiffs brought a civil anti-trust action alleging that the defendants had conspired to eliminate discounts on sales of library books to schools and libraries. As the date for trial approached, and after considerable discovery had been completed, all of the defendants settled except one. The final settlement was not reached until after the trial had started. The attorneys requested 20% of the recovery, pursuant to a contingent fee arrangement entered into with some of the members of the class. Notification was sent specifying the fee requested and no objections were filed. Thus, the question was whether to extend the terms of the contingent fee contract to those members of the class who were not parties to the agreement. Although this case involves a post-settlement situation, the issue is the same in post-litigation circumstances. The attorneys argued that these arrangements should be considered an important factor in assessing the fees, even as to the absent class members.[51] The court recognized, however, that:

46. 364 F. Supp. 1311 (D.C. 1973).
47. *Id.* at 1314.
48. *Id.* at 1315.
49. *Id.*
50. 55 F.R.D. 221 (N.D. Ill. 1972).
51. *Id.* at 223.

> [T]his procedure [has] been followed in the settlement of a number of class action cases in which the contingent percentage fee arrangements have been automatically extended to class members. While the assessment of a flat percentage fee to cover all plaintiffs may relieve the court from the burden of making its own evaluation of the reasonable value of the services rendered, I do not believe that it is fair to the class members who were unrepresented when the fee contracts were made.[52]

The use of the contingent fee contract in class actions, although it appears to be a pervasive problem, has not been subjected to criticism until only recently.

Prior to discussing proposed reforms, it should be emphasized that part of the problem has been the courts' attitude toward fees in a class action. Whereas the American Bar Association has expressed the view that excessive fees must not be charged,[53] some courts have stated that, "[s]ubstantial counsel fees may even be an acceptable incentive to encourage forceful prosecution of cases imbued with public interest."[54]

A third potential abuse in the fee area is fee solicitation. As stated by the *Manual for Complex Litigation*:

> In the absence of some preventative action by the court, formal parties to the action or counsel for the formal parties may directly or indirectly, without knowledge or consent of the court, solicit from the potential or actual members of the class (or subclasses) who are not formal parties, funds for attorneys' fees and expenses, or agreements to pay fees and expenses. To the party solicited, solicitation may appear to be an authorized activity approved by the court, simply by reference to the title of the court, the style of the action, the name of the judge and to official processes. Such unapproved solicitation may be of doubtful ethical propriety and may well result in well founded dissatisfaction with judicial management of the action.[55]

Although there is no evidence of the pervasiveness of such "unapproved solicitation," it should be considered as a possible source of unethical conduct. The *Manual* suggests that by adopting the provisions to abolish claim solicitation this problem can be overcome.[56]

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52. *Id.*
53. Canon 2, Ethical Consideration 2-17.
54. Halverson, 458 F.2d at 931 n.5. *See also* Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968) which stated, "The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits."
55. § 1.41 (1973).
56. *Id.*

The area of excessive fees and the problem of the contingent fee contract demand a solution. It should be emphasized that the attorney who represents a class is entitled to a reasonable fee for his services. The purpose of any reform is to keep fees reasonable and to minimize abuse. Only in this way can the class action device benefit the persons most in need of it, that is, those who would not be able to adequately assert their rights on an individual basis. The *Manual* and recent cases suggest that the determination should be left to the court.[57] The court would be required to look to certain criteria to determine what reasonable fees would be for the services rendered. The court in *Kiser v. Miller* suggested a two level approach. On the first level the court should consider such factors as the time and effort involved, the complexity and uniqueness of the issues, the amount of legal skill necessary to handle the issues involved, the use made of other counsels' work, the risks involved and the results of the action. The court suggests that on another level it should consider three additional factors, owing to the uniqueness of the class action. These are the "Attorney-Client Relationship," the "Public Service Element," and the "Incentive Factor."[58] The first two were explained by one court which said:

> One accepting employment as counsel in a class action does not become a class representative through simple operation of the free enterprise system. Rather, both the class determination and designation of counsel as class representative come through judicial determinations, and the attorney so benefitted serves in something of a position of public trust. Consequently, he shares with the court the burden of protecting the class action device against public apprehensions that it encourages . . . excessive attorney's fees.[59]

In assessing the fees the court must balance these factors with the incentive factor discussed earlier. It is only in this way that the injured parties can receive adequate representation, and insure that the attorney receives adequate compensation for his services.

Dismissal and Compromise

The area in dismissal and compromise which has caused the greatest confusion is the question of when an attorney may drop the class allegations in a complaint in order to secure a settlement for his client. The adoption of Rule 23(e) has solved many of the complexities previously associated with dismissal and compromise. Prior to the adoption of Rule 23(e) in 1966, notification was not

57. *Id.*; Kiser v. Miller, 364 F. Supp. 1311, 1315 (D.C. 1973); Illinois v. Harper & Row, 55 F.R.D. 221, 224 (N.D. Ill. 1972).
58. Kiser v. Miller, 364 F. Supp. at 1315.
59. Alpine Pharmacy Inc. v. Charles Pfizer & Co. Inc., 481 F.2d 1045, 1050 (2d Cir. 1973).

required in the "hybrid"or "spurious" action unless directed by the court. All class actions under the revised rule require notice of a dismissal or compromise.[60] Rule 23(e) was adopted to protect the rights of those who are represented but who are unnamed parties in the action.[61] The current difficulty with dismissal is the determination of the point at which a complaint can be striken to exclude any references to the class action, thereby circumventing the notification required by Rule 23(e). If the rule applies, it must then be decided what type of notification will satisfy its requirements. The attorney owes an equal obligation to those parties who are before the court, as well as those not before the court.[62] This concept was elaborated on by the court in *Greenfield v. Villager Industries, Inc.*,[63] which said that:

> Not the least important of the fiduciary duties shared by counsel and the court is their duty to insure that absentee class members have knowledge of proceedings in which a final judgment may affect their interests.[64]

In *Yaffe v. Detroit Steel Corporation*,[65] a class action was filed on behalf of the shareholders of Detroit Steel. The attorney stated that a motion for class determination would be made after discovery was completed. Plaintiffs' counsel, in defiance of the court's orders, made a motion to a different court to strike the class action allegations. The motion was granted, a settlement was then reached, and plaintiffs sought to dismiss the action. The question was whether Rule 23(e) applied in spite of the fact that the class had not yet been determined. The court held that for purposes of dismissal or compromise a suit filed as a class action is to be treated as such "until there is a full determination that the class action is not proper."[66] The court based its finding on two grounds: (1) Because of the publicity the suit had received, some of the class members may have relied on the suit to redress their claims there-

60. Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 328 (E.D. Penn. 1967). [Hereinafter referred to as Philadelphia v. Anaconda.]
61. Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970).
62. Greenfield v. Villager Industries Inc., 483 F.2d 824 (3d Cir. 1973). [Hereinafter cited as Greenfield.]
63. *Id.*
64. *Id.* at 832.
65. 50 F.R.D. 481 (N.D. Ill. 1970).
66. *Id.* at 483.

fore not filing their own separate actions; and (2) In reliance on the statement in *Philadelphia Electric v. Anaconda*,[67] that "[N]o litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants."[68] The court reasoned that if amendment were allowed in order to strike the class action allegations, the defendants might be willing to pay the named parties to eliminate the class. In this way the plaintiffs would have more bargaining power by virtue of filing their suit as a class action.

A contrary view was espoused by the court in *Elias v. National Car Rental System*.[69] In that case the plaintiff brought a class action based on a violation of Federal Securities Law. Prior to class determination, the representative party wrote to his attorney that he no longer wanted to prosecute the action. A dismissal was requested, and it was argued that the provisions of Rule 23(e) should be invoked. In dismissing the action without notification the court said:

> [T]he court does not perceive it has any duty to notify those whom plaintiff's counsel might claim to be class members of the proposed dismissal. Rule 23 does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper.[70]

The court remarked that it was convinced that plaintiff had not been "bought off," and that no one was relying on the action.[71] In *Berse v. Berman*[72] the court came to the same conclusion but advanced a different theory, holding that if the action were dismissed, each member would still be able to enforce his rights independently. The court noted that the situation would be different if class members had learned of the suit and were relying on it to prosecute their claims.[73] When there has been notification to the members of the class it would be difficult to ascertain whether injured parties were relying on the action, absent some notification to them of the dismissal.[74]

Therefore, there are two policies served by requiring notice. First, notice reduces the possibility that the named representatives will have increased bargaining power by filing the suit as a class

67. 42 F.R.D. 324 (E.D. Penn. 1967).
68. *Id.* at 328.
69. 59 F.R.D. 276 (D. Minn. 4th Div. 1973).
70. *Id.* at 277.
71. *Id.*
72. 60 F.R.D. 414 (D. Minn. 4th Div. 1973).
73. *Id.* at 416.
74. Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1973).

action. Second, it serves to inform those who have relied on the action to prosecute their claims.[75]

A secondary problem is to determine what notice will be sufficient to satisfy Rule 23(e). In *Greenfield v. Villager Industries, Inc.*[76] the court was called upon to determine the sufficiency of notification accomplished by publication in the Wall Street Journal on two nights during the Easter Holiday season. The plaintiffs' attorneys had easy access to the names and addresses of the members of the class. The court held that the responsibility for meeting the requirement was primarily on the attorney seeking the dismissal.[77] The court said that notice by publication under these circumstances was "superficial" and would not withstand the *Mullane* test, that is, it was not ". . . reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."[78] In order to satisfy due process, the notice must also "afford a reasonable time for those interested to appear or default, acquiesce or contest."[79] The notice must also contain information on fees and expenses, the estimated unitary recovery, and must specify the time and place of the settlement hearing.[80]

It is thus submitted that the notice requirement of Rule 23(e) be strictly adhered to unless the court can determine with absolute certainty that dismissal without notice would leave no possibility for prejudice.[81] It should be required that individual notice be given whenever feasible[82] in order to protect the unrepresented parties against an attempted compromise or settlement.

ADEQUATE REPRESENTATION

Federal Rule 23(a)(4) provides that ". . . the representative par-

75. Muntz v. Ohio Screw Products, 61 F.R.D. 396, 398 (N.D. Ohio 1973).
76. 483 F.2d 824 (3d Cir. 1973).
77. *Id.* at 832.
78. *Id. quoting* Mullane v. Hanover Bank & Trust, 339 U.S. 306, 314 (1950).
79. Mullane v. Hanover Bank & Trust, 339 U.S. at 314.
80. Manual for Complex Litigation § 1.46.
81. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil § 1797.
82. *See* Manual for Complex Litigation § 1.45; Hansberry v. Lee, 311 U.S. 32 (1940), where the court says that due process, ". . . does not indicate the giving of notice where it is not feasible to do so."

ties must fairly and adequately protect the interests of the class."[83] In defining this requirement it has been held that adequate representation demands that there be no conflicts of interest between the attorney and the class, and that the attorney "prosecute the action vigorously."[84] The discretionary question of adequate representation by the parties' attorney has led to inquiries regarding the ethical propriety of certain practices. The primary issue is whether an attorney can ethically, "adequately represent" the class, and also be a party to the action.

A recent development in class actions has been a situation in which the attorney is an injured party seeking to be both counsel for the class, as well as a member of the class. In *Graybeal v. American Savings and Loan Association*[85] the court held that the attorneys could not fairly and adequately protect the interests of the class where they sought to be both "attorneys for, and representatives of the proposed class."[86] The court remarked that such "dual roles are inherently fraught with conflicts of interests."[87] The reasoning was that a class action is particularly susceptible to the attorneys' recommending a settlement on unfavorable terms due to the large fees involved. The court argued that in a situation where individual recoveries are likely to be small, but the overall recovery will probably be large, the ". . . plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class."[88]

In *Kriger v. European Health Spa, Inc.*[89] the court came to the same conclusion but offered a different analysis. In that case a class of plaintiffs sought to recover damages based on alleged violations of the Truth in Lending Act. The plaintiff was an associate in the firm that was representing his class in the action. The court held that there was inadequate representation, because of the substantial ethical problem which would arise if the plaintiff were called as a witness.[90] The *Code of Professional Responsibility* pro-

83. FED. R. CIV. P. 23(a)(4).
84. Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968).
85. 59 F.R.D. 7 (D.C. 1973).
86. *Id.* at 13.
87. *Id.* at 14. This analysis has received recent support in Erovaldi v. First National Bank of Chicago, 57 F.R.D. 545, 546 (N.D. Ill. 1972). The court added:

> Since the named plaintiff is also acting as co-counsel for the class his interest in legal fees clearly outweighs his interest as a plaintiff and creates a conflict of interest. He cannot therefore be considered a fair and adequate representative of the class.

88. *Id.*
89. 56 F.R.D. 104 (E.D. Wis. 1972). [Hereinafter cited as Kriger.]
90. *Id.* at 105.

vides support for this position.[91] If the lawyer is both counsel and witness, he would be more easily impeached as having an interest in the outcome of the case. The attorney, challenged as a witness, is disadvantaged and in an untenable position to argue his own credibility. Further, "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."[92] In *Kriger*, the attorney recognized the problem and argued that he could effectively pursue the litigation without his own testimony or, if his testimony were required, his associates could and would withdraw as counsel. The court responded to this argument by saying that there was no adequate representation where the attorney would be under a disability not likely to be found in any other member of the class.[93]

The most vigorous attack on this dual position is found in two cases which involved the same attorney.[94] In similar actions attorney Shields sought to be both counsel and representative party in a suit alleging that the defendant failed to make disclosures as required by the Truth in Lending Act. The court in *Shields v. First National Bank of Arizona*[95] agreed with the decision of Judge Frey, who stated in *Shields v. Valley National Bank of Arizona*:[96]

> The court further feels that Shields has not demonstrated competence to represent the class because he seeks to be not only the attorney for the class and be awarded a fee for his representation, he seeks in the same action personal relief. The practice involved does not seem to the court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this court or elsewhere. This case seems to involve a questionable method of soliciting legal business and such solicitation should not be encouraged.[97]

The court in both actions clearly held that seeking to be both attorney and representative party would preclude adequate repre-

91. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 5-9.
92. *Id.*
93. Kriger, 56 F.R.D. at 105-06.
94. Shields v. First National Bank of Arizona, 56 F.R.D. 442 (D. Ariz. 1972); Shields v. Valley National Bank of Arizona, 56 F.R.D. 448 (D. Ariz. 1971).
95. 56 F.R.D. 442 (D. Ariz. 1972).
96. 56 F.R.D. 448 (D. Ariz. 1971).
97. *Id.* at 450.

sentation, further suggesting that this situation encourages a form of claim solicitation.

Although there is some authority to the contrary,[98] the courts have generally disallowed the practice of the attorney acting as both a representative party and as attorney for the class. It seems clear that if the practice were allowed, it would surely lead to serious ethical objections.

Challenging A Breach of Ethics

The purpose of this section is to determine the strategic ramifications of challenging what counsel believes to be a breach of ethics, and discuss the effect this challenge has had in cases where the propriety of counsels' conduct has been questioned.

The first, and most important area, is the strategic implication of a challenge to opposing counsel. The first step is to determine who has the burden of proving that the conduct in question is a breach of ethics. In *Dolgow v. Anderson*[99] the court stated that "[u]ntil the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession."[100] As one law review commentator remarked:

> It would appear that an attack upon a party's lawyer, under 23(a)(4) . . . is strategically disastrous unless the incompetence charged is specific, supported by solid evidence, and so apparent as to be obvious. Even where incompetence seems patent, this contention will inevitably involve the speculatory difficulties of definition and proof of professional inability. Therefore, it is wise to assume that a judge might not agree with an allegation of incompetence about a fellow attorney.[101]

If this is an accepted strategy, it would appear that questionable conduct could be going unchallenged, and if this is true, the ethical problems in class actions could well be more pervasive than previously believed. Further, if the unchallenged conduct is in fact more pervasive, some steps must be taken to assure that the class action device does not fall into disrepute.

The general view regarding a breach of ethics was advanced in *Stravrides v. Mellon National Bank and Trust Co.*.[102] In a deposition one of the plaintiffs was asked about the circumstances surrounding the initiation of the suit, and how the action was being

98. *See* Lamb v. United Security Life Co., 59 F.R.D. 25 (S.D. Iowa 1972).
99. 43 F.R.D. 472 (E.D.N.Y. 1968).
100. *Id.* at 496.
101. Donelan, *Requisites to a Class Action Under New Rule 23, The Class Action a Symposium,* 10 B.C. Ind. & Com. L. Rev. 527, 536 (1969).
102. 60 F.R.D. 634 (W.D. Penn. 1973).

financed. The attorney instructed the plaintiff being questioned that the inquiries were to go unanswered. The issue the court was ultimately to decide was the effect a determination of unethical conduct would have on the action. The court held that it was permissable to consider the ethical conduct of the attorney in determining whether to certify a class. The court felt that they were the "guardian of the rights of the absentees,"[103] and that it was their duty to see that the absentees were represented by counsel who were intellectually and ethically competent.[104] In this case the questions were designed primarily to discover if there was claim solicitation involved. The court held that insofar as this was the purpose of the questions, they were to be answered.[105]

Several courts prior to *Stravrides* had drawn similar conclusions. In *Korn v. Franchard*,[106] where counsel used names and addresses provided for a court approved communication, to send an unapproved one, the court held that this action prohibited counsel from fairly and adequately representing the members of the purported class.[107] The court then decided that the action could not be certified as a class suit, though recognizing the difficulty inherent in this position concerning the rights of the unnamed members of the class, who were relying on the suit to prosecute their individual claims. The court solved this problem by ordering the defendants to mail notice to all of those who had been sent a notice and proof of claim. The notice was to inform investors of the class action determination and advise them that they could intervene as individual plaintiffs, provided notice of their intentions were properly filed. In *Taub v. Glickman*[108] the court did not state what procedures were to be followed subsequent to their dismissal of the action. Neither did the court find that there was a breach of ethics, but rather that there was inadequate representation to maintain the action as a class action.[109] The court in *Simon v. Merrill Lynch*[110] came to a similar conclusion where there was evidence

103. *Id.* at 637.
104. *Id.*
105. *Id.*
106. CCH FED. SEC. L. REP. ¶ 92845 (D.C.N.Y. 1970).
107. *Id.* at 90,167.
108. 14 F.R. Serv. 2d 847, 849 (S.D.N.Y. 1970).
109. *Id.*
110. 16 F.R. Serv. 2d 1021 (S.D.N.Y. 1970).

that the action was "the result of an effort to seek out a person willing to have a class action instituted in his name as representative of a class."[111]

Dismissing the action and taking steps to assure that there is no reliance on the suit is a relatively new position and there is conflict between the cases on the point. In *Dolgow v. Anderson,* the challenge resulted in an enthusiastic report regarding counsel's abilities.[112] In *Kronenberg* the attorneys sent an unauthorized letter with the notice. The court refused to dismiss the action, stating that they are primarily concerned with the interests of the class members. A dismissal, in the court's opinion, would be adverse to the class members' interests because of their reliance on the action while the statute of limitations had run on their individual claims.[113] The court in *Halverson* advanced a similar analysis, noting that the attorneys' slight breach of ethics "should not prejudice the rights of his clients."[114]

In the area of fees, if the court finds that the contingent fee contracts were exhorbitant, they may disallow them and impose a reasonable attorneys' fee.[115] This is rare, however, and the usual result is that the fee contract is not only upheld but is extended to those members of the class who did not sign it.[116] The results in *Kiser* and *Illinois v. Harper & Row* are clearly better in that they assure the attorney receives reasonable compensation and the class receives adequate representation.

In the area of settlements, the effect of a violation of Rule 23(e) is to require notification prior to court approval of a settlement.[117] An interesting development occurred in *Greenfield v. Villager Industries,*[118] where the argument was advanced that any objection to the settlement was moot because the district court had previously approved it, and its terms had already been carried out. The court rejected the argument as "frivolous," asserting that the terms of the settlement provided that it was not to be carried out pending final appeal. The court ordered that all proceedings pertaining to the settlement were void and all settlement orders were to be vacated.[119]

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111. *Id.* at 1022.
112. 43 F.R.D. 472, 496 (E.D.N.Y. 1968).
113. 281 F. Supp. 622, 625-26 (S.D.N.Y. 1968).
114. 458 F.2d 927, 931 (7th Cir. 1972).
115. Kiser v. Miller, 364 F. Supp. 1311 (D.C. 1973).
116. Illinois v. Harper & Row, 55 F.R.D. 221, 223 (N.D. Ill. 1972).
117. Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970); Muntz v. Ohio Screw Products, 61 F.R.D. 396, 399 (N.D. Ohio 1973).
118. 483 F.2d 824 (3d Cir. 1973).
119. *Id.*

The general trend seems to be either to dismiss the action or to disallow it as a class action. It should be recognized that it is the class that requires the courts' protection and that if a dismissal is entered, the court should take steps to insure that the *class* is protected, as was done in *Korn v. Franchard.*[120]

CONCLUSION

The ethical problems that have developed as a result of increased use of the class action do not in any way eliminate its potential to afford a recovery for those who would not be able to prosecute their claims individually. It is in the spirit of preserving Rule 23 that this article was written. The problems discussed are ones that are frequently cited in a discussion of the class action device. It is important to eliminate these problems by taking reformatory action before Rule 23 falls into disrepute, and can no longer be utilized by those to whom it was originally intended to benefit.

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120. CCH FED. SEC. L. REP. ¶ 92845 (D.C.N.Y. 1970).