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Class Action Litigation: Representing Divergent Interests of Class Members

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CLASS ACTION LITIGATION: REPRESENTING DIVERGENT INTERESTS OF CLASS MEMBERS*

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At a recent conference with class members in an extended employment discrimination proceeding, *Hairston v. McLean Trucking Co.*,[1] one disgruntled class member, among sixty-seven and one of seventeen named plaintiffs asked me: "Lawyer, who do you represent in this proceeding?" Forty of the class members and sixteen of the named plaintiffs were at that time reasonably satisfied with a backpay settlement proposal. One class member and one plaintiff objected vehemently. I advised the group that the settlement was reasonable and that they should accept it. The objector's question, however, did seriously concern me.

We had been litigating the case for ten years. During this period there had been no division in the ranks of the plaintiffs and the class. All of them were interested in a determination which would insure better job opportunities for blacks and compensation for earnings they had lost because of the employer's discrimination. Some, however, had better claims than others: some had been with the employer longer; some had expressly rejected opportunities to move to better jobs; some were admittedly unable to perform the better jobs. Not-

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1. 520 F.2d 226 (4th Cir. 1975). *Hairston* was a Title VII, 42 U.S.C. §§ 200e et seq., proceeding alleging that McLean Trucking Corporation, its maintenance division, Modern Automotive Services, and the union representative, International Brotherhood of Teamsters and its local, discriminated against black employees in employment practices because of race. The district court rendered a decision on the merits in 1974, finding that both defendants had discriminated against the plaintiffs and other black employees in the certified class in violation of Title VII. 62 F.R.D. 642 (M.D. N.C. 1974). The Fourth Circuit affirmed the liability determination but ordered additional relief for the plaintiffs and the class in light of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Prior to resolution of the remedies phase of the proceeding, the Supreme Court decided International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), which held that section 703(h) of Title VII, 42 U.S.C. § 2000e-3(h), protected bona fide seniority systems. *Teamsters* substantially affected the liability determination and the type of relief which could be granted.

withstanding, the disgruntled class member insisted that each class member and plaintiff receive an equal sum of the backpay award.[2]

From my representation of the parties in the proceeding, I knew the weakness of the claims of the objecting class member and plaintiff. Under these circumstances, was I to withdraw from the proceeding, continue to represent all parties and ignore the objection, or represent those who assented and insist that the objectors retain other counsel?

In *McLean Trucking*, my obligation was to limit the class to those with like or similar interests, to seek a division of the class in order to accommodate separate claims or facts and to request separate representation for those of the class who objected to or opposed the relief being sought. The Fifth Circuit in *Pettway v. American Cast Iron Pipe Co.*[3] and the Fourth Circuit in *Flinn v. FMC Corp.*[4] have tried to provide some guidance for counsel and the court where conflicting interests develop. The named plaintiff remains in charge of the case subject to the strictures of Rule 23 as to fairness and adequacy of representation.[5] Counsel for the plaintiff has an obligation to advise the plaintiff and the court with respect to the plaintiff's rights and interests and any competing interests of the class.[6]

Fortunately, in this case, the objectors retained other counsel and did not question my continued representation of the assenting plaintiffs and class members. The potential dilemma I faced regarding the lawyer-client relationship, however, is one public interest attorneys are encountering rather frequently today. The question arises not just in the context of relief. It is frequently presented in consideration of the substantive claims, for example, whether race or sex discrimination are illegal or unconstitutional; whether racial isolation, *de facto* rather than *de jure*, is unconstitutional. It is also posed when considering the extent of the client's involvement in the lawsuit. For instance, does the attorney or the client determine the relief which should be requested, whether to appeal, and so forth?

Even before my class problem arose in *McLean Trucking Co.*, Professor Derrick Bell had furthered my interest in this area with his article in the Yale Law Journal entitled *Serving Two Masters: Integra-*

2. The objectors contended that if the monetary reward were not distributed equally, the court should conduct a hearing on each individual claim.

3. 576 F.2d 1157 (5th Cir. 1978).

4. 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

5. FED. R. CIV. P. 23. "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . requiring, for the protection of the members of the class . . . that notice be given . . . of the opportunity of members to signify whether they consider the representation fair and adequate . . . ." FED. R. CIV. P. 23(d).

6. 576 F.2d at 1178.

tion Ideals and Client Interests in School Desegregation Litigation.[7] Professor Bell argued that civil rights attorneys in school desegregation cases, citing as examples the NAACP and the Legal Defense Fund, were ignoring changing client interests in these cases by unilaterally advocating desegregation through racial balancing strategies.[8] He contended that there was strong evidence that client interests had shifted from supporting racially balanced schools to advocating concentrated improvement of educational programs in existing segregated or racially identifiable systems, and that a growing number of urban parents had become skeptical about any positive effects of school desegregation.[9]

Although I strongly object to most of Professor Bell's argument, the article did highlight a major problem with regard to the lawyer-client relationship around control of decisions affecting litigation. Professor Bell accused lawyers of usurping client control over the litigation by ignoring client interests when they differed from the preferences and goals of the lawyers.[10] He also argued that this relationship was too strongly influenced by third parties—civil rights organizations which funded the litigation.[11]

An inherent problem in this lawyer-client issue which Professor Bell fails to mention is the often wide socio-economic disparity between the average civil rights attorney and the average client or class member in a civil rights case. This social distance can create problems in the relationship. I have seen that in some cases the attorney as "the professional" does act toward lay client/class members in sometimes paternalistic, often overly aggressive, controlling, or patronizing ways.

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7. 85 YALE L.J. 470 (1976).
8. *Id.* at 483-87.
9. *Id.* at 480.
10. *Id.* at 490, 493, 512.
11. *Id.* at 497-500. Professor Bell ignored the traditional commitment and objectives of the third party organizations he criticized. The NAACP and the NAACP Legal Defense Fund (LDF), for instance, were organized to challenge racially discriminatory practices. Their efforts resulted in the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). While individuals may disagree with the objectives of these organizations, their efforts and the procedure they followed have been held to be in the highest tradition of American jurisprudence. NAACP v. Button, 371 U.S. 415 (1963); *In re* Primus, 436 U.S. 412 (1978).

After obtaining the *Brown* ruling, the LDF and the NAACP set about implementing the decision. The history of these efforts has been told many times and will not be repeated here. *See, e.g.*, R. KLUGER, SIMPLE JUSTICE (1976). The point is that at least a vocal majority of the members of the organizations and the clients they sought to represent were interested in challenging the exclusion of black children from public schools reserved for white children. Similarly in other civil rights and public interest areas, individual plaintiffs, in addition to counsel and third party organizations, have challenged practices which deprived them of what they believed to be their constitutionally or federally protected rights. They are entitled to their day in court.

Clearly this problem should be more closely examined by the profession.

In addition, in many of the class action proceedings, counsel for plaintiffs may be able to talk or consult with all class members, if at all,[12] only at the later stages of the proceeding. The initial objective of the suit is generally known and broadly accepted. When conflicts develop, they are usually at the remedy stage, for example, in school discrimination, whether there should be reorganization of the school system, new attendance zones, transportation of students, or the elimination of grouping practices of students, or, in employment discrimination, whether the goals and timetables and adjustments of seniority are appropriate, and whether back pay should be on a per capita basis or specifically limited to provable violations.

Professor Bell's assertions have met with considerable opposition in the field,[13] but they have served to direct the profession's attention to the issue of client rights in civil rights litigation. This is an appropriate and important issue and it raises a series of more basic questions such as: Given the socio-economic differential between lawyer and client/class member in civil rights cases, how do we realistically function so that the clients have information equal to other parties such as the lawyers and funding organizations? How do we maintain informed interest among clients in long-term desegregation cases? How do we respond to the increased potential for division among class members when more informed and active participation is expected of them?

All Clients Have a Basic Right to Representation

In reality, there are articulate members of minorities which are discriminated against who, for any number of reasons, prefer not to oppose discrimination waged against them. Some of these members actually prefer their separate and unequal status. For example, the Equal Rights Amendment has not faced defeat solely from male chauvinists. The most visible opposition forces are women themselves. Also, throughout the history of the race relations dilemma in the United States, blacks as a group have experienced deep cleavages among the rank and file and leadership, on the pros and cons of segregation as the best solution to the American race problem.

12. For example, some courts have adopted rules limiting communications with class members except by prior court approval. *See, e.g.,* Cole v. Marsh, 560 F.2d 186 (3rd Cir. 1977), *cert. denied,* 434 U.S. 985 (1977).

13. *See, e.g.,* Nathaniel R. Jones', General Counsel for the NAACP, response to the article, 86 YALE L.J. 378 (1976) and Professor Bell's reply, *id.* at 382.

Should these groups be denied quality representation simply because they oppose the views and goals of the majority? For instance, in the case of a class action when differences occur between the members on the position being taken by the attorney, do both sets of interests deserve representation? To me, the answer is obvious: every client is entitled to representation of his or her interest.

This is a complicated issue. There may arise a difference between an individual client and his or her attorney on the position of the case. Or there may occur a division within the ranks of the class, and an individual or a minority of class members may oppose the position of the other class members and the attorney.

In such cases, even if a clear majority, as indicated by vote, supports one position, the opposing minority position is still entitled to representation. The attorney should not ignore the clients' interests or preferences and advocate his or her own preferences to the point of denying representation. Those of the minority position ought to seek legal representation from an attorney willing to represent that position.

Further, it appears both fair and logical in a case where there is division within the class that the attorney ought to have the opportunity to continue to represent the position of that side of the split class which he or she supports. Some may argue that this gives the attorney an unfair advantage over those who split the class for an opposing position, and urge that the attorney drop out all together and that totally new actions be filed. This need not be the case. Although a good deal of knowledge and experience might have been gained in the early stages of the case, such information need not in and of itself jeopardize or unfairly unbalance the case of the opposition. In fact, since the opposing client(s) were members of the original suit, they leave the class with the advantage of having gained important information with which to wage their opposition.

On the other hand, if a majority of the class or the named plaintiffs are opposed to the position of counsel for the plaintiff, counsel and the court should limit the representation. If all plaintiffs and class members are opposed and plaintiffs' counsel cannot effectively represent their interests, plaintiffs' counsel should withdraw from the proceedings.

The underlying constitutional issue here is the right of each client position to representation and the necessity that lawyers continue to exhibit respect for these client rights, regardless of their views.

In obtaining the *Brown v. Board of Education* decision,[14] the NAACP had to find and refer clients. Many did not know their rights

14. 347 U.S. 483 (1954).

— their right to representation or the availability of attorneys who would represent them. And since blacks are not a monolithic group, some were opposed to the entire *Brown* effort.

The Supreme Court, in *NAACP v. Button*[15], held that this major effort was in the tradition of the American ideal. It was a clear example of blacks exercising their First Amendment rights of freedom of speech and association. This position was reaffirmed just last term in *In re Primus.*[16] There, an ACLU attorney, who advised an individual of her constitutional rights and that the ACLU would assist her in protecting her rights without cost, was held to be acting "within the generous zone of First Amendment protection reserved for associational freedoms."[17]

Primus, however, as well as *Button,* are not without limitations. Thus, a state may proscribe in-person misleading or fraudulent solicitations designed to financially reward an attorney.[18] Justice Powell, in *Primus,* suggests that a state may limit solicitation by lawyers on behalf of lay organizations that exert actual control over the litigation.[19] It seems clear from *Button* and *Primus*, however, as well as *Bates v. State Bar of Arizona*[20], that an attorney may solicit or accept referrals of clients in order to advance particular philosophical or constitutional goals in court, even where the attorney is compensated for his or her efforts pursuant to a rule of court or a statutory provision. This is particularly true where a funding organization does not maintain primary control over the litigation.[21]

Further, there is another potential advantage of more varied civil rights representation where there, in fact, exist substantially different views on issues such as school desegregation strategies or employment discrimination remedies. Diverse arguments and approaches by plaintiffs on specific public interest issues could result in a greater number of more clearly framed cases, lessen the ambiguities on the central issues, and improve the overall quality of public interest litigation.

Finally, the growing concern for client rights also focuses greater attention on the need for more interdisciplinary approaches to litigating public interest cases. There is need for more input from and consultation with social scientists, psychologists, economists, labor consultants, criminologists, and other behavioral scientists who can aid

15. 371 U.S. 415 (1963).
16. 436 U.S. 412 (1978).
17. *Id.* at 431.
18. *Id.* at 438-39. Ohralik v. Ohio St. B. Ass'n, 436 U.S. 447 (1978).
19. 436 U.S. at 439.
20. 433 U.S. 350 (1977).
21. 436 U.S. at 439.

the legal profession in working through the dynamics of the lawyer-client relationship to facilitate greater client awareness and involvement.

In all this there can be no substitute for continuing our commitment to a pluralistic ideal in which differences and diversity among interest groups are maintained and the rights of the minority to be heard are protected as forcefully as those of the majority.

Subscribing to this ideal does not mean that we abandon traditional goals of desegregation cases. Believers in desegregation simply have to face internal conflicts more squarely. We have to work even harder to build a strong enough case to convince the courts that the desegregation position is the most feasible and desirable to be pursued at this time in history and that the implications of falling behind on desegregation goals can have devastating effects on blacks and the country as a whole.

These issues also point up the need for more dedicated and well trained legal manpower. Being in the forefront of evolving constitutional law around opportunities for minorities, women and other disadvantaged persons and developing interpretations of various statutes has been exciting for me. We have only begun to achieve some major breakthroughs and now must also contend with internal conflicts as well as continue the development process. *Regents of the University of California v. Bakke*[22], *International Brotherhood of Teamsters v. United States*[23], and *Dayton Board of Education v. Brinkman*[24] are only expected aberrations. My major concern is that many black students and others previously interested in this struggle have passively accepted the notion that the fight is over, that the system is wide open and opportunity is fully available to everyone! Too many young people are less interested in public interest law than in the high paying traditional practices with large corporations.

I was very impressed in reading the objectives of this school which emphasized the relationship between Judeo-Christian ethics and the professional responsibility of an attorney as an officer of the court and a servant of society. I sincerely hope that emphasis here will encourage many of you to follow the urgings of Justice Marshall and "participate in serving the disadvantaged"[25]—minorities, women and others.

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22. 98 S. Ct. 2733 (1978).
23. 431 U.S. 324 (1977).
24. 433 U.S. 406 (1977).
25. Ohralik v. Ohio St. B. Ass'n, 436 U.S. 447, 471 (1978) (Marshall, J., concurring).