RULE 23 AS AN ETHICS CODE

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I. Introduction.

Judges, lawyers and scholars have commented—whether with confusion, bemusement, or skepticism—that class action lawyers sometimes play by their own ethical rules. They make a fair point. But that does not mean class action lawyers act unethically.

The difficulty for class action ethics stems in part from the failure of the drafters of the ethical rules to take class actions adequately into account in their efforts. The requirements, prohibitions, and permissions they put in place may not fit the class context or even may run contrary to the policies behind the class action device. This piece suggests a pragmatic recognition of this reality—that the ethical rules should be adapted to accommodate the policies underlying Federal Rule of Civil Procedure 23, the rule that governs class actions. In other words, Rule 23 at times should be read as embodying its own ethical code.

This piece develops a general framework for class action ethics and shows how it derives from—and can cast new light on—case law as it has developed regarding various ethical issues. The need for such a general framework is pressing. Class actions play an important and controversial role in our legal system. Yet ethical rules were not written with class actions in mind. It is therefore unsurprising that class actions give rise to a great deal of litigation over ethical issues.[2]

Consider, for example, the bar in some jurisdictions on attorneys engaging in sexual activity with their clients.[3] Imagine a class action lawyer who becomes romantically involved with someone, only later to learn that the target of her affections is one among hundreds of thousands of absent class members that she represents. Neither the lawyer nor the class member had any idea

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[2] *See, e.g.*, *Corn Derivatives*, 748 F.2d 157, 163 (3d Cir. 1984) ("Perhaps no area of the law provokes as much litigation concerning ethical issues as class actions.") (citing Waid, Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed rules of Professional Conduct, 27 Loy. L. Rev. 1047, 1047 (1981)).

[3] Model Rule 1.8(j).

of this legal relationship. It played no role in the romance. And the class member's interests in the class litigation are small—the prospect of recovering ten or twenty dollars if the lawsuit is successful. Should the ordinary ethical rules apply? The question seems to answer itself.

This example may seem trivial. No prosecutor is likely to pursue sanctions against the class attorney. But it offers several larger lessons that are worthy of consideration. So assume that a lawyer defending the class action learns of the affair and uses it as a basis to seek disqualification. Should the court rule that the class attorney has violated the ethics code and, potentially, disqualify counsel from representing the class?

In answering this question, a first point is that the ethical provision at issue simply does not appear pertinent. The attorney and absent class member do not have the sort of relationship that would be likely to give rise to the concerns that underlie the prohibition on sexual relationships between an attorney and client. No meaningful risk exists that the attorney has used the legal relationship to exploit the client, that the sexual relationship will hamper the lawyer's ability to exercise independent professional judgment, or that the sexual relationship will imperil the confidences of the absent class member.[4]

A second point is that no direct conflict is necessary to make application of the ethical provision seem inappropriate. The attorney could abide by Rule 23 and the ban on sex with a client. Nothing in Rule 23 requires or authorizes sexual relations between attorneys and the absent class members they represent. The problem is that a defense attorney can use the ethical provision in a way that does not benefit—and that in fact may harm—the absent class member whose interests the provision is designed to protect. While there is no meaningful prospect of the sexual relationship injuring the absent class member, the motion to disqualify class counsel could give the defendant a strategic advantage. Indeed, that presumably would be the motivation behind the motion. That strategic advantage may well detract from the recovery the class ultimately receives.

A third point is that a wooden approach to resolving the tension between Rule 23 and the ethical provision comes with its own risks. One way to reconcile the two, for example, is simply to

[4] Model Rule 1.8(j) at Comment [17] (explaining the reasoning behind the prohibition on sexual relations between attorney and client).

conclude that the absent class member is not the attorney's "client" for purposes of the ban on sexual relations. In the hypothetical, that result would be fine. But the approach might perform poorly in other settings. Imagine, for example, that the attorney represented a class of employees who allegedly lost their jobs as a result of illegal discrimination in the workplace, that each class member has years of pay and possible reinstatement at stake, that preparation for litigation led the attorney to form an intimate relationship with one of the absent class members, and that that relationship became sexual. In such circumstances the categorical ban on sex might be appropriate, and a general rule that an absent class member is not a class attorney's "client" for purposes of the ban could work mischief.

A fourth point is that application of ethical provisions in the class context often turns on a single word, and often that word is "client." As a result, not only can a mechanical approach to language within a particular ethical rule fail to protect clients and fail to serve the policies behind Rule 23, but a definition adopted for purposes of one rule may suit another rule poorly. While policy concerns may support adopting a particular definition of the term "client" in one class setting, similar policy concerns may well support a different approach in another setting. The conclusion that an absent class member is not a client for purposes of the ban on sexual relations, for example, could be read to imply that an absent class member is not the client of class counsel for purposes of conflicts of interest or for allowing and protecting communications between attorney and client. The aims of the ethical rules and Rule 23 can best be served by a more nuanced interpretive strategy.

This piece argues that courts have at times recognized these points and wisely so. Judges have ruled on numerous occasions that ethical codes should give way to the policies animating Federal Rule of Civil Procedure 23.

II. A Framework for Class Action Ethics.

A. General Framework.

A dispute has arisen about how best to regulate the ethics of class action attorneys in federal court. In many instances, the ordinary ethical rules do not fit the class context well. Various options exist for addressing this problem: draft special rules for class counsel or special modifications to the ordinary rules; enforce the ordinary ethical rules in unmodified form, notwithstanding any adverse consequences; interpret the ordinary ethical rules so as to accommodate class action practice as best as is possible; or modify or depart from the ordinary ethical rules, as appropriate, in the class context.

The drafters of ethical rules have thus far decided not to prepare special rules for class counsel or to make any extensive set of adaptations to accommodate class practice. As to the remaining options, this piece argues that the best approach—and the one most consistent with germinal judicial decisions—is to modify and depart from the ordinary ethical rules through a common law process. It contends that applying the ethical rules in a mechanical fashion could greatly undermine class actions and that more harm than good would be done by efforts to squeeze class conduct into the language of the existing ethical rules. Rather than rigidly following the ordinary ethical rules or begrudgingly tinkering with them, the better approach is simply to craft new approaches to ethics in the class context, when the underlying policies of the class device support doing so. Attention to a range of ethical issues makes these points more clearly than focusing on a single issue, as others commentators have done.

Clever interpretation of the ethical rules may help in some instances, but it often will create as many problems as it solves. Moreover, it is likely to encourage courts to engage in formalistic reasoning that may fit one context reasonably well but others very poorly. The result is counterproductive. Key terms can be interpreted in unintuitive and inconsistent ways.

B. Applications.

B.i. Costs.

One of the more straightforward doctrinal areas in which courts have adapted ethical rules to the class context involves costs. Historically, many jurisdictions required clients to remain

ultimately responsible for the costs of litigation.[5] That ethical rule posed a potential challenge to class actions.

The problem arose from Federal Rule of Civil Procedure 23(a)(4). That provision requires that a proposed named plaintiff be able to represent a class fairly and adequately. If the parties must remain ultimately responsible for the costs of litigation, and if those costs include the hundreds of thousands or even millions of dollars that prosecution of class action can entail, almost no named plaintiff could adequately represent many classes. Why would a rational plaintiff be willing to risk massive liability while seeking to recover a relatively modest amount?

In the germinal case of *Rand v. Monsanto*,[6] for example, the Seventh Circuit confronted a securities action in which a named plaintiff was asked to accept up to $25,000 in potential liability on costs but stood to recover at most $1,135.[7] At deposition he testified that he was not willing to accept that sort of exposure.[8] On that basis, the trial court found the named plaintiff inadequate to protect the class interests.[9] Judge Easterbrook, writing for the Seventh Circuit on appeal, noted, "No (sane) person would pay the entire costs of a securities class action in exchange for a maximum benefit of $1,135. None would put up $25,000 or even $2,500 against a hope of recovering $1,135."[10] Judge Easterbrook further explained:

> The very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class![11]

Judge Easterbrook thus appreciated the danger to class actions of requiring named plaintiffs to pay substantial litigation costs.

The problem, however, was that the Northern District of Illinois—in which the trial court proceedings took place—had

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[5] *See, e.g.*, ABA Model Code of Professional Responsibility, Rule 5-103(B) (allowing attorneys to advance costs on behalf of a client only if the client remains ultimately responsible for them).
[6] 926 F.2d 596 (7th Cir. 1991).
[7] Id. at 598.
[8] Id. at 598.
[9] Id.
[10] Id. at 599.
[11] Id.

adopted the Model Code of Professional Responsibility by local rule.[12] The Model Code does not allow counsel to assume ultimate responsibility for a client's costs.[13] So, it seemed, to be "adequate" the named plaintiffs might have to assume potential liability for the full costs of litigating the class action. The Seventh Circuit nevertheless rejected this position.[14] That outcome is significant. Requiring named plaintiffs to remain ultimately responsible for court costs could greatly impede the prosecution of class actions.[15]

More important for present purposes, however, is the way in which the court reached its conclusion. One option before the Seventh Circuit was to interpret the Model Code in a way that would not require the named plaintiffs to reimburse class counsel for the full costs of litigation. Judge Easterbrook recognized both an interpretive path to this result and a strong justification for taking it.

Judge Easterbrook expressed "doubt" that the Model Code would require the named plaintiffs to assume responsibility for the full costs of litigation.[16] True, he acknowledged, the relevant provision, DR 5-103(B) of the Model Code, "says that lawyers may advance costs but that the client ultimately bears responsibility for them."[17] But he was not willing to assume that the named plaintiffs count as clients for these purposes. To the contrary, he pronounced in *dicta*: "In a class action, the client is the class."[18] In other words, according to this view, the entire class in theory is ultimately responsible for the costs of the litigation, not the individual named plaintiffs—although the lawyers may not have any ability to collect against the class if the litigation were to fail.[19] So the Seventh Circuit *could* have applied the Model

[12] Id. at 598 (citing Local Rule 3.54(b)).
[13] Id. at 600 (citing DDR 5-103(B)).
[14] Id. at 600-01.
[15] Id. at 600 (noting such a rule would "cripple" class actions); see also Geoffrey P. Miller, Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent, 22 Rev. Litig. 557, 558 (2003) (noting such a rule would "severely undermine[]" the utility of class actions); Deborah Rhode, Institutionalizing Ethics, 44 Case W. L. Rev. 665, 723 (1994) (noting such a rule "would 'paralyze'. . . class actions. . . where no single plaintiff has a sufficient stake to accept liability for expenses").
[16] Id. at 600.
[17] Id.
[18] Id.
[19] *Rand* explained, "It may be that if the action fails the class's debt to the lawyer is not collectible, but DR 5-103(B) does not ensure that lawyers always will be able to collect. If it did, no lawyer could take any

Code—and indicated, if necessary, it *likely would* apply the Model Code—in a way that would avoid "crippl[ing]" class actions.[20] But that is not what it did.

Instead, Judge Easterbrook refused to apply the Model Code at all. The rationale he offered for this decision seems straightforward. The trial court had adopted the Model Code by local rule.[21] Federal Rule of Civil Procedure 83 holds that local rules "are valid only to the extent they are consistent with the national rules."[22] And, he concluded, the local rule was inconsistent with Federal Rule of Civil Procedure 23.[23] It therefore was invalid.

But upon further consideration this reasoning becomes less straightforward than it at first appears. In particular, what was the basis for the court's conclusion that the Model Code was inconsistent with Rule 23? To be sure, Judge Easterbrook noted that "*if* [the local rule adopting the Model Code] indeed requires the representative plaintiff to underwrite all costs personally, it is inconsistent with Fed. R. Civ. P. because it would cripple the action device that rule creates."[24] But Judge Easterbrook then expressed "doubt" that the Model Code in fact required any such outcome.[25] So wherein lay the inconsistency?

The answer would seem to arise from the value of uniformity. Most states had switched from the Model Code to the Model Rules of Professional Conduct by the time of the *Rand* decision.[26] Model Rule 1.8(e) allows counsel to assume responsibility for paying costs in unsuccessful litigation.[27] Conflicting approaches to court costs, Easterbrook worried, could create unnecessary inconsistency and, with it, presumably uncertainty and inefficiency. If there were a risk that one federal

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case on behalf of a poor person, for collecting costs from a client is problematic." Id.

[20] Id.

[21] Id. at 598 (italics added).

[22] Id. at 600 (citing Fed. R. Civ. P. 83).

[23] Id. at 600-01 (citing Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989); United States v. Klubock, 832 F.2d 664 (1st Cir. 1987); County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407 (E.D.N.Y. 1989)).

[24] Id. at 600.

[25] Id.

[26] Id.

[27] Id. (citing Model Rule of Professional Responsibility 1.8(e)).

court would require named plaintiffs to remain responsible for costs, for example, class counsel might merely identify an additional plaintiff and file in a different court.[28] It would be better to adopt a uniform rule. As he explained, "Rule 23 is designed for the nation as a whole. Slavishly following the different state rules on the allocation of costs would balkanize litigation."[29]

The issue of costs may play less of a role in federal class actions today.[30] Even by the time of *Rand*, the ABA had rejected, and the states were quickly replacing, "this relic of the rules against champerty and barratry."[31] But *Rand* has broader implications.

Rand offered one possible basis for adapting ethical rules to the class context, at least to the extent the ethical rules are adopted by local rule. Under Federal Rule of Civil Procedure 83, a national procedural rule trumps an inconsistent local rule. It also suggested a relatively undemanding test for inconsistency. Under *Rand*, it apparently sufficed for an ethics rule to significantly compromise the policies underlying Rule 23. After all, the court did not feel obligated to determine whether the Model Code requires named plaintiffs to assume responsibility for the full cost of class litigation. Instead, it seemed to rely on concerns about uniformity as adequate to displace the local rule adopted by the trial court.

Rand also addressed the issue of who counts as the client in the class context, albeit in *dicta*. As noted above, the Seventh Circuit declared that the client is the class—a view that, we shall see, has become influential. But this declaration rests somewhat uncomfortably with the purposivist approach adopted by the court—an analysis that relied more on the policies at play and their practical significance than on abstractions or wooden formalism.

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[28] Id.

[29] Id. Judge Easterbrook also could not identify a policy that the Code Approach promoted. Id. ("[S]o far as we can tell DR 5-103(B) itself serves no good purpose.).

[30] But see Geoffrey P. Miller, Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent, 22 Rev. Litig. 557, 558-60 (2003) (noting most courts have found ways around placing substantial liability for litigation costs on name plaintiffs but worrying there might be such liability in securities class actions and arguing that the Private Securities Litigation Reform Act preempts state ethics rules to the extent they impose ultimate responsibility for court costs on named plaintiffs).

[31] 926 F.2d at 600.

Many of these same issues have arisen when courts have contended with conflicts of interest in the class context.

B.ii. Conflicts.

Various potential conflicts of interest can arise in class actions. A dispute may involve the negotiated resolution of a class action, for example, in which class counsel defends a settlement opposed by members of the class—even by named plaintiffs the lawyer represented[32]—or in which class counsel attacks a settlement supported by class members—even by named plaintiffs the lawyer represented.[33] Alternatively, a lawyer may seek to represent a class that includes absent members the lawyer is suing in a different case. No doubt variations and permutations abound.

Although some courts initially applied the ethical rules to these conflicts in a mechanical fashion,[34] a longstanding trend has been to modify ordinary ethical rules to fit the class context. In doing the latter, courts have often spoken in terms of "balancing" the policies behind Rule 23 and the ethical rules as they apply in a particular case.[35] But careful attention to one of the germinal opinions in the area—the concurrence of Judge Adams in *In re Corn Derivatives Antitrust Litigation*[36]—suggests a more structured approach, one that holds greater potential for predictability and certainty than a vague balancing test and one that also can make sense of most of the outcomes in the relevant case law.

Before addressing the details of how courts have addressed conflicts of interest in the class setting, a couple of general points are worth addressing. They include the source and scope of the court's authority to depart from the ordinary ethical rules. The opinions in the conflict setting are not as explicit as they might be. They do at times refer to the "inherent powers" of federal courts

[32] *Lazy Oil Co. v. Witco Corp*., 166 F.3d 581 (3d Cir. 1999).
[33] *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157 (3d Cir. 1984).
[34] *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157 (3d Cir. 1984).
[35] *Lazy Oil Co. v. Witco Corp*., 166 F.3d 581 (3d Cir. 1999); In re Agent Orange Product Liability Litig., 800 F.3d 14 (2d Cir. 1986); *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157 (3d Cir. 1984) (Adams, J., concurring).
[36] 748 F.2d 157 (3d Cir. 1984).

over discipline.[37] But they do not suggest precisely when that power is triggered or its limits. [38] Instead, they are apt to say that the ordinary ethical rules do not necessarily apply in the class setting and that adapting them should involve "balancing."[39] Consider, for example, Judge Adams' concurrence in *Corn Derivatives*:

> Courts confronting an ethical problem in the class action setting must focus on two points. First, courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context; and second, a resolution of such issues would appear to call for a balancing process that in most cases should be undertaken initially by the district court.[40]

Notably, in this passage, Adams acknowledged more explicitly than did Easterbrook in *Rand* that a strong from of inconsistency is not required for a federal court to modify ordinary ethical rules in the class setting. He suggested "a balancing process"[41] without indicating whether it should occur only when the ethical rules are inconsistent with the policies behind Rule 23.

Some facts are necessary to understand precisely the approach Adams proposed in his influential concurrence. The appeal in *Corn Derivatives* involved a dispute over a class action settlement. Two of the named plaintiffs, Pan-O-Gold and Land O'Lakes—both represented by the same law firm—initially opposed the settlement but one of them, Land O'Lakes, decided to accept the settlement if the district court approved it.[42] The district court did approve the settlement, and the law firm withdrew as counsel for Land O'Lakes and then challenged the settlement on appeal only on behalf of Pan-O-Gold.[43] Land O'Lakes moved to disqualify the law firm as it had represented Land O'Lakes in the trial court but was now taking a position directly adverse to it in the very same matter on appeal.[44]

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[37] Id. at 160; id. at 166 (Adams, J., concurring).
[38] One possible explanation for the difference between the reasoning in *Rand* and *Corn Derivatives* is that in the latter case, at the time of the decision the Third Circuit had "never formally adopted any particular formulation of the standards of professional conduct." Id. at 160.
[39] Id. at 162.
[40] Id. at 163 (Adams, J., concurring).
[41] Id.
[42] Id. at 160.
[43] Id.
[44] Id.

Under a straightforward application of the ethical rules the issue in *Corn Derivatives* should not have been challenging. Even assuming that a law firm may avoid a concurrent conflict by withdrawing as counsel for a client,[45] the Model Rules prohibit an attorney from undertaking representation directly adverse to a former client in the very same matter in which the attorney represented the former client.[46] That is just what the law firm did. Disqualification would seem to have been appropriate.

In reaching a conclusion along these lines, the majority in *Corn Derivatives* identified three purposes served by the conflict of interest rule in this context: to protect client confidences and secrets; to maintain public confidence in the legal system; and to respect the expectations of a client for loyalty in the matter for which counsel is retained.[47] All three purposes, the majority reasoned, would be protected by disqualifying the law firm.[48]

Judge Adams did not disagree with that outcome given the facts before the court. He did write separately, however, to express his view that a special approach was necessary for addressing conflicts of interest in the class setting. It is in this context that he discussed the importance of adapting ethical rules to the class setting and balancing the purposes of those ethical rules against the purposes of Rule 23. But his opinion, if parsed, offers far more guidance than that.

In particular, Judge Adams' concurrence could be read to adopt a distinctive structure for assessing conflicts in the class setting. He voiced doubts that either loyalty to the client or the appearance of impropriety warrant "*automatic* disqualification"[49] in the case of a potential conflict. He also explained that "the duty owed in a class action is in some ways unique and cannot be equated with the traditional lawyer-client setting." And he further noted, "The inherent risks in a class action are 'accepted structural' facts, known to those who choose to participate in a class."[50] As a result, courts should not require the same loyalty in class actions as they do in individual actions nor should they worry to the same extent that the public will perceive impropriety.[51]

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[45] Discuss "hot potato" rule.
[46] Id. at 161-162.
[47] Id. at 162.
[48] Id.
[49] Id. at 165 (emphasis in original).
[50] Id.
[51] Id.

Judge Adams also provided a more nuanced approach to the issue of confidentiality. He recommended abandoning the ordinary "prophylactic rule" that would minimize any risk of disclosure of confidences. Clients invoking the duty of confidentiality ordinarily need to show merely that the matters involving representation have the kind of relationship in which one would expect a risk of use of confidential information to the detriment of the client. This test is generally automatically met if an attorney is directly adverse to a former client in the very same matter. But Judge Adams suggested in the class setting—"in which disqualification potentially threatens the viability of the representational suit"[52]—that a client should have to make a showing for disqualification, including "the amount and nature of the information that has been proffered to the attorney, its availability elsewhere, its importance to the question at issue, such as settlement, as well as actual prejudice that may flow from that information."[53] In other words, rather than assume based on the general circumstances that the attorney received confidential information and that its disclosure would harm the client, Judge Adams suggested the clients should have to make a showing in these regards.

A summary of Judge Adams' proposed approach might be something like the following: Unlike in ordinary conflicts between counsel and clients, class counsel does not owe class members a duty of undivided loyalty. Nor should the mere appearance of impropriety suffice to disqualify class counsel. Concerns about protecting confidentiality remain. But courts should not take the ordinary prophylactic approach to confidentiality—avoiding any risk of disclosure or exploitation without any inquiry into whether a confidence was shared or would cause harm. Instead, courts should test whether the attorney actually possesses any confidences and, if so, balance any harm their disclosure might cause against the potential harm to the class from disqualifying counsel.

Judge Adams' concurrence in *Corn Derivatives* became the law of the Third Circuit in *Lazy Oil Co. v. Witco Corp*.[54] So, arguably, did the framework he used to analyze conflicts in the class setting. In *Lazy Oil*, the lead plaintiff in a class action became the leader objector to its proposed resolution.[55] The objectors asked

[52] 748 F.2d at 165.
[53] Id. (citing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 759 (2d Cir. 1975) (Adams, J., concurring).
[54] 166 F.3d 581 (3d Cir. 1999).
[55] Id. at 583.

that class counsel be removed or disqualified.[56] In affirming the district court's refusal to take that measure, the Third Circuit relied on the balancing test proposed by Judge Adams.[57] But the court engaged in more than just unstructured balancing.

The *Lazy Oil* court began by acknowledging that the attorneys were taking a position directly adverse to their former clients, which would not normally be permissible.[58] But the court followed Judge Adams' concurrence in *Corn Derivatives* (and the Second Circuit's opinion in *In re "Agent Orange" Product Liability Litigation*) in declining to apply ordinary ethical rules mechanically in the class context.[59] As recommended in Judge Adams' concurrence, the Third Circuit suggested that a court should take into account the actual information in the attorney's possession rather than assume possession of confidentialities, as is the usual rule.[60] Next the court weighed heavily the importance of allowing class counsel with years of experience in a case to continue to represent the class and affirmed the decision of the trial court not to disqualify class counsel.[61] *Lazy Oil* then can be understood to have deployed the framework implicit in Judge Adams' concurrence in *Corn Derivatives*.

Judge Adams' reasoning in developing that framework has implications for who counts as the client in the class setting. He declared, "The obligation of counsel representing a class runs to the class as a whole, although as a general matter class counsel may have worked closely only with the named plaintiffs."[62] He thus implied, to paraphrase *Rand*, that the client is the class. But this conclusion seems a bit facile. After all, he did concur rather than dissent. In other words, he agreed that the law firm in the case before him should be disqualified. And he recognized the need in some circumstances to protect confidentiality. So, apparently, class counsel can owe some form of a duty of confidentiality to individual class members.

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[56] Id. at 584.
[57] Id (citing Corn Derivatives, 748 F.2d at 162); id. at 589.
[58] Id. at 588.
[59] Id. at 589-90 (citing Corn Derivatives, 748 F.2d at 163-64; Agent Orange, 800 F.2d at 18-19).
[60] Id. at 590 (citing Agent Orange, 800 F.2d at 19).
[61] Id. at 590-91.
[62] Id. at 163 (citing Greenfield v. Villager Industries, Inc. 483 F.2d 824, 832 (3d Cir.1973); Deborah Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1203 (1981); Developments in the Law -- Conflicts of Interest, in the Legal Profession, 94 Harv. L. Rev. 1247, 1451 (1981)).

In sum, Judge Adams' influential concurrence in *Corn Derivatives* recognized a federal court's inherent authority to modify traditional ethical rules to fit the class setting and that, in doing so, courts should balance the policies behind Rule 23 and those behind the ethical rules at issue. A strong form of inconsistency would not necessarily be required to modify the ethical rules. A superficial reading of Adams' opinion might further suggest that for purposes of this undertaking, only the class counts as the client. But that conclusion would seem to be simplistic—in part because it has difficulty explaining the outcome in the case. More fundamentally, Judge Adams' opinion is marked by purposivism—an effort to honor the purposes of the ethical rules while balancing them against the health and vitality of representational actions under Rule 23. Any rigid definition of the client as the class, then, would seem to involve a kind of wooden formalism that is antithetical to the interpretive approach that he himself employed.

B.iii. Communications.

A third ethical controversy in the class context involves communications between attorneys and class members. This controversy triggers at least two ethical constraints. The first is the ban on solicitation and the second is the ban on contacting an adverse party represented by counsel.

Solicitation bears on the permissibility of plaintiffs' lawyers in a class setting contacting absent class members. If those absent class members are not the attorneys' clients—which arguably is more likely to be true before class certification—there may be limits to the communications the attorneys may initiate.[63]

The flip side of the coin, if you will, involves the so-called "no contact rule." An attorney generally cannot contact a person about the subject of representation regarding which the attorney knows the person is represented by another attorney.[64] This rule has the potential to limit communications between the attorneys for a defendant and absent class members.

The United States Supreme Court made a rare foray into class action ethics in addressing communications between attorneys and absent class members. In *Gulf Oil Co. v. Bernard,*[65]

[63] MR 7.3
[64] MR 4.2.
[65] 452 U.S. 89 (1981).

the Court addressed a case involving allegations of employment discrimination. The Equal Employment Opportunity Commission had entered a conciliation agreement regarding black and female employees of an oil refinery.[66] The refinery sent notices to 643 affected employees proffering backpay in exchange for execution within thirty days of a full release of all discrimination claims.[67] The notices asked the employees not to discuss the offer with others, although it proposed to arrange an interview with a government representative for employees who were confused.[68] About a month after the signing of the conciliation agreement, plaintiffs' attorney filed a proposed class action on behalf of the then-present and former African American employees of the refinery as well as African American rejected applicants for employment.[69]

The controversy arose because the defendant, Gulf Oil Company ("Gulf"), requested a protective order preventing parties and their counsel from communicating with potential class members.[70] The court issued such an order and, then, nevertheless permitted Gulf to continue its mailings about the conciliation agreement and its settlement process.[71] The result was that Gulf could communicate with class members about a potential settlement but the named plaintiffs and their attorneys could not do the same regarding the possibility of participating in class litigation.[72] In rejecting this approach, the Supreme Court issued an opinion instructive in various ways. To be clear, the Court's opinion had the hallmarks of an early analysis of a legal problem. Its reasoning arguably was not fully informed and was vague in some regards. As a result, it is easy to overread the case. Still, one can see glimmers, and sometimes more, of a general approach to class action ethics—one consistent with the opinions discussed above—as well as of a way to address communications in the class context.

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[66] Id. at 91.
[67] Id.
[68] Id. at 91, n.1
[69] Id.
[70] Id. at 93. A later court allowed some exceptions, such as communications initiated by "clients" and, potentially, communications based on an asserted constitutional right such as, presumably, the right to free speech. Id. at 95. As to the latter, the Supreme Court expressed skepticism about the adequacy of allowing communications subject to potential sanctions. Id. at 103, n. 17.
[71] Id. at 94.
[72] Id.

The first point of note was that in resolving the issue before it the Court relied only on Rule 23. The Court explicitly declined to resolve the Free Speech issues implicated by its prior restraint[73] and implicitly declined to parse the relevant ethical rules, relying instead on the general purposes of Rule 23. The Court noted that "the question for decision is whether the limiting order entered in this case is consistent with the general polices embodied in Rule 23, which governs class actions in federal court."[74] To be clear, the Court acknowledged the potential for abuses in class action cases, but it largely ignored the approach to such abuses set out in any ethical codes.[75]

A corollary is that the Court crafted an approach based on the policies underlying Rule 23 without asking whether they were compatible with the ethical rules. It did not indicate that some threshold of inconsistency had to be crossed before the policies behind Rule 23 would govern and any formal ethical rules would be put aside. But that does not mean *Gulf Oil* ignored ethical concerns. To the contrary, it suggested that a court should *balance* the harm from potential abuses in class action practice against the importance of the class action device.[76] The Court simply did not focus on the technical requirements of the ethical rules in deciding how, if at all, to constrain attorney behavior in the class context.

As to the issue before the Court—whether the trial court had properly restricted communications from the named plaintiffs and their lawyers to the potential class members—it reached several notable conclusions. First, it criticized the trial court for failing to make appropriate findings and for imposing a broader

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[73] Id. at 101, n. 15.
[74] Id. at 99.
[75] A limited exception is the Court's citation in a footnote to the "no contact rule." Id. at 104, n. 21. The potential significance of this exception is discussed below.
[76] See, e.g., id. at 101-02 ("Because of these potential problems [regarding informing potential class members of their rights and obtaining information from them], an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a *weighing* of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially rule 23.") (footnotes omitted; emphasis added); id. at 100 ("Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in management of cases. ") (footnotes omitted).

prohibition on communication than was necessary.[77] Second, it expressed skepticism of any substantial risk of solicitation, given that among plaintiffs' counsel were attorneys from a nonprofit organization—the the NAACP Legal Defense and Education Fund—"dedicated to the vindication of the legal rights of blacks and other citizens."[78] Third, and most relevant, it held that the potential for abuses in class actions did not justify routine prohibition of communications that could assist in either the formation or prosecution of class actions.[79]

In reaching these conclusions, the Court focused on the restrictions on communications from the named plaintiffs and their lawyers to absent class members, not on communications from defendants and their counsel. The Court explained, "[I]n this case we. . . consider the authority of district courts under the Federal Rules to impose sweeping limitations on communications by named plaintiffs and their counsel to prospective class members."[80] Although the Court hardly addressed any formal ethical rules, it did note near the end of the opinion—arguably with apparent approval—that some ethical rules constrain expression and cited in particular the provision of the Model Code that imposes the "no contact rule."[81] That could suggest a greater openness to restricting communications from defendants and defense counsel to absent class members. After all, in this regard the "no contact rule" affects only the defense attorneys, not the plaintiffs' attorneys. To be sure, at times the Court referred to the rights of the "parties" in class actions rather than the rights of plaintiffs.[82] But the Court paid little attention to the rights of defendants or their attorneys to communicate with a class and may have implied, with its citation to the "no contact rule," that the same standards would not apply.

Also notable is that Court did not draw any distinction between communications that occur before or after a class is certified. Indeed, it recognized the importance of protecting

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[77] Id. at 104

[78] Id. at 100, n. 11 (citation omitted).

[79] Id. at 104 ("We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with potential class members. But the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or prosecution of a class action in accordance with the rules.") (footnote omitted).

[80] Id. at 99.

[81] Id. at 103, n. 21 (citing ABA Code of Professional Responsibility, DR 7-104 (1980)).

[82] See, e.g., id. at 101.

communication not only if it could promote the "prosecution" of a class action but also its "formation."[83] Similarly, the Court affirmed the value of ensuring that potential class members know their legal rights and that named plaintiffs and their counsel are able to secure the information they need to prosecute class litigation.[84]

In a related point, the Court's reasoning did not appear to turn on a formalistic analysis of who counts as the "client." Consider how the Court did *not* reason. It did *not*, for example, say that absent class members—or unnamed class members in a class that is not yet certified—are not class counsel's "clients" and therefore that class counsel could not "solicit" the class members in light of the ethical rules. Rather, it inquired into the risks of abuse and the policies behind Rule 23.[85]

Taking all of this together, a natural reading—not necessarily the only natural reading—of *Gulf Oil* is that it creates a presumption against court orders preventing the named plaintiffs or and their lawyers from communicating with the members of a potential or certified class. According to this reading, the named plaintiffs and their counsel should ordinarily be free to inform class members of their legal rights and to obtain relevant information from them. Courts should prevent such communications, according to this view, only if there are specific reasons for believing that they will result in some form of abuse of the legal system. One might also expect that trial courts should show less deference to communications from defendants and defense counsel to members of a potential or certified class. After all, defendants and their counsel have incentive to interfere with the effective formation and prosecution of class actions.

More generally, and somewhat less speculatively, *Gulf Oil* appears to adopt an interpretive strategy similar to Judge Easterbrook's in *Rand* and Judge Adams' in his concurrence in

[83] Id. at 104.
[84] Id. at 101 ("The order interfered with [plaintiffs'] efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for [plaintiffs], as the class representatives, to obtain information about the merits of the case form the persons they sought to represent.") (footnote and citations omitted).
[85] Id. at 101-02, 104.

Corn Derivatives. That strategy focuses on the policies behind Rule 23 and, taking a purposivist approach, seeks to pursue those policies while minimizing the risk of ethical abuses. It does not worry overly much about the wording of particular ethical rules. Indeed, *Gulf Oil* did not attend to such wording *at all*, even though the Model Code at the time addressed both solicitation[86] and the "no contact rule."[87]

One might imagine that later case law addressing communications and ethics in the class context would have followed the lead of *Gulf Oil* and reasoned in a manner akin to Judge Easterbrook in *Rand* and Judge Adams' concurrence in *Corn Derivatives*. One would be wrong. To be sure, a minority of courts—and some scholars—have promoted the sort of practical, policy-driven approach that *Gulf Oil* modeled. But most courts have adopted a more formalistic stance, attempting to apply the ethical rules in a wooden manner in the class context without adaptation or modification.[88]

Most courts after *Gulf Oil* have taken a formalistic approach to communications in class actions. Their reasoning has proceeded in two steps. First, they typically ask whether absent class members count as clients of class counsel or as represented by class counsel. Second, if the absent class members are clients or are represented, then and only then the relevant ethical provisions apply. The "no contact rule," for example, extends only to a person "represented" in the matter at issue. Similarly, the limitations on solicitation apply only to "potential clients," not to existing clients.

In part as a result, most courts have drawn a line between class pre-certification and classes post-certification. They have reasoned—or at least concluded (their reasoning is sometimes quite thin)—that absent class members are not the clients of or represented by class counsel until a court certifies a class.

The consequences often appear exactly backwards from the perspective of policy. Those least likely to serve the interests of class members are most free to communicate with them. Defendants and their lawyers seeking to pursue their own interests—and, given the adversarial nature of litigation, to

[86] See, e.g., DR 2-103(A), DR 2-103(C)(1), and DR 2-103(D)(4)(b) & (c).
[87] See DR 7-104. As noted above, however, the Court did cite this provision in its final footnote. See 452 U.S. at 104, n. 21.
[88] See generally Debra Lyn Bassett, Pre-Certification Communication Ethics in Class Actions, 36 Ga. L. Rev. 353 (2002).

undermine the interests of class members—have been free to communicate with them. Named plaintiffs and their lawyers seeking to protect the interests of class members have often been unable to communicate with them.

None of these questionable consequences follow from the reasoning of the Supreme Court in *Gulf Oil*. To the contrary, *Gulf Oil* employed a much less formalistic approach to determining the role of ethics in the class context and suggested a much greater sensitivity to the differences between when plaintiffs' lawyers and defense lawyers communicate with absent class members.

III. Conclusion.

We should read the decisions addressing tensions between Rule 23 and ethic codes as a whole rather than treating them as discrete topics. When we do, we reach some valuable conclusions. First, courts can and should adapt the ethical rules in the class context when doing otherwise could undermine the policies underlying Rule 23. Second, in adapting the ethical rules, courts should take a pragmatic approach, one that privileges substance over form and ensures that class actions can vindicate the rights of class members as effectively as is practical.