

PRACTICAL CONSIDERATIONS IN SELECTING CLASS
REPRESENTATIVES, AND MANAGING THEIR
EXPECTATIONS IN LITIGATION AND SETTLEMENT*

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I. INTRODUCTION

The named plaintiffs play a crucial role in successful class actions.¹ Especially at the outset, their claims will shape and define the litigation, the complaint, and the policy, pattern, or practice claims asserted on behalf of the class. Their individual circumstances will determine jurisdiction and venue. They must have standing, and their claims must withstand a motion to dismiss. Those claims also must support class certification as common and typical of the class, and the named plaintiffs must be free of conflicts in relation to other class members and otherwise be adequate representatives.

Beyond the requisites for certification, the named plaintiff must actually and accurately represent the interests of the class by participating effectively with counsel in prosecuting the case, considering settlement, and fashioning relief. Further, a plaintiff's ability to characterize and communicate the "story" behind the case, to act as the public face and voice of the class, can greatly enhance the power of litigation. Thus, counsel should give careful attention to these issues in the selection of named plaintiffs, to the extent real choices are available.

Circumstances may not always permit choices among prospective named plaintiffs, particularly where there are administrative prerequisites or fear or reluctance among the affected class. In the absence of a truly qualified named plaintiff, the only choice may be not to file; avoiding the risk of damaging the interests of the class or a ruling making certification more difficult until a suitable candidate is presented. Class certification, in some circumstances, is becoming more challenging, and care must be taken to avoid unnecessary adverse decisions.

Whether selecting among a number of candidates or assessing the only available plaintiff, potential named plaintiffs must be afforded the opportunity to understand fully the role they will play on behalf of others and its demands and limited benefits. Selection is a two-way street, and a potential plaintiff needs to self-select with a full understanding of the responsibilities involved and commitment to see them through. After they are identified, counsel must afford named plaintiffs the support and preparation necessary to play that role well.

1. In discussing class actions, this paper cites primarily to the Federal Rules of Civil Procedure and relevant federal law, although the principles discussed are generally applicable to class actions under state law and procedures.

Creating an understanding of roles and expectations in advance and providing continuing attention also serves to establish an effective relationship between counsel and the named plaintiff – a vital ingredient to successful prosecution and resolution of the litigation. A class action is something of a joint venture. Shared understandings of the goals and burdens of the litigation, as well as the responsibilities involved, leads to more effective and productive communication, decision-making and trust throughout what likely will be a lengthy and complex process.

II. SELECTION CONSIDERATIONS

A. Legal Issue

There are a number of considerations that are necessary and useful in identifying those who might best play the role of a named plaintiff in a class action. Even where no choice is available, these same factors should be investigated and analyzed to ensure that the requisites for class certification can be satisfied and the representation will be most effective.

1. Individual Standing

In class actions, as in any case, it is essential that the plaintiff have standing to assert the claims at issue. Without individual standing, plaintiffs cannot seek relief for themselves or others.² The named plaintiffs must have individual standing to assert their claims before they can be considered proper representatives of others with whom they share their claims. Thus, potential plaintiffs should be scrutinized carefully to assure that they actually have standing.

If they lack any element of standing, or solid proof of facts that would establish standing – such as applying for a position or asking for training or a promotion – those vulnerabilities often can be cured before filing the action. And because standing commonly is determined at the time the complaint is filed, attention to its requisites at the outset can avoid needless problems and complications after a case is filed.

The named plaintiffs' standing should be relatively simple to state or establish. Otherwise, the complaint may invite a motion to

2. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

dismiss or the equivalent of a motion for summary judgment and the need for affidavits, discovery, and litigation over facts at the very outset of the case. Such a motion may jeopardize or cast doubt on the class action and exhaust valuable time and resources before it even gets started. There are cases in which years have been consumed over litigation, including appeals, on issues of plaintiffs' standing, without ever getting to the question of certification or the issue of the defendant's conduct.

Thus, where at all possible, select named plaintiffs whose standing can be made apparent from the face of the complaint. To the extent that establishing standing requires spelling out facts in the complaint beyond the minimal requisites of notice pleading, it is more than worth the effort. Thus, plaintiffs whose standing can be established without reference to matters that would require additional factual proof or assumptions are preferable. Similarly, the legal questions associated with their standing should be relatively straightforward and capable of being framed in the complaint. If the facts giving rise to standing are more complex and detailed than can be plead in the complaint, it is vital to make sure the plaintiffs can articulate the basis for standing in affidavits and depositions.³

Individual standing requires: (1) an allegation of personal injury, (2) that is fairly traceable to the allegedly unlawful conduct of the defendant, and (3) that is likely to be redressed by the relief requested.⁴ A detailed discussion of the elements of standing or their application to the variety of claims presented in employment-related class actions is beyond the scope and purpose of this paper. Rather, the purpose is to suggest that counsel examine and confirm that each prospective named plaintiff's circumstances satisfy requirements for standing, and assess how simply and clearly those requisites can be demonstrated.

2. Organizational Plaintiffs and Standing

In appropriate circumstances, organizations can have derivative standing to bring class actions. Associational or representational standing exists where: (1) an organization's members would otherwise have standing in their own right, (2) the interests to be protected are

3. *See, e.g.*, *Thomas Cty. Branch of the NAACP v. City of Thomasville Sch. Dist.*, 187 F.R.D. 690, 693-95 (M.D. Ga. 1999), *quoted in* 1 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 2.6 (4th ed. 2002).

4. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991).

germane to the organization's purpose, and (3) neither the claim nor the relief requested requires the participation of individual members.⁵ The first two criteria are relatively straightforward inquiries and often can be satisfied. But whether the claim or relief requires participation of individual members is a more complex question, and calls for careful scrutiny. Although actions for injunctive, declaratory or other prospective relief often will not require individualized participation, they may if the claim is based on facts that require the participation of members. Actions for monetary relief likely will require individualized inquiry into injury and damages.⁶ Thus, careful examination and analysis is necessary before selecting an organization as a named plaintiff.

But the effort to investigate associational standing can be worthwhile. Nothing can replace the resources that a membership organization can provide in locating plaintiffs or witnesses and mobilizing participation in and support of a case. Often, such an organization will want plaintiff status – and the publicity and recognition that go with it.

If the claims or relief sought preclude associational standing, however, there are other available options for an organization to be involved in and obtain benefits from the litigation. First, the organization may have standing in its own right if it suffers an injury as a result of the defendant's conduct, such as reduced membership. Where that is the case, the organization can be a plaintiff without representative status, along with individuals who are class representatives. Second, if individuals also are participating as named plaintiffs, the concern with individualized participation in assessing the organization's associational standing may be alleviated.⁷ Third, if the organization has its own attorneys, it may wish to participate as counsel for the class, rather than as a party. In either of these scenarios, the organization can play an important role in stimulating participation in, supporting, and publicizing the litigation, and be recognized for that role. AARP and the NAACP often have played these important roles in class litigation.

5. *Hunt v. Wash. St. Apple Advertising Comm'n*, 432 U.S. 333, 342-343 (1977); *Pennell v. City of San Jose*, 485 U.S. 1, 7-8 (1988) (holding that a landlord's association had standing to challenge a city rent control ordinance because the ordinance's likely enforcement would reduce rents for the association's members).

6. *See Warth v. Seldin*, 422 U.S. 490, 515-17 (1975).

7. *See Arkansas Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971).

3. Rule 23 Standards

Whether the plaintiff has individual standing to assert claims, and whether a named plaintiff is a proper representative to assert claims on behalf of a class are distinctly different questions that should not be confused. Standing is determined under the “case or controversy” standards discussed above. When that threshold has been satisfied, the question whether that plaintiff can assert claims on behalf of a class is determined under the different standards of Rule 23(a).⁸ Those include whether the claims of the named plaintiff are common to and typical of the class and whether the named plaintiff is an adequate representative of the class. Answering these questions involves a determination whether the claims the plaintiff seeks to assert on behalf of the class are the same kind and scope of claims as those the plaintiff can assert individually.⁹

At the core of determining whether a named plaintiff can assert claims on behalf of a class is the requirement that a representative plaintiff be a part of the class and possess the same interest and suffer the same injury as the class members.¹⁰ Thus, the Rule 23 considerations look to whether a named plaintiff’s individual injuries and claims fit the nature and scope of the class injuries and claims. Generally, therefore, a plaintiff denied a promotion has not suffered the same injury and cannot represent those who were not hired; and plaintiffs not meeting qualifications for promotion cannot represent those denied promotions.¹¹

But the question of shared injuries and claims looks also to the mechanisms or practices at work. If the same mechanisms, such as tests, are used discriminatorily to disqualify persons both from being hired and promoted, a plaintiff adversely affected by the tests may represent all so affected. General policies and practices of discrimination also may serve to unite otherwise differing individual and class claims, but care must be taken to identify a mechanism or practice through which the discrimination is effectuated on a class-wide basis, such as subjective decision-making processes. Courts have made clear that being a member of a protected class alone is not sufficient to make one a representative plaintiff for all possible claims

8. FED. R. CIV. P. 23(a).

9. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

10. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

11. *Rodriguez*, 431 U.S. at 403-04.

of discrimination against an employer, and that class claims must be directed at identified discriminatory practices.¹²

A detailed discussion of the application of Rule 23's requisites to particular types of claims is beyond the scope and purpose of this paper. Instead, its purpose is to suggest that in evaluating potential named plaintiffs, careful attention to the individual injuries and claims, and their fit with proposed class injuries and claims, is of vital importance. Conversely, the class injuries and claims to be asserted must be tailored to fit those of the named plaintiff. At least one named plaintiff must have suffered the same injury as a result of a common practice as the class members whose claims he or she seeks to represent. If this requirement is satisfied, then the trial of the plaintiff's claims can be said to present common questions and the Rule 23(a) requirements of commonality and typicality merge with aspects of adequacy of representation, meeting many of the standards for class certification.¹³

a. Commonality

The issue of commonality is determined by whether a trial of the claims of the individual plaintiff will involve questions common to the class, that is, whether the defendant has a common policy, practice, or mechanism that injures the class as a whole.¹⁴ There need be only a single factual or legal issue common to the class, and individual issues related to defenses, the right to recover, and the extent of injury need not defeat certification. However, the closer the fit between individual issues and class issues, the less opportunity for a court to lose sight of the common issues. Thus, identifying named plaintiffs with the greatest commonality and the lowest level of individual questions can enhance the chances of certification.

b. Typicality

Typicality overlaps with commonality, but refers to the nature of the claim – whether it arises from the same practice or course of conduct as that of other class members and is based on the same legal theory.¹⁵ Assessing typicality involves determining whether there is a sufficient interrelationship between the claims of the named plaintiff

12. *Falcon*, 457 U.S. at 156 n.15.

13. *Id.* at 157-58 n.13.

14. *Id.* at 157-58.

15. *Id.* at 157-58 n.13.

and those of the class. A plaintiff's claims are "typical" when the questions common to the class will be decided in the course of determining the plaintiff's claims.¹⁶ Individual questions and defenses, including defenses unique to the plaintiff and differences in amounts of damages ordinarily should not defeat typicality. However, the fewer uniquely individual questions presented in a named plaintiff's circumstances, the lower the possibility of challenges to or problems in establishing typicality.

c. Adequacy

Adequacy looks to whether there are conflicts between the named plaintiff and other class members and whether the plaintiff will vigorously prosecute the class claims. Adequacy overlaps with typicality, but is broader in the sense that it encompasses conflicts among class members with typical claims and the adequacy of counsel. Not all actual or potential conflicts between a named plaintiff and others in the class will constitute inadequacy; they must be material conflicts that go to the common issues in the case. These can include competition for available positions between applicants for employment and incumbent employees, should relief be granted,¹⁷ and conflicting interests in the allocation of available relief.¹⁸

Thus, in assessing potential named plaintiffs, careful examination of the particular circumstances and interests of the individual in relation to the interests of other class members is necessary. For example, if the liability claims of the named plaintiff involve allegations of race discrimination that include differential treatment by gender, conflicts may preclude adequate representation of a class based only on race.

Consideration of adequacy concerns regarding potential named plaintiffs is appropriate and necessary in structuring the case to avoid or address conflict problems. Recognition of conflicts between the named plaintiffs and the class should guide the design and, if necessary, limitation of the class definition. In addition, proposing initial subclasses can serve to address conflict problems, including conflict issues among named plaintiffs. Finally, if available, opt-out provisions may serve to address potential conflicts.

Adequacy is also assessed by matters extrinsic to any relationship

16. *Id.* at 159 n.15.

17. *Gen. Tel. Co., v. EEOC*, 446 U.S. 318 (1980).

18. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

between the claims of the named plaintiff and the class. Unique relationships between the named plaintiff and putative class counsel can render a plaintiff inadequate. For example, a father-son relationship risks a heavy reliance on class counsel, and a spousal relationship risks not only unusual reliance, but also involves a shared financial interest that creates a conflict between the named plaintiff and the class.¹⁹

B. Potential Plaintiffs' Individual Abilities

In addition to considerations comparing the claims of potential named plaintiffs to those of the class, the adequacy of a named plaintiffs under Rule 23(a)(4) and practical considerations regarding their desirability involve individual abilities and characteristics.

1. Ability to Understand and Articulate Class Claims

Lack of knowledge about the law or the facts necessary to prove the claims generally is not a basis on which a plaintiff is found inadequate.²⁰ While one need not be educated or particularly knowledgeable to be an adequate representative, a basic level of understanding of and familiarity with the claims, the ability to speak to facts that support the claim, an appreciation of the purpose of the case, and a willingness to prosecute the case on behalf of others are necessary.²¹

There are clear advantages to representing a knowledgeable plaintiff who can assist counsel in investigating and understanding the facts and circumstances underlying the claim, and who articulately can describe the alleged violation and injuries in depositions and at trial. Where a choice can be made, selection of such a plaintiff is wise. Where no choice is available, class counsel should make every effort to educate and inform the named plaintiff about the legal basis for the claim and factual proof required, as well as the obligations of a named plaintiff. Troublesome points in opposition to certification are far less likely where the named plaintiff's deposition adequately covers these matters.

19. See *Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 309-10 (D. Mass. 1987); see also *Smith v. Gulf Oil Corp.*, 30 Fair Empl. Prac. Cas. (BNA) 591 (S.D. Tex. 1977).

20. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 372-73 (1966).

21. See *In re Storage Tech. Corp. Sec. Litig.*, 113 F.R.D. 1175 (D. Colo. 1986); *Malloy v. Eichler*, 628 F. Supp. 582, 589 (D. Del. 1986).

2. Ability to Participate in Discovery and Depositions

Adequacy requires that the plaintiff participate in discovery and appropriate proceedings.²² Persons whose depositions have been difficult to schedule or who have not attended hearings or otherwise participated in discovery may be disqualified.²³

Assessing a prospective plaintiff's ability, availability, and interest in participating in discovery and the litigation is vital. Effectively managing a class action requires ready availability of named plaintiffs for a variety of purposes, discovery being at the top of the list. The named plaintiff may be a most articulate representative, but he or she must be available and willing to devote the necessary time and attention. Regardless of abstract standards of adequacy, it is extremely difficult to prosecute an action where the named plaintiff will not respond to interrogatories or document requests, fails to attend depositions, and does not appear at conferences and hearings. To avoid these problems, it is important to ensure that a potential named plaintiff have both the availability and commitment necessary for the role, as well as other necessary and desirable characteristics.

3. Ability to Work with Counsel

Adequacy requires that a named plaintiff be able to make non-delegable decisions about the conduct of the litigation. That necessitates a level of understanding of the claims and litigation described above. While a representative plaintiff can and should rely on the advice of properly qualified and disinterested counsel, also an element of adequacy, blind adherence to or total dependence on counsel for decisions renders a plaintiff an inadequate representative.

As a practical matter, informed, thoughtful and creative named plaintiffs can contribute substantially to the prosecution of a class action and can effectively assist counsel. While counsel may make a number of decisions regarding the course of the litigation, the informed participation of plaintiffs enhances the decision-making process by bringing different sources of information and perspectives to the questions and keeping the interests of those affected at the fore. Further, collective plaintiff-counsel decision-making helps to build and shape consensus and understanding that may be an

22. *See, e.g.,* *Abelson v. Strong*, Fed. Sec. L. Rep. (CCH) ¶93, 365 (D. Mass. 1987).

23. *Kline v. Wolf*, 88 F.R.D. 696, 700 (S.D.N.Y. 1981).

important asset when facing difficult decisions, such as continuing to litigate or settling, and explaining such decisions to unnamed class members.

4. Ability to Withstand Pressures

All litigation involves a variety of sources of pressure on the parties, and those generally are magnified for a named plaintiff in class litigation. An effective named plaintiff is one who can participate in discovery and trial while resisting those pressures. Thus, plaintiffs must be able to assert and defend their claims and those of the class without weakness or intimidation against a variety of challenges by a defendant. Named plaintiffs also must be able to resist potentially lucrative offers to settle their individual claims at the expense of their duties to the class. At the same time, they must be able to withstand pressures from others within the class to take unreasonable or unwise positions.

The individual qualities that equip a person to withstand such pressures are difficult to describe or catalogue. Often the manner in which a person has responded to the adverse circumstances giving rise to the action is an indicator of how that person responds to pressure or intimidation. Whatever the method or source of such an assessment, it is important to consider these factors in identifying named plaintiffs.

5. Ability to Lead or Unite the Class

A class action ordinarily is quite different from and not well suited to an effective organizing campaign. At the same time, identifying class members who will participate as plaintiffs, witnesses, or sources of documents and information in investigating the case can benefit from the leadership of a named plaintiff. Leadership also finds expression in a genuine interest in and commitment to address the issues affecting the class. Where this interest is recognized by other class members prior to or over the course of the litigation, the named plaintiff can establish credibility important to making, communicating and gaining acceptance of critical decisions, such as those involving the definition of the class, narrowing or focusing the claims, or reaching a settlement.

As with other characteristics, assessing the leadership qualities of individuals often is not easily done, but it is worth the undertaking. Leadership that emboldens or stimulates class members to participate

in the case can directly increase the evidence available to prove claims, cross-examine witnesses, and evaluate remedial devices. Leadership through credibility can make all the difference in leading the class to accept the sometimes difficult judgments necessary to settle class claims.

6. Ability to Participate in Settlement Process

Proposing or evaluating settlement offers can be difficult and complex. The active and informed participation of named plaintiffs is of critical importance. Assessing the ability to participate in that process involves several considerations. A plaintiff with a sufficient understanding of the nature and scope of the practices and policies being challenged can identify crucial points where changes will have particularly effective remedial results. A plaintiff with a sound understanding of the objectives of the litigation, together with an appreciation of the relative risks and burdens of a litigated decision and the potential benefits of compromise, also can be a most effective participant in the settlement process. Credibility with the class, including the ability to seek and obtain input in striving for the best outcome available, also is an important asset.

The ability to make pragmatic assessments and judgments may be a discernable feature of an individual's personality and, as such, is a very desirable criterion in selecting a named plaintiff. Apart from a plaintiff's individual characteristics, experience in an informed and collaborative plaintiff-counsel decision-making process, discussed above, can help to develop these skills and an important sense of perspective during the life of the case.

7. Ability to Deal with the Media

An ability to interact effectively with the media is related to the ability to articulate claims in legal proceedings, but requires that one be able to communicate in a way that tells the "story" of the case in a relatively simple and compelling way. It also requires a presence of mind to know how to speak with the media without making either concessions or overstatements that could create problems in discovery or at trial. Also important is an understanding of the role and objectives of publicity, with a proper respect for the interests of the court and the judicial process.

These attributes are not particularly common among attorneys, and apart from organizational plaintiffs, may be relatively rare

qualities in a plaintiff. But consideration of these capabilities is worthwhile. Media will speak with attorneys but always will ask for “real people” to tell their stories, and those stories can be compelling. Particularly with the skepticism toward lawyers and a sense that lawyers are only “in it for the money,” having a plaintiff with the ability to communicate with the media can be a real advantage. Persons with experience in customer relations or with receiving public attention, even if only written up in company publications, may have the skills and capacity to speak with the press. Good candidates not only have the ability to project the interests of the employees in the class, but are savvy enough that counsel need not be a part of the interviews.

C. Handling Expectations of Named Plaintiffs

The criteria discussed above represent both judicially required and desirable attributes and behaviors of named plaintiffs. But, plaintiffs have, and should have, expectations of class counsel and the judicial process. Identifying these expectations at the outset of the relationship is critically important. Fulfilling and managing these expectations is even more important. Several techniques that can help to manage expectations are discussed below.

1. Duties of Representative Plaintiffs and Class Counsel

As indicated above, both the responsibilities of a representative plaintiff and an individual’s willingness and capacity to carry them out should carefully be discussed and analyzed in connection with the selection of or agreement to represent the plaintiff. Memorializing those responsibilities and expectations in the retainer agreement serves to emphasize their importance, explicitly make them a condition of the relationship and serve as a point of reference for identifying and resolving issues throughout the litigation. Some sample provisions of retainer agreements regarding these expectations are attached as examples.

Rule 23 also encompasses responsibilities that class counsel owes to class members and, at least by implication, to named plaintiffs in properly carrying out their roles. These include educating the plaintiffs about the legal standards and processes and informing them about the various proceedings, requirements, and issues arising in the case, and of its progress. Counsel’s obligations also include providing preparation and assistance to plaintiffs in exercising their obligations

to participate in the proceedings and to make decisions in the prosecution of the case. These, too, not only should be spelled out at the outset, but engrained in practice as the case proceeds.

Monthly conference calls with named plaintiffs to inform them of upcoming matters in a case, to discuss important questions and issues and to make needed decisions is one method of providing plaintiffs with support in their roles and establishing a productive client attorney relationship. Websites that post pleadings and orders and discuss – on a non-privileged basis – the progress and course of the case also are very useful in keeping not only the named plaintiffs but class members informed of the course of the litigation. Whatever the means, communicating fully and frequently with named plaintiffs and, where possible, class members is important to fulfilling the Rule 23 duties of both named plaintiff and class counsel.

2. Expectations Regarding Compensation

Potential named plaintiffs understandably want to know the effect, if any, that participating in a class action or serving as a named plaintiff will have on their potential recovery. They may approach this question with varying expectations. These questions should be addressed in a straightforward manner. Any expectations that the role of named plaintiff will lead to a windfall, or that claims can be sacrificed after certification of the class for an enhanced individual award, should not only be dispelled but considered a negative factor in assessing fitness for named plaintiff status.

Named plaintiffs are not entitled to a recovery different from that of other class members with similar claims. The fact that their claims likely will be the subject to discovery or litigation may serve to enhance or diminish the strength of their claims relative to other class members, to the extent that individualized relief is afforded in a litigated judgment. However, class action settlements typically include enhanced recoveries or bonuses for the efforts of named plaintiffs in representing the interests of the class. Courts have taken a variety of views and approaches to assessing and approving or disapproving of these enhancements. Those that recognize and approve of enhanced settlement awards generally have done so where those awards are not enormously disproportionate to the recoveries of other class members, or the total settlement recovery can be justified by the strength of their claims or demonstrable efforts, expenditures, or risks

incurred on behalf of the class.²⁴ Courts have been less inclined to permit enhanced awards for class members who are not named plaintiffs, denying such awards, limiting them to reimbursement of expenses, or suggesting that any compensable efforts should be paid from attorney's fees.²⁵

Plaintiffs also should be informed that recoveries may be subject to income taxation and that other payroll taxes may be deducted from awards. Unless you also have a tax practice, it is advisable to inform plaintiffs to seek appropriate tax advice.

3. Expectations Regarding the Risks and Burdens of Litigation and Potential Benefits of Settlement

The only way to approach class action litigation is to expect and be prepared to litigate the claims to conclusion. That means a commitment to the often very substantial expenses and efforts necessary to see a case through. Suggesting anything less to a prospective named plaintiff may create false expectations. At the same time, the risk and cost of litigating, in time and expense, must be weighed against the potential for settlement and the benefits of a negotiated resolution. Creating appropriate expectations in this respect also should begin as one aspect of forming the attorney-client relationship prior to filing an action.

Where counsel is advancing the costs of the litigation and the named plaintiffs do not appreciate or believe that they share in those risks and burdens, disputes over important litigation decisions or settlement proposals can arise. Responsible decision-making for the class and appreciation of terms on which class counsel agree to undertake litigation are not well served by the impulse to have one's "day in court" at any cost. While, in the exercise of fiduciary responsibility to the class, counsel can part company with a named plaintiff in strategic decisions or proposing a settlement, the legitimacy and strength of a position is enhanced when there is agreement.

As with other obligations and considerations in assuming a representative capacity, discussion of the risks and burdens of litigation should begin at the outset and continue throughout the

24. See, e.g., *Staton v. Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003).

25. See Jocelyn D. Larkin, *The Impact Fund, Incentive Awards To Class Representatives In Class Action Settlements*, at <<http://www.impactfund.org/pages/articles/incentiveawards.doc>> (last viewed Oct. 16, 2006).

named plaintiff-class counsel relationship. Frank discussions about the value of potential settlement scenarios and an appreciation of the risk and cost of a litigated resolution should be included in an assessment of potential named plaintiffs. Ongoing communications should address not only the progress of the case, but its weaknesses, risks, and costs.

These matters also may be given explicit treatment in retainer agreements to ensure that they are discussed at the outset of a case and as a subsequent point of reference. Other techniques may be appropriate to make sure plaintiffs understand or share in the risks. For example, providing plaintiffs with regular statements of the costs incurred in the litigation may serve to foster an appreciation of that burden. Named plaintiffs may be asked to “invest” in the case and share the burden by making regular payments toward expenses. While these payments may do little to offset the expenses of the case, even small payments from individuals demonstrate that continuing to litigate has a shared cost. Alternatively, provisions for mediation of disputes may be included.

Finally, discussing the realistic objectives of the litigation is important in assessing a potential named plaintiff. A continuing focus on practical results to be obtained from the litigation in communications with plaintiffs and class members alike will serve to counteract unrealistic expectations regarding an outcome and build a solid basis to guide decisions on litigation issues and consideration of settlement proposals. Attention to achieving this end also will serve to keep the interests of the class at the forefront of deliberations between class counsel and the named plaintiff.

III. CONCLUSION

Assessing the full range of ingredients that comprise a legally sufficient and effective class representative can help avoid problems in obtaining class certification and prosecuting a class action. Written materials describing the duties and expectations of class representatives and class counsel can serve as a basis for identifying those ingredients and incorporating them into the named plaintiff-class counsel relationship. Exploring those issues in discussions with potential class representatives, at the outset and throughout the litigation, can equip both the named plaintiffs and class counsel better to fulfill their roles to represent and act in the best interests of the class.

APPENDIX

Examples of Terms of Retainer Agreements Addressing Expectations and Duties of Plaintiffs and Relationship with Class Counsel²⁶

- The Plaintiff has read the attached summary of “Duties of Class Representatives.”
- A class representative is not required to be particularly sophisticated or knowledgeable with respect to the subject of the lawsuit. However, he or she should be interested on a continuous basis in the progress of the lawsuit, and must make every effort to provide his or her lawyers and the court with all relevant facts of which he or she is aware.
- A class member has claims, which are typical of those of the class, and thus involve *common issues* of law or fact. For example, as a class representative, your claims against the defendants are *typical* of the class claims against them.
- A class representative represents the interests of all members of his or her class in litigation to recover money damages for the class.
- A class representative always considers the interests of the class just as he or she would consider his or her own interests.
- A class representative participates in the lawsuit, such as by testifying at deposition and trial, and assisting counsel in accurately answering written interrogatories and producing requested documents, and by keeping generally aware of the status and progress of the lawsuit.

26. The terms of any proposed retainer agreement, including these, should be scrutinized for compliance with the law and the ethics rules of the relevant jurisdiction(s). The inclusion of various terms in this appendix should not be interpreted as any endorsement.

- A class representative recognizes and accepts that any resolution of the lawsuit, such as by settlement or dismissal, is subject to court approval, and must be designed in the best interests of the class as a whole.
- A class representative accepts the possibility that, in the event the case is lost entirely, the defendants may ask the court to assess certain of defendants' costs of litigation against the class representatives.
- A class representative volunteers to represent many other people with similar claims and damages, because he or she believes that it is important that all benefit from the lawsuit equally, because he or she believes that a class lawsuit will save time, money, and effort, and thus will benefit all parties, and the court, and because he or she believes that the class action is an important tool to assure honesty in the marketplace, compliance with the law, and to promote integrity and truthfulness in the marketing of investments.

Or

- Plaintiff understands that this case will be filed as a class action. Plaintiff understands that if he or she is allowed by the Court to bring a class action, the lawyers will represent not only plaintiff, but also the other members of the class and that the lawyers and plaintiff will owe a duty to represent class members and protect their interests.
- Plaintiff further understands that his or her claim and defense will be brought on behalf of a class as well as him or herself, that he or she has a responsibility to act in the best interests of the class and not just in his or her best interests, and that any acceptable settlement or order must make adequate provision for the class he or she represents, as well as for him or herself.
- Plaintiff understands that the lawyers must also represent

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the interests of the class, and plaintiff will be guided by the views of plaintiff's counsel with respect to any settlement of class claims.

- Plaintiff further understands that if his or her attorneys should determine on the basis of newly discovered facts or changed circumstances, that in their professional legal judgment his or her claims or defenses should be dismissed, settled or otherwise disposed of, and if he or she will not consent to such settlement, dismissal, or other disposition, his or her attorneys reserve the right to withdraw from further representation of him or her in connection with these claims or defenses.
- Plaintiff also understands that his or her attorneys reserve the right to withdraw from his or her representation at any time if he or she is untruthful or fails to cooperate.
- Plaintiff will keep his or her attorneys informed of any changes in his or her address or telephone number, and will cooperate in attending any court proceedings where his or her attorneys tell him or her that his or her presence is needed, in providing any information his or her attorneys may need about his case, and in attending meetings with his or her attorney as necessary.
- Plaintiff further understands the need to respond quickly and accurately to discovery requests, and to keep his or her attorney informed of any changes in his or her circumstances or facts that he or she knows which might affect his or her claim.
- Plaintiff acknowledges and understands that any lawsuit is inherently uncertain and it is therefore possible that he or she may not achieve any of the relief sought in his or her complaint.
- Plaintiff understands that his or her attorneys reserve the right to determine all litigation tactics on behalf of plaintiffs, including [Rule 23 only] adding other class

representatives to the matter and [all plaintiffs] bringing in additional law firms to work with the plaintiffs on the case.

Or

- The client agrees to provide all information and papers requested by the attorneys and to cooperate fully in any proceedings related to the case, including but not limited to attending scheduled meetings and hearings, answering interrogatories, appearing for depositions, and participating in judicial or other proceedings as may arise from time to time in the case. The client also agrees not to misrepresent or conceal any facts when communicating with the attorneys. The client agrees not to communicate with the court or administrative tribunal, with other parties to the case, or with the news media, without the attorneys' consent.
- The client understands that if the defendant prevails in the case, the defendant may recover certain of its costs of litigation from the client.
- If the defendant prevails and also demonstrates that the action was frivolous, unreasonable, groundless, or litigated in bad faith merely to harass or oppress the defendant, he or she may also recover his or her attorneys' fees from the client.
- The client and the attorneys are agreed that, should it become possible to settle the case on reasonable terms, this course should be taken.
- They also agree that the reasonable settlement value of the case depends on the probability of winning and on the amount of damages that will likely be awarded.
- The client understands that perfect justice cannot be achieved in any legal system, that even cases that appear strong can often be lost, and that sheer chance and the prejudices of judges and jurors affect the outcomes of trials. In one sense, the attorney-client relationship

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represents a partnership to achieve an economic result, and the “partnership” created by this agreement recognizes no economic value in rejecting a reasonable prospective settlement merely in order for the plaintiff to have “his day in court.”

- The attorneys may withdraw from representing the client if:
 - The client indicates an intention to give false testimony, or is found to have misrepresented or concealed facts;
 - The client directs the attorneys to file any paper, or insists on advancing any claim or defense that the attorneys reasonably believe might subject them to sanctions;
 - The client makes an economically unreasonable decision to reject a prospective settlement of the case.
- If the attorneys withdraw they will give the client reasonable advance notice in writing of their intentions.
- Of course, the client may discharge the attorneys, or direct the attorneys to discontinue the case, at any time. If the attorneys have appeared as counsel of record for the client in any court they will promptly move for an order in accordance with the client’s decision to discharge them or discontinue the case.
- The client, by law, has the right to make all decisions regarding the settlement of the case and the attorneys will not settle the case on the client’s behalf without the client’s prior authorization. If the client settles the case, even after the termination of representation, the client will inform the attorneys at the earliest possible moment.