Avoiding Legal Ethics Violations in Class Actions

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"We may trust the man to help his fellow man if by doing so he helps himself – particularly if only by helping others will he be able to protect and promote his own interests. . . . Our system of justice tolerates and at times favors litigation through champions who stand or fall with the whole group."

- A. Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609, 610 (1971).

"If we desire respect for the law, we must first make the law respectable."

- Louis D. Brandeis

I. Introduction

1. Lawyers assume several fiduciary duties upon taking on a new client, such as the duty to:

   (1) to provide competent representation;
   (2) to appropriately exercise and allocate control;
   (4) to communicate;
   (5) and
   (6) to resolve conflicts of interest.

   See 22 N.Y.C.R.R. 1200.0.

2. Several ethical issues arise that are peculiar to litigation of class action lawsuits, and some of the duties outlined above pose particular concerns.

3. This presentation will focus on, among other things, the duties of exercising appropriate control, engaging in proper communications, and navigating conflicts of interest in the context of the key stages of litigation of class action lawsuits.

II. Prefiling and Precertification Stages

1. **Preliminarily** - Some class actions that are barred under the CPLR are not necessarily barred in federal court

A. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)-

i. In this case, the District Court dismissed the matter pursuant to CPLR § 901(b), "which precludes a suit to recover a 'penalty' from proceeding as a class action," and the Second Circuit affirmed. *Id.* at 397-98.

ii. The Supreme Court, Justice Antonin Scalia, reversed and remanded the matter, noting that while "keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping . . . a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it." *Id.* at 415-16 (quoting *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965)).

2. **Communication**

A. Considerations for Plaintiffs' counsel

i. For plaintiffs' counsel, ethical considerations regarding communication revolve around the rules against soliciting new clients. *See Alfaro v. Vardaris Tech, Inc.*, 69 A.D.3d 436, 436 (1st Dep't 2010) (citing *Kleiner v. First Nat'l. Bank of Atlanta*, 751 F.2d 1193, 1202-1203 (11th Cir.1985); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981), *appeal dismissed* 659 F.2d 1081 (6th Cir.1981)); *see also* Jack A. Raisner, Ryan A. Hagerty, & Lee Schreter, *Ethical Issues*, American Bar Association, Section of Labor and Employment Law, Federal Labor Standards, Legislation Committee, Key West, Florida, February 22-24, 2012 (discussing ethical issues in soliciting clients in the class action context).

ii. Certain types of communication are less susceptible than others to a finding of improper solicitation, such as First Class mail and email. *See Rosenbohm v. Cellco P'ship*, Case No. 2:17-cv-731, 2018 WL 4405836, at *4 (S.D. Ohio Sept. 2018).

iii. Solicitation of "professional employment for the purposes of filing a class action" is analyzed under the "adequacy" requirement of class certification, and can be a violation of the Rules of Professional Conduct. *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17cv2335-GPC(MDD), 2018 WL 6300479, at *7 (S.D. Cal. Nov. 29, 2018); *Cleven v. Mid-America Apartment Cmtys, Inc.*,

No. 1:16-CV-820-RP, 2018 WL 4677891 (W.D. Tx. Sept. 5, 2018); *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 535 (N.D. Tex. 2005) (listing solicitation as a factor that "tend[s] to weigh against a finding of adequacy.").

a. Such violation does not, however, necessarily render a plaintiff inadequate to represent the class. *See id.*

iv. Sanctions for improper solicitation include

a. Denial of class certification. *See Cleven*, 2018 WL 4677891; *Defendant First American Title Insurance Company's Memorandum in Support of Its Motion to Compel*, *Piazza v. First Am. Title Ins. Co.*, No. 306-cv-765 AWT, 2008 WL 627844 (D. Conn. Jan. 8, 2008).

b. Orders directing corrective and curative notice to solicited class members and that any future advertisements be "prominently marked as such" to prevent "confusion with court-authorized notices." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1246 (N.D. Ca. 2000) (court ordered such notice where solicitations were "disruptive of the orderly class action," and labeled as "notices" without court approval).

c. Order to remove contact information from notice. *See Castillo v. Perfume Worldwide Inc.*, CV 17-2972 (JS) (AKT), 2018 WL 1581975, at *9 (E.D.N.Y. Mar. 30, 2018).

v. **ABA Model Rules of Professional Conduct: Rule 7.3: Solicitation of Clients**

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

vi. Solicitation of putative class members is not *per se* unethical so long as counsel does not violate relevant ethical rules in the way he or she communicates with those individuals. *Bowen v. Groome*, No. 11-139-GPM, 2012 WL 2064702, *1 (S.D. Ill. June 7, 2012) ("Solicitation of a named plaintiff does not in and of itself foreclose counsel's adequacy.") (citing *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), as modified, Sept. 22, 2011); *Jim Ball Pontiac-Buick-GMC, Inc. v. DHL Express (USA), Inc.*, No. 08-CV-761C, 2011 WL 815209, at *5 (W.D. N.Y. Mar. 2, 2011) ("Defendant further states that counsel solicited plaintiff to be the class representative, an action it deems 'ethically questionable' and intended primarily to advance the interests of the law firm rather than the class members. Having considered the objections of defense counsel, the court nonetheless concludes that the class is adequately represented by plaintiff's counsel."); *Kennedy v. United Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 197 (S.D. Ohio 2002); *cf. Ramos v. Banner Health*, 325 F.R.D. 382, 394 n.6 (D. Colo. 2018) ("Plaintiffs' supplemental briefing also argues that their advertisement did not constitute an

improper or unethical 'solicitation,' and that a prohibition against similar advertisement would undermine ERISA's purposes. These arguments have little bearing on the present Rule 23 analysis, and the Court takes no view of whether there was anything improper about counsel's advertisement.") (citation omitted*); Spagnuoli v. Louie's Seafood Restaurant, LLC*, 20 F. Supp. 3d 348, 358-59 (E.D.N.Y. 2014) ("[E]ven assuming that [plaintiff's law firm] did improperly solicit clients, such a violation of the NYRPC would not, in the Court's view, support disqualification here …. [T]he Court has not discovered any court within this Circuit that has disqualified an attorney when confronted with similar circumstances.") (citation omitted); *see* William B. Rubenstein, Newberg on Class Actions, Ethical Concerns In Class Action Practice, § 19:4 (Westlaw, Nov. 2018 Update).

vii. Federal Rules of Civil Procedure Rule 23 has been used to address alleged improper solicitation of putative class members in the context of determining whether to certify a class. *See Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323-24 (11th Cir. 2008), declined to extend *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012); *cf. Ramos*, 325 F.R.D. at 394 n.6; *Spagnuoli*, 20 F. Supp. 3d at 358-59; *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 556 (S.D.N.Y. 1995) ("While some courts have held that the ethical conduct of counsel is relevant to the issue of adequacy of counsel, there is no unquestionable proof on this record that such improper solicitation has occurred.") (citing *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568 (N.D.N.Y. 1979); *see also* William B. Rubenstein, Newberg on Class Actions, Ethical Concerns In Class Action Practice, § 19:4 (Westlaw, Nov. 2018 Update).

a. **Federal Rule of Civil Procedure Rule 23: Class Actions (recently amended)**

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)**--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)**--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. **The notice may be by one or more of the following: United States mail, electronic**

means, or other appropriate means.[1] The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

[1] It remains to be seen what the limits will be with respect to notice given via "electronic" or "other appropriate means," e.g. whether notice by text message or even social media would be considered "appropriate."

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--**or a class proposed to be certified for purposes of settlement**--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal **if giving notice is justified by the parties' showing that the court will likely be able to:**

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate **after considering whether:**

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). [**removed language: "; the objection may be withdrawn only with the court's approval."**] The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) **Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:**

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, **but not from an order under Rule 23(e)(1)** [**removed language: "if a petition for permission to appeal is filed."] A party must file a petition for permission to appeal** with the circuit clerk within 14 days after the order is entered, **or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf.** An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and

the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

B. Considerations for defense counsel

i. Issues for defense counsel revolve around rules prohibiting communication with represented parties

ii. ABA Model Rules of Professional Conduct:

Rule 4.2: Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

C. **At this point the key questions become: When does representation begin, and up to what point is defense counsel permitted to communicate directly with class members?**

i. **ABA Formal Ethics Opinion 07-445**:

a. "The key to evaluating the propriety of contacting putative class members is whether they are deemed to be represented by the lawyer or lawyers seeking to certify a class." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445, at *1 (2007).

b. Before a class action has been certified, counsel for plaintiff and defendant have interests in contacting putative members of the class. **Model Rules of Professional Conduct 4.2 and 7.3 do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class. Both plain[t]iff's and defense counsel must nevertheless comply with Model Rule 4.3**. *Id.*

c. If represented, Rule 4.2 bars defense counsel from communicating with class members.

d. If not represented, plaintiffs' and defense counsel may communicate with class members (discussed further below).

ii. Federally, the majority view is that an attorney-client relationship, carrying with it all of the relevant fiduciary duties, is not created pre-certification. *See In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 4401970, at *2 (E.D. La. Sept. 22, 2008) (holding that, precertification, only named plaintiffs may claim attorney-client privilege) (citing *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 313 (3d Cir. 2005); *Cobell v. Norton*, 212 F.R.D. 14, 17 (D.D.C. 2002); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000); *In re Shell Oil Ref.*, 152 F.R.D. 526, 528 (E.D.La. 1989); 5 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 15:16 (4th ed.2002); Manual on Complex Litigation § 30.24 (3d ed.)).

iii. Further, an attorney-client relationship is "different in the class context than it is in a traditional, nonclass situation," whereas a relationship between class counsel and named class members is "one of private contract, whereas the relationship between absent class members and class counsel is one of court creation." *In re Chicago Flood Litig.*, 289 Ill. App. 3d 937, 942 (1st Dist., 2d Dep't 1997)).

iv. **CPLR Article 9**

a. Was modeled after the Federal Rules of Civil Procedure. *See Desrosiers v Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 495 (2017); New York City Bar Association, Council on Judicial Administration and Litigation Committee, Report on Legislation by the Committee on State Courts of Superior Jurisdiction, n. 8 (April 2016).

b. In general under Article 9, a class action becomes such when "all of the prerequisites of CPLR 901 and 902 have been met, an order issued pursuant to CPLR 903 and notice sent pursuant to CPLR 904." Thomas A. Dickerson, *New York Law Journal*, https://www.law.com/newyorklawjournal/2018/02/15/when-is-a-class-action-a-real-class-action/ (February 15, 2018); *but see* discussion of *Desrosiers*, 30 N.Y.3d at 495 below.

c. **CPLR § 901: Prerequisites to a class action**

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action. N.Y. CPLR 901 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

d. **CPLR § 902: Order allowing class action**

Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move

for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action. N.Y. CPLR 902 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

e. **CPLR § 903: Description of a class**

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice. N.Y. CPLR 903 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

f. **CPLR § 904: Notice of class action (discussed more fully in discussion of Settlements below)**

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules. N.Y. CPLR 904 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

v. **Thus, generally, defense counsel is free to communicate with potential class members, including negotiating settlements, up**

to the point when class members are represented, and class members are represented when:

a. **the class is certified; and**

b. **the opt-out period has expired.** ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007); *but see Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985); *Gortat v. Capala Bros., Inc*., No. 07-CV-3629, 2010 WL 1879922 (E.D.N.Y. May 10, 2010) (compiling decisions where Rule 4.2 applied as soon as the class was certified).

c. A small number of federal courts, however, preclude defense counsel from communicating directly with potential class members **from the moment the litigation is commenced**. *See e.g. Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001).

d. In essence, when litigating class actions, defense counsel engaging in precertification communications with putative class members should be mindful of the many ethical considerations.

D. Regardless of when the communication occurs, counsel may not communicate with class members in any way that is **coercive, misleading, or improper.**

i. **ABA Model Rules of Professional Conduct**

a. **Rule 4.3: Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. Model Rules of Prof'l Conduct r. 4.3 (Am. Bar Ass'n 2018).

b. **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. Model Rules of Prof'l Conduct r. 4.1 (Am. Bar Ass'n 2018).

c. **Rule 8.4 (a) and (c):**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Model Rules of Prof'l Conduct r. 8.4 (a), (c) (Am. Bar Ass'n 2018).

d. See also, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007).

ii. While the precertification stage is fraught with potential for abuse with regard to communication between counsel and class members, the settlement stage, discussed below, carries its risks for attorneys communicating with class members as well.

E. Orders limiting Precertification Communications

i. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the U.S. Supreme Court considered whether an order limiting counsel's communication with putative class members violated the right to free speech under the First Amendment. There, the Court recognized "the possibility of abuses in class-action litigation," and that "such abuses may implicate communications with potential class members." *Id.* at 104.

a. While cautioning that the order "involved serious restraints on expression," the court ultimately upheld its use only to prevent "serious abuses" implicated by communications with potential members of a class. *Id.*

b. Any such order, however, must:

1) be narrow and limited in scope;

2) identify the potential abuses that gave rise to the order; and

3) be supported by "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." *Id.* at 101.

c. Even so, limitations on speech in this regard are reviewed using "a relaxed standard of scrutiny better suited to the hardiness of commercial speech," and "will satisfy first amendment concerns if it is grounded in good cause and issued with a 'heightened sensitivity.'" *Kleiner*, 751 F.2d at 1205.

ii. With that said, in order to show that a court should impose some kind of restrictions on counsel's communication with putative class members, a moving party must show that (1) "a particular form of communication has occurred or is threatened to occur," and (2) the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation." *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 697-98) (S.D. Ala. 2003).

3. **Conflicts of Interest**

A. "[T]he typical pathology of class action litigation . . . is riven with conflicts of interest." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 686 (7th Cir. 2008).

B. Conflicts between class members

i. **FRCP Rule 23(a)(4)**

a. The perquisite set forth in Fed. R. Civ. P. Rule 23(a)(4) is that "the representative parties will fairly and adequately protect the interests of the class."

1) One of the purposes of this prerequisite is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157-58, n. 13 (1982)).

2) A denial of certification on this ground, however, must be "**fundamental**," and go "**to the heart of the litigation**." *Charron v. Wiener*, 731 F.3d 241, 250 (2d Cir. 2013) (quoting *Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC.*, 504 F.3d 229, 246 (2d Cir. 2007)).

ii. **CPLR § 901**

i. The New York State prerequisites are set forth in CPLR § 901: Prerequisites to a class action

ii. Section 901(a)(4) mirrors its federal counterpart by requiring that "the representative parties will fairly and adequately protect the interests of the class." N.Y. CPLR 901(a)(4) (Westlaw through L.2018, ch. 1 to 372, 377-403).

iii. **CPLR § 902-**

a. Within 60 days after all responsive pleadings are due, plaintiff must move for an order determining whether the class action can be maintained.

b. The court must consider the factors set forth in CPLR § 902 in determining whether the class action may continue as such. *See* N.Y. CPLR 902 (Westlaw through L.2018, ch. 1 to 372, 377-403).

C. Conflicts between class counsel and class members

i. "The relevant case law . . . generally holds that class counsel's duty, above all, is to the class members as a whole and not to any particular named plaintiff. Furthermore, the duty to the class is owed regardless of whether the class has yet been certified." *Med. & Chiropractic Clinic, Inc. v. Oppenheim*, No. 8:16-cv-1477-T-36CPT, 2018 WL 3707836, at *9 (M.D. Fla. Aug. 8, 2018) (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981), *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982), and *Fla. Bar v. Adorno*, 60 So. 3d 1016, 1018, 1025 (Fla. 2011)) (holding that a three-year suspension

was warranted for an attorney whose misconduct included negotiating a seven million dollar settlement on behalf of seven named plaintiffs, while abandoning thousands of putative class members, and obtaining a nondisclosure agreement with the named plaintiffs for which the only logical reason could be keeping the facts of settlement secret from putative class members); *see Smith v. SEECO, Inc.*, No. 4:14-CV-00435 BSM, 2017 WL 2221707, at *3 (E.D. Ark. May 20, 2017) ("There can be no question that . . . class counsel has a unique attorney-client relationship with class members regardless of whether that relationship was established after certification or at the conclusion of the opt-out period") (citing *Kleiner*, 751 F.2d at 1206-07.

ii. CPLR § 901(a)(4), which requires "adequate representation," also applies in this context

a. Adequacy of representation implicates "plaintiffs as class representatives and counsel, and the impact of alleged improper or unethical conduct by each." *Meachum v. Outdoor World Corp.*, 171 Misc. 2d 354, 358 (Sup. Ct. Queens Cty. 1996).

b. Such representation "depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation." *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977) (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1975)).

c. Furthermore, "[t]he conduct of plaintiff's counsel, particularly the ethical considerations of such conduct, is a factor in considering the adequacy of representation." *Meachum*, 171 Misc. 2d at 358 (citing *Cannon v. Equitable Life Assurance Soc'y of U.S.*, 106 Misc. 2d 1060, 1068 (Sup. Ct. Queens Cty. 1980)).

iii. *Tanzer v. Turbodyne Corp.*, 68 A.D.2d 614 (1st Dep't 1979)

a. In this decision, the First Department reversed Special Term, and denied class certification where numerous conflicts of interest existed, including questions whether plaintiffs' attorney was a stockholder in the defendant's company, whether "class representatives were closely related to the lawyers for the class and that they (the class representatives), as a regular practice, made small investments in corporations for the purpose of bringing lawsuits through the law firm." *Stern v. Carter*, 82 A.D.2d 321, 343-44 (2d Dep't 1981).

iv. **ABA Model Rules of Professional Conduct 1.7: Conflicts of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 2018).

v. However, class counsel who may be adverse to certain class members is not precluded from representing those members.

vi. Arguably the most concerning conflicts of interest that arise between class counsel and members arise during the **settlement stage** discussed below.

III. Settlement

1. **Control-**

A. Generally, counsel directs the strategy and conducts the strictly legal duties of litigation.

B. Clients have the sole authority over the objectives of representation, and exclusively over matters such as whether to settle. *See* 22 N.Y.C.R.R. 1200.0 r. 1.2 (Westlaw 2018).

C. **22 N.Y.C.R.R. 1200.0 Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. 22 N.Y.C.R.R. 1200.0 r. 1.2(a) (Westlaw 2018)

2. **Judicial Approval of Settlement and Notice**

A. **Federal Rule of Civil Procedure 23**

i. "The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests. The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995).

ii. **Federal Rule of Civil Procedure 23(e): Settlement, Voluntary Dismissal, or Compromise**

a. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. Fed. R. Civ. P. 23(e).

1) Under section (e)(1), "the court must provide notice of [any settlement] to 'all class members who would be bound' by the proposal." *Desrosiers*, 30 N.Y.3d at 498 (quoting Fed. R. Civ. P. 23(e)(1)(B)).

2) "Thus, under the current federal rule, mandatory approval and notice of a proposed settlement is now required only for certified classes." *Id.*

B. **CPLR § 908**

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs. N.Y. CPLR 908 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

i. *Desrosiers v Perry Ellis Menswear, LLC*, 30 N.Y.3d 488 (2017).

a. In this case, the Court of Appeals considered "whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been certified." *Id.* at 492.

b. The Court was reviewing two First Department decisions that, in part, relied upon an earlier decision *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982).

c. In a split 4-3 decision, the Court held that, pursuant to CPLR § 908, "notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given," regardless of whether the class had been certified. *Id.*

d. In making this determination, the Court stated that there were "policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced." *Id.* at 499.

e. In her dissenting opinion, Judge Stein asserted that the majority found "ambiguity in CPLR 908 where none exists," and "place[d] undue weight on the First Department's holding in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dep't 1982])." *Id.* (Stein, J., dissenting).

1) According to Judge Stein, "the requirement in CPLR 908 that notice be provided 'to all members of the class' is expressly limited to a 'class action.'"

Id. (quoting N.Y. CPLR 908 (Westlaw through L.2018, ch. 1 to 372, 377 to 403)).

ii. CPLR § 908 also implicates the ethical issue of **conflicts of interest** inasmuch as "in 1975, the State Consumer Protection Board observed that the purpose of that statute 'is to safeguard the class against a "quickie" settlement that primarily benefits the named plaintiff or his or her attorney, without substantially aiding the class.' " *Id.* at 495 (citing Mem from St Consumer Protection Bd, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207).

3. **Settlement Communications-**

A. Once class members are considered represented, any communication should be directed to class counsel.

B. Any communications occurring before that point are not precluded, including communication for the purpose of settlement, but must not be, as discussed above, misleading, coercive, or otherwise unethical. *See Kleiner*, 751 F.2d at 1202 ("A unilateral communications scheme [from a defendant to putative class members] is rife with potential for coercion."); *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 263 (S.D. W.Va. 2007) ("Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel.") (quoting *Cox Nuclear Med.*, 214 F.R.D. at 698; *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002)).

C. *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979)-

i. In this case, the 7th Circuit set forth a three-step analysis in determining whether a particular settlement communication was improper.

a. "an offer to settle should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle." *Id.* at 1139; *see Kay*, 246 F.R.D. at 263; *Keystone*, 238 F. Supp. 2d at 157.

D. Settlement communications that do not inform putative class members of important facts, such as the existence of a lawsuit, the nature of the lawsuit, the putative class member's position with respect to the lawsuit, etc., have been found to be "misleading or coercive." *Friedman v. Intervet Inc.*, 730 F. Supp. 2d 758, 762 (N.D. Ohio 2010); *cf. Cox*, 214 F.R.D. at 699.

4. **Conflicts of Interest and Informed Consent -**

A. In many cases, it is nearly impossible to obtain informed consent from all members of a class

B. Incentive Awards -

i. An example of a potential fundamental conflict is the use of Incentive Awards-

a. Incentive Awards are "designed to compensate [a class action plaintiff] for bearing [certain] risks," such as his or her liability for defendant's costs, including, in some cases, attorney's fees. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012).

b. These awards pose potential ethical issues in cases where they are extended exclusively to named plaintiffs who support settlement. In those situations, named plaintiffs may be tempted to accept a settlement offer regardless of the best interests of the class. *See Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014); *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009); *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012).

5. **Settlement offers that include language barring class counsel from bringing subsequent lawsuits against particular defendants are generally unethical and unenforceable to that extent.**

A. **ABA Model Rules of Professional Conduct 5.6: Restrictions on Rights to Practice**

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. Model Rules of Prof'l Conduct r. 5.6 (Am. Bar Ass'n 2018); *see also In re Hager*, 812 A.2d 904 (D.C. 2002); *Adams v. BellSouth Telecomm., Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001).

6. **Considerations for Objectors**

A. "A federal district court possesses broad inherent power to protect the administration of justice by levying sanctions in response to abusive litigation practices." *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 386 (2d Cir. 1981).

B. These powers include the authority to discipline attorneys appearing before a court who are deemed to engage in such practices. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (citing *Ex Parte Burr*, 22 U.S. 529 (1824)); *see In re Petrobras Sec. Litig.*, 14-CV-9662 (JSR), 2018 WL 4521211, at *3 (S.D.N.Y. Sept. 21, 2018) (discussing the broad inherent power of courts to sanction attorneys who engage in bad faith litigation practices).

C. *In re Petrobras Sec. Litig.*, 14-cv-9662 (JSR), 2018 WL 4521211 (S.D.N.Y. Sept. 21, 2018)-

i. Here, the Court defined "objectors" as "members of the class who file objections to proposed class action settlements prior to the Court's determination of whether or not to finally approve the settlement to which it has previously given preliminary approval." *Id.* at *1.

ii. While recognizing that objectors' objectives can serve instrumental purposes, such as "protecting class interests" by "bring[ing] to light evidence that a settlement was collusive or that class counsel's fee award was inflated," objectors can also pursue much more self-interested goals that thwart the judicial process. *Id.*

iii. One way in which objectors' efforts inhibit or "pervert the process" is "by filing frivolous objections and appeals, not for the purpose of improving the settlement for the class, but of extorting personal payments in exchange for voluntarily dismissing their appeals. *Id.* (citing *Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (referring to self-serving efforts of objectors as "objector blackmail"), *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991), *In re Initial Public Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010)).

iv. In dealing with counsel and members who the Court determined to be in this class of objectors, the Court noted a then-pending amendment to Federal Rules of Civil Procedure Rule 23, which would require "judicial approval of any monetary settlements to objectors," and had the potential to hinder what it dubbed "these abusive side deals." *In re Petrobras Sec. Litig.*, at *1 (citing Proposed Amendments to the Federal Rules of Civil Procedure, Rules 5, 23, 62, and 65.1, Slip Order at *9-15 (U.S. Apr. 26, 2018, https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf).

v. The Court found that the objectors, who were blocking a final order awarding a nearly $3 billion settlement that the Court had approved several months prior, asserted objections that lacked "any colorable merit," and were made in bad faith. *Id.* at *4.

vi. The Court: (1) imposed sanctions on one attorney in the amount of $10,000; (2) ordered one of the objectors to post an appeals bond of $5,000; (3) ordered the other objector to post a similar bond in the amount of $50,000.

7. ***Cy Pres* Settlement Awards**

A. Under the doctrine of *cy pres*, courts are authorized to "distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries for the indirect benefit of the class." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)).

B. "A *cy pres* award must be 'guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.'" *Dennis v. Kellogg Co*., 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin*, 663 F.3d at 1039).

C. Potential Ethical Issues for Plaintiffs' Counsel

i. *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

a. "To avoid the 'many nascent dangers to the fairness of the distribution process,' we require that there be 'a driving nexus between the plaintiff class and the cy pres beneficiaries.' " *Id.* at 865) (quoting *Nachshin*, 663 F.3d at 103); *see In re Google*, 869 F.3d at 743 ("when 'unbridled by a driving nexus between the plaintiff class and the *cy*

pres beneficiaries[,] [the *cy pres* doctrine] poses many nascent dangers to the fairness of the distribution process.' ") (quoting *Nachshin*, 663 F.3d at 1038) (citing *Dennis*, 697 F.3d at 865).

ii. Issues generally arise for class counsel who has some kind of conflict of interest with respect to any cy pres award or an interest in resolving the litigation quickly.

iii. Recently, the U.S. Supreme Court granted certiorari and heard oral argument for *Frank v. Gaos*, 138 S. Ct. 1697 (2018), which arose out of 9th Circuit case, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017). *See* Transcript of Oral argument, *Frank v. Gaos*, No. 17-961 (U.S. Oct. 31, 2018). The Court also recently asked the parties to address standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in supplemental briefing so it is possible that the case could be decided on that basis without reaching the Cy Pres issues.

a. In *In re Google*, the Court reviewed, using an abuse of discretion standard, the District Court's approval of a $5.3 million cy pres-only award to six organizations that pledged to use the settlement funds to promote internet privacy.

b. Preliminarily, the Court, citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), found that "because the settlement took place before formal class certification, settlement approval requires a 'higher standard of fairness.'" *In re Google*, 869 F.3d at 741 ("at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, [and thus] we scrutinize the proceedings to discern whether the court sufficiently 'account[ed] for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit.'") (second alteration in original) (quoting *Lane*, 696 F.3d at 819).

c. The Court held that the *cy pres*-only award was appropriate where each class member would receive approximately 4 cents, that the award was "non-distributable" under FRCP Rule 23, *id.* at 742, and that the attorneys' fees awarded were reasonable, *id.* at 747.

d. The "crux" of the appeal, though, was "whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients." *Id.* at 743.

1) In this regard, the Court upheld the award, stating that "the claimed relationships d[id] not 'raise substantial questions about whether the selection of the recipient was made on the merits." *Id.* at 744 (quoting Principles of the Law of Aggregate Litig., § 3.07 cmt. b (Am. Law Inst. 2010))..

D. Potential Ethical Issues for Defense Counsel

i. **ABA Model Rules of Professional Conduct Rule 1.8: Current Clients: Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Model Rules of Prof'l Conduct r. 1.8 (Am Bar Ass'n 2018).

ii. "In addition, courts exercise close review of cy pres distributions as part of the settlement approval process to ensure that the settlement is fair, reasonable, and adequate. Therefore, under Model Rule 3.3, which directs attorneys to engage in candor toward the tribunal, attorneys with an interest or relationship with a cy pres beneficiary should also disclose this to the court so that the court is equipped with all relevant facts and knowledge needed to review and decide whether to approve the settlement." *Id.*

IV. More on possible ramifications of ethics violations

1. **New York-**

   A. **Judiciary Law § 90 (2) -** authorizes each Appellate Division Department

   > "to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice." N.Y. Jud. Law § 90(2) (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

   B. **22 N.Y.C.R.R. § 1200.0-1200.59**

      i. Rules of Professional Conduct

   C. **22 N.Y.C.R.R. § 1240**

      i. Rules for Attorney Disciplinary Matters

2. A few possible repercussions for violating relevant ethical rules

   A. Denial of attorney's fees. *See Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012)

   B. Denial of class certification. *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489 (7th Cir. 2013); *Creative Montessori Learning Ctrs. v. Ashford Gear, LLC*, 662 F.3d 913 (7th Cir. 2011).

   C. Disciplinary action under relevant ethical rules. *See* Section IV(1) above.

   D. Disqualification as class counsel. *cf. Reliable Money Order,* 704 F.3d at 500 (finding that even if counsel violated ethical rules, their conduct "d[id] not mandate disqualification of counsel.").