

ETHICAL DUTIES OF CLASS COUNSEL ALSO REPRESENTING CLASS REPRESENTATIVES

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In their excellent article entitled *May Class Counsel Also Represent Lead Plaintiffs?*,¹ Professors Bruce Green and Andrew Kent explore a particular aspect of two broader questions I have also addressed: (1) who *should* regulate class action lawyers;² and (2) who *will* regulate class action lawyers?³ I, too, focused on lawyers' conflicts of interest; however, Professors Green and Kent focus even more specifically on conflicts arising from class counsel's simultaneous representation of both the class and individual clients who are serving or will serve as class representatives. Their concern is with three particular scenarios in which the class representative's interest conflicts with the interests of the class as a whole: holdouts (where the class representative objects to a settlement viewed by class counsel as benefitting the class as a whole); sellouts (where the class representative wants to settle their individual claim in a manner that may prejudice the interests of the class); and payouts (where the class representative wants to receive unjustified individual payments for serving as a representative).⁴ After identifying these conflicts, they analyze class counsel's obligations under both rules of professional conduct and class action law (including both Rule 23 of the Federal Rules of Civil Procedure and individual case adjudication).⁵ They conclude by making suggestions concerning how class counsel can better understand their existing obligations both to their individual clients and to the class⁶ and what types of reform would further clarify and protect both the individuals and the class.⁷ In considering possible reform efforts, they wisely take a realistic view of both institutional expertise⁸

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1. Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083 (2020).

2. Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (2003) (hereinafter Moore, *Who Should Regulate?*).

3. Nancy J. Moore, *Who Will Regulate Class Action Lawyers?*, 44 LOY. U. CHI. L. REV. 577 (2012) (hereinafter Moore, *Who Will Regulate?*).

4. Green & Kent, *supra* note 1, at 1083.

5. Unfortunately, the authors do not systematically address the conflicts under, first, rules of professional conduct, and then under the Federal Rules of Civil Procedures; rather, their analysis is interspersed among the various sections. *See, e.g.*, Green & Kent, *supra* note 1, at 1103–13 (providing a detailed analysis of conflicts involving holdouts, sellouts, and payouts, citing variously to Model Rules of Professional Conduct, Rule 23, and case law adjudicating class actions).

6. *Id.* at 1123–25.

7. *Id.* at 1125–32.

8. *See id.* at 1127–28 (suggesting that federal courts, rather than ABA, are the appropriate “institutional choice”).

and the likelihood that particular reforms could be enacted.⁹

This Response agrees with almost everything Professors Green and Kent have to say about this particular type of conflict of interest. The purpose of this brief comment is threefold: first, it explains why the existing rules of professional conduct adequately address the authors' concerns about necessary protections for the individual clients;¹⁰ second, it comments on the authors' proposal for federal judicial reform to provide the necessary protections for the class;¹¹ and third, it offers my own views on the extent to which courts can, do, and should address these issues in the context of individual case adjudication.¹²

I. WHO *SHOULD* REGULATE CLASS ACTION LAWYERS?: THE ADEQUACY OF EXISTING RULES OF PROFESSIONAL CONDUCT TO PROTECT THE INDIVIDUAL CLIENTS

In my first article on the ethics of class counsel, I responded in part to the commonly expressed view that “the ethics rules cannot be mechanically applied to class actions,” and the accompanying exhortation for the ABA and other rule drafters to revise the rules of professional conduct to specifically address the ethical issues that arise in representing a class.¹³ I began my analysis by urging that much of the confusion surrounding the ethics of class action lawyers stems from the belief that class counsel represents each member of the class, thereby creating unmanageable “conflicts of interest” under rules of professional conduct.¹⁴ I then suggested that the class be viewed as an entity client, in which case conflicts arising from differences among class members would have no more ethical significance than the differences among various constituents of a corporate client.¹⁵

Adopting this move eliminates some, but not all conflicts involving class representation. When class counsel simultaneously represents both the class itself and individuals either inside or outside the class, conflicts arise under Model Rule 1.7 if there is a significant risk that the lawyer's duties to one client (class or individual) would be materially limited by the lawyer's duties to another client (individual or class).¹⁶ Professors Green and Kent convincingly demonstrate that these Rule 1.7 conflicts exist in the case of class representatives who want or might benefit from

9. *See id.* at 1128 (noting U.S. Supreme Court's preference for individual case adjudication over federal rulemaking).

10. *See infra* Part I.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See Moore, Who Should Regulate?*, *supra* note 2, at 1477–78.

14. *Id.* at 1482–84.

15. *Id.* at 1485–89.

16. *See id.* at 1492–94.

holding out, selling out, or seeking an excessive payout, and how class counsel's ability to represent each client adequately may be compromised by their duties to the other client.¹⁷

In my article, after acknowledging that these conflicts exist under Rule 1.7, I then argued that, with respect to the risks to the individual clients, "Rule 1.7 should apply in full force."¹⁸ In other words, "if there is a significant risk that the lawyer's duty to the class will materially limit the lawyer's representation of the individuals, then the individuals are entitled to full disclosure of the existence of the implications of the conflict."¹⁹ I also argued that under Rule 1.7 "the individual clients are entitled to give their informed consent to the conflict, in which case the lawyer may proceed with the conflicted representation."²⁰

Professors Green and Kent agree that lawyers must comply with the rules of professional conduct in their representation of their individual clients, including class representatives.²¹ However, they press the analysis further, questioning whether class counsel can adequately address the conflicts that arise with respect to potential holdouts, sellouts, or payouts. For example, they argue that when a proposed class settlement is disadvantageous to the individual but good for the class, class counsel cannot give disinterested advice to either the individual or the class.²² Similarly, they argue that when the individual wants to settle their own case and that settlement would prejudice the class, or the defendant attempts to "pick off" the class representative by offering an attractive settlement offer, the lawyer cannot give disinterested advice to either client.²³

Although they do not say so explicitly, the clear implication of their argument is that the ethical rules do not adequately address the conflicted position of class counsel in these situations, even with respect to their duties to the individual clients. I disagree.

Consider a lawyer who is asked to represent an individual in a matter in which the lawyer believes that filing a class action lawsuit will benefit

17. See Green & Kent, *supra* note 1, at Part II. As I noted earlier, the authors do not systematically address these conflicts under Rule 1.7. See *supra* note 5. However, they begin by referencing Rule 1.7, *id.* at 1101–02, 1102 n.91, and then provide a detailed discussion how the lawyer's ability to represent the individual class representatives is materially limited by the lawyer's simultaneous obligations to the class. See *id.* at 1102.

18. See Moore, *Who Will Regulate?*, *supra* note 3, at 579.

19. *Id.*

20. *Id.* at 579–80.

21. Green & Kent, *supra* note 1, at 1123 ("But if individuals are represented as individuals, a lawyer must still comply with their state-adopted version of the ABA Model Rules governing communications with, and disclosures to, a client—e.g., Rules 1.2(c), 1.4 and 1.7, among others.").

22. *Id.* at 1105.

23. *Id.* at 1107–08.

both the individual and the class. As Professors Green and Kent acknowledge, a concurrent conflict exists under Rule 1.7 if there is a significant risk that the lawyer's duty to the class (including duties to a putative class before the class action lawsuit is filed²⁴) will materially limit the lawyer's representation of the individual client.²⁵ Is there such a significant risk at the outset of the representation, even before the opportunity arises for the individual to gain a benefit at the expense of the class? Professors Green and Kent are of two minds on this question, at one point noting that these conflicts are "ubiquitous in class actions,"²⁶ but elsewhere stating that the specific conflicts they address "may occur in only a fraction of class actions."²⁷

Ignoring the potential for conflicts until they actually arise, however, is clearly misguided given the difficulty of determining what class counsel should do when that happens if this issue has not been previously addressed. A lawyer representing individuals seeking to serve as class representative must, at the very least, inform them precisely what that role entails, including substantial limitations on the ability of class representatives to control the class lawsuit.²⁸ Surely it is the wiser course for the lawyer to simultaneously address the risk that conflicts between the individual and the class will arise, including disagreements over holdouts, sellouts, and payouts. Having identified an existing conflict (based on the significance of the risk that the clients' interests will clash at a later point), the lawyer must then follow the dictates of Rule 1.7.²⁹

Rule 1.7(b) provides that even though a concurrent conflict exists, a lawyer may proceed with the representation if "the lawyer reasonably

24. *Id.* at 1117. The authors correctly note that "[u]ntil the class is certified, the class does not exist as a legal entity;" however, they further observe, that "it is conceivable that the lawyer nevertheless owes duties to absent putative class members, or to the nascent class, that limit the lawyer's ordinary zeal on behalf of the individual." *Id.* Material limitation conflicts under Rule 1.7 are not limited to conflicts between existing clients but include situations where there is a significant risk that the lawyer's representation of a client (the individual class representative) may be materially limited by the lawyer's responsibilities to "another person" (absent putative class members or the nascent class). MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2020).

25. Green & Kent, *supra* note 1, at 1115.

26. *Id.* at 1087.

27. *Id.* at 1114.

28. If a lawsuit has not yet been filed, then it is up to the individual client to decide whether to file the action as an individual or a class lawsuit. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR. ASS'N 2020) (stating that a client determines the objectives of the representation); *Id.* at r. 1.4(b) (stating that lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions concerning the representation").

29. Professors Green and Kent agree that "[l]awyers should explain the ground rules of the class action to their individual clients and talk through important issues and questions that may arise." Green & Kent, *supra* note 1, at 1123. However, their advice is not grounded in a discussion of what lawyers must do under Rule 1.7 in order to secure the clients' informed consent to the conflict.

believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing.”³⁰ Professors Green and Kent do not directly address the application of this provision to the conflicts they describe; however, they imply that neither requirement can be met. For example, in discussing the options available to class counsel when the defendant makes an offer to settle the class representative’s claim on terms disadvantageous to the class, they are clearly skeptical that class counsel could either stop representing the class representative individually or limit the scope of the representation “by carving out assistance regarding a possible settlement,” on the ground that, except perhaps for institutional clients, the individual clients would be seriously disadvantaged by such action.³¹ Similarly, they disparage provisions in some retainer agreements that provide that the “client waives all future conflicts or agrees to be dropped as a client if any future conflicts arise,” on the ground that these waiver provisions do not suffice to give informed consent and “[m]any courts are skeptical of advanced waivers of conflicts of interest, precisely because the relevant facts creating the risk of conflict are not yet known.”³²

My response to Professors Green and Kent is two-fold. First, I disagree that seeking the clients’ informed consent at the outset of the representation constitutes a request for an “advanced waiver” and therefore the client’s consent cannot be fully informed. Second, I disagree that clients cannot agree in advance that the lawyer will address conflicts that arise either by withdrawing from the individual representation or by agreeing at the outset to limit the scope of the representation to exclude advice concerning holding out, selling out, or seeking an improper payout.

Advance waivers are admittedly controversial,³³ precisely because clients may not adequately understand how a particular (unknown) conflict may adversely affect their interests.³⁴ But advance waivers do not refer to waiving the risks that might arise from the lawyer’s duties to others *in the current representation*, but rather to the possibility that, *in the future*, the lawyer may undertake duties to others *in a different matter*, where the facts of that representation, as well as the identity of the

30. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1), (4) (AM. BAR. ASS’N 2020).

31. Green & Kent, *supra* note 1, at 1108–09.

32. *Id.* at 1124.

33. See, e.g., Charles G. Spalding, Jr., *A New “Prospective” on Advance Waivers of Conflict in Georgia*, 50 GA. L. REV. 1335, 1337–38 (2016).

34. See MODEL RULES OF PRO. CONDUCT. r. 1.7 cmt. 22 (AM. BAR. ASS’N 2020) (“The effectiveness of [waivers of future conflicts] is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.”).

potentially adverse parties, may not be known.³⁵ I agree that the “barebones” retainer provisions some lawyers use are insufficient, but not because they purport to waive “future conflicts.”³⁶ By definition, a “concurrent conflict” is one that entails a significant risk that at some point, *during the current representation*, the lawyer’s duties to others may materially limit the lawyer’s ability to adequately represent a client. Yes, the lawyer must provide a detailed explanation of “the risks, benefits, and alternatives”³⁷ of agreeing to the conflicted representation, but using Professors Green and Kent’s article as a blueprint and focusing on the possibility of disagreements concerning holdouts, sellouts, and payouts, I see no reason why class counsel cannot provide an explanation that most individuals would understand.

As for the adequacy of the representation, I also see no reason why the individual clients cannot agree at the outset of the representation that, in the event one of the triggering events occurs (disagreements over holding out, selling out, or seeking an excessive payout), class counsel will either withdraw from representing the individual or will continue the representation but not advise or represent the individual client with respect to that particular issue. Under Model Rule 1.2(c), class counsel may limit the scope of the representation “if the limitation is reasonable under the circumstances and the client gives informed consent.”³⁸ Once again, using Professors Green and Kent’s article as a blueprint, the lawyer should be able to provide a detailed explanation of “the risks, benefits, and alternatives” of proceeding in this manner and thereby obtain the client’s informed consent.

In addition, it is difficult to see why, at least in most cases, such a limited representation would not be reasonable, particularly if it is true that disagreements concerning holdouts, sellouts and payouts “may occur in only a fraction of class actions.”³⁹ Of course, whether such a limitation is reasonable might depend on the type of class action contemplated as well as the strength and potential damages attributable to the individual claim. If the class claims are relatively uniform and the individual damages likely to be minimal, then the risk of harm is low. If, however, individual claims differ significantly, and the client’s individual claim is strong and the potential damages are high, then the risks may be more substantial. However, even then, the strength and size of the individual claim also makes it more likely that the client will be able to identify another lawyer willing to take on the representation, or even merely

35. See, e.g., *id.* (emphasizing that the concern is for the types of risk that may arise in “future representations”).

36. Green & Kent, *supra* note 1, at 1124.

37. *Id.*

38. MODEL RULES OF PRO. CONDUCT r. 1.2(c) cmt. 22 (AM. BAR. ASS’N 2020).

39. See Green & Kent, *supra* note 1, at 1113–14.

advise the client concerning the disagreement. After all, in many class action lawsuits, there are many lawyers other than lead counsel who are either already representing individual members of the class or are following the case and willing to step in and assist the class representative. Keeping in mind the potential benefits of being represented by class counsel (including acting as class representative and thereby participating in the lawsuit in a limited, but nevertheless potentially significant manner), I believe that individuals can reasonably decide that the advantages outweigh the disadvantages and properly agree to limit the representation in the manner proposed.

II. WHO *SHOULD* REGULATE CLASS ACTION LAWYERS?: HOW TO PROTECT THE INTERESTS OF THE CLASS

Thus far, I have disagreed with Professors Green and Kent by arguing that, in my opinion, the rules of professional conduct already provide adequate protection for the individual class representative. They are absolutely correct, however, that the rules of professional conduct do not currently provide adequate protection for the class. This is because “class counsel’s conflict is different from the conflicts that ABA Model Rule 1.7 ordinarily addresses;” therefore, it would not be sufficient to apply that rule, using “the court’s authorization . . . as a substitute for the class’s informed consent.”⁴⁰

As for which institution is in a better position to remedy this deficiency, this is an issue I addressed in my first article, in which I explained why, as Chief Reporter to the Ethics 2000 Commission, I recommended against proposing an ethics rule directly addressing class counsel’s representation of a class.⁴¹ As I said then:

[E]thics code drafters have neither the expertise nor the authority to determine the appropriate relationships between class action counsel and the various constituents of a class. Moreover, given the courts’ current ability (and obligation) to monitor the adequacy of representation as part of the class action lawsuit, I suggest that what makes the most sense is to leave these issues to be resolved under class action law—namely, under the rubric of a further elaboration of the adequacy of representation requirement of FRCP Rule 23.⁴²

At that time, I did not propose any specific reforms, nor did I assume that such reforms would or could take the form of specific amendments to Rule 23; rather, I proposed that courts supervising class action lawsuits should “consider class counsel’s conflicts as an important factor in

40. *Id.* at 1126.

41. *See Moore, Who Should Regulate?*, *supra* note 2, at 1478–81.

42. *Id.* at 1501–02.

determining the adequacy of representation under Rule 23,” using “many of the principles and concepts underlying [Rule 1.7] . . . in the Rule 23 [adequacy] analysis.”⁴³

Professors Green and Kent apply a similar analysis of who should regulate the type of conflicts they are addressing. Although they do not question the ABA’s competency to draft a set of rules addressing conflicts in class actions, they offer two additional reasons why we should look to the federal judiciary to provide the needed reform. First, they point out that “conflict rules are written to cover situations where there are no courts to oversee the lawyers, and may therefore tend to be more protective and more categorical than courts need to be in class action litigation, in which there is substantial judicial oversight.”⁴⁴ Second, they correctly observe that “[t]he federal rulemaking process is likely to involve greater participation by different constituencies than an ABA-controlled process,” and that “the ABA’s output might tend to be ‘lowest common denominator’ because of the need to reach agreement from the ABA House of Delegates and other factors.”⁴⁵ Whatever the reasons, we all agree that any proposed clarification or reform of class counsel’s ethical duties *to the class* should come, not from the ABA, but rather from the federal judiciary, at least with respect to class action lawsuits filed in federal courts.⁴⁶

Professors Green and Kent go further than I did in my initial article by suggesting a specific reform of Rule 23. They propose that the rule “be amended to make explicit that conflicts of interest should receive the sustained attention of courts overseeing class actions,” noting that “[t]here is no good reason why FRCP Rule 23(g)(1)(A) should not expressly mention conflicts.”⁴⁷ I agree that this would be a helpful reform that would likely lead supervising courts to better recognize and address the conflicts of interests confronting class counsel. Indeed, in my second article, *Who Will Regulate Class Action Lawyers?*, I favored at least some amendments to Rule 23, including identifying the class itself as a client and requiring supervising courts “to inquire about and consider conflicts of interest arising from class counsel’s representation of clients other than the class itself, both when initially appointing class counsel and when

43. *Id.* at 1502–03.

44. Green & Kent, *supra* note 1, at 1127.

45. *Id.* at 1127–28.

46. Professors Green and Kent limit their discussion to federal class action lawsuits. *Id.* at 1085 n.5. Of course, class action lawsuits are also filed in state courts. Here, I assume Professors Green and Kent would agree with me that state courts will need to provide the necessary supervision and guidance, not in their role as adopters of rules of professional conduct, but as trial courts supervising individual class action lawsuits. In all likelihood, state courts will follow the lead of federal courts in adopting any necessary reforms.

47. *Id.* at 1128.

reviewing the adequacy of class counsel's representation."⁴⁸

Aside from amending Rule 23, Professors Green and Kent propose that courts adjudicating class action lawsuits provide greater scrutiny of class counsel's conflicts, with a view toward not only resolving these conflicts as they arise, but also providing better guidance to class counsel as to their ethical responsibilities when representing both individual representatives and the class. For example, they propose that courts "resolve the question of what duties the lawyer owes to the nascent class . . . and when they arise," and "set forth their expectations when there is a significant risk that the lawyer's duties to the class, or nascent class, will be compromised."⁴⁹

One of their more tentative suggestions is that "courts should seek assurances from plaintiffs' lawyers at the outset of a class action lawsuit that they have reached an appropriate understanding with their individual clients."⁵⁰ Included in this suggestion is a requirement that counsel "file with the court any retainer agreements or other documents setting forth the scope and basis of the attorney-client arrangement."⁵¹ I agree that courts should seek assurances at the outset of a class action lawsuit that class counsel have adequately addressed potential conflicts as they affect counsel's individual clients; indeed, an analogous requirement has been adopted for counsel representing multiple defendants in federal criminal trials.⁵² I also agree that courts should request relevant information concerning conflicts from lawyers seeking initial appointment as class counsel or seeking approval of a class settlement, in which the court must determine the adequacy of counsel's representation of the class. I disagree, however, that class counsel should be required to file with the court their retainer agreements or other relevant documents, such as conflicts waivers. The authors do not explain why this is necessary for courts to adequately protect *the class* and, if the information *is* necessary to protect the class, then it is arguably information that should also be provided in some form to defense counsel, since defendants also have legitimate interests in any final adjudication or settlement of the class claims.⁵³

48. Moore, *Who Will Regulate?*, *supra* note 3, at 588–89.

49. Green & Kent, *supra* note 1, at 1131.

50. *Id.* at 1132.

51. *Id.*

52. FED. R. CRIM. P. 44(c) (requiring courts to inquire about the propriety of joint representation of co-defendants, inform each defendant of the right to effective assistance of counsel, and "[u]nless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel").

53. Professors Green and Kent do suggest that "[a]ny documents containing attorney-client privileged information or opinion work product could be filed *in camera* for judicial review only." Green & Kent, *supra* note 1, at 1132. It is unclear, however, what portions of an engagement

III. WHO *WILL* REGULATE CLASS ACTION LAWYERS: THE LIKELIHOOD OF SIGNIFICANT REFORM

I published my first article attempting to clarify the ethical duties of class counsel in 2003.⁵⁴ I published my second article in 2012, nearly a decade later.⁵⁵ During that interval, little had been done either to amend Rule 23⁵⁶ or to provide greater guidance for class action counsel in meeting their ethical responsibilities either to individual clients or to the class.⁵⁷ Indeed, in those intervening years, I learned of extremely disturbing conduct by lawyers pursuing class actions. For example, in one case a lawyer negotiated a class settlement prior to filing any class action lawsuit, without informing his existing clients who would be members of the class and without identifying any potential class action representatives.⁵⁸ I also learned of lawyers who, having been fired by their individual client and putative class representative prior to the approval of a settlement negotiated prior to filing the lawsuit, found new individuals willing to file competing class action lawsuits.⁵⁹ The new lawsuits caused the defendant to withdraw from the proposed settlement favored by their former client.⁶⁰ In both instances, I had been retained as an expert witness and was frustrated by what I perceived as the courts' inability to adequately analyze the duties owed by class counsel either to their individual clients or to the courts. As a result, I am perhaps less sanguine than Professors Green and Kent that individual case adjudication will adequately address the ethical duties of class counsel anytime soon, particularly in novel situations such as the ones I encountered. This is in part because these issues do not surface with such frequency that appellate courts have the opportunity to correct and guide the trial courts, which must address these issues without the guidance they

agreement or written conflicts waiver are protected by attorney-client privilege or whether they could or should be redacted so that defense counsel can have at least some indication of how class counsel's conflicts might affect the validity of any adjudication or settlement of the class claims.

54. See Moore, *Who Should Regulate?*, *supra* note 2.

55. See Moore, *Who Will Regulate?*, *supra* note 3.

56. Federal Rule of Civil Procedure 23(g), governing the appointment of class counsel and providing that in making such an appointment "[the court may consider] any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," had been proposed at the time of my initial article, and was formerly adopted shortly thereafter. See Moore, *Who Will Regulate*, *supra* note 3, at 584 (noting that Rule 23(g) was adopted in 2003).

57. See *id.* at 584–85 ("[T]here has been much less development than I had hoped with respect to case law addressing the adequacy of representation when class counsel has an ethical conflict of interest.").

58. *Id.* at 581–82.

59. *Id.* at 582–84 (discussing a hypothetical based on circumstances underlying *Bartle v. Berry*, 953 N.E.2d 243 (Mass. App. Ct. 2011)).

60. *Id.*

need to do so.⁶¹

Perhaps most frustrating to me personally was the American Law Institute's failure to address the ethical duties of class counsel when it drafted its Principles of the Law of Aggregate Litigation, adopted in 2010, in which there is very little discussion of legal ethics.⁶² Despite urging by me and by some other advisers to the ALI project, the Reporters chose not to address the ethical obligations of class action lawyers either in the black-letter rules or even in the comments.⁶³ In my view, this was "a missed opportunity, both to alert class action lawyers to at least some of the ethical problems they might encounter and to assist courts in untangling the knots these problems present"⁶⁴

Despite my overall pessimism, however, I see some bright spots in the caselaw. For example, with respect to a potential "windfall payout to the [class] representative before a settlement is approved," Professors Green and Kent cite several instances in which class counsel negotiated settlements with "significant benefits to both class representatives and class counsel, and little or nothing of value for the class."⁶⁵ In both of the cases they describe, the settlements were approved by the trial courts but reversed on appeal because they were unfair to the class.⁶⁶ Of course, bad decisions by trial courts are not always appealed, but this is true of lawsuits generally, not just class action lawsuits. And it is to be hoped that insights gained by reading articles such as the one recently published by Professors Green and Kent will reduce bad decisions by trial courts and class action lawyers.

61. *Id.* at 585.

62. See Nancy J. Moore, *The Absence of Legal Ethics in the ALI Principles of the Law of Aggregate Litigation—A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717 (2011).

63. See *id.* at 721.

64. *Id.* Indeed, in my view, I believe that the ALI did more than simply miss an opportunity to address these issues; rather, it affirmatively muddled the waters by using the unexplained term "structural conflicts of interest" to encompass the types of conflicts between "the named parties or other claimants and the lawyer" and "among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others" *Id.* at 725 (citing section 2.07(a)(1) of the ALI Principles). The term is unfortunate because it does not distinguish between the types of intraclass conflicts that are ubiquitous in class actions and those that can be adequately addressed, at least with respect to the individual clients, by Model Rule 1.7. See *id.*

65. Green & Kent, *supra* note 1, at 1111.

66. See *id.* at 1111–12.