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COMMENT

THE ATTORNEY AS PLAINTIFF AND QUASI-PLAINTIFF IN CLASS AND DERIVATIVE ACTIONS: ETHICAL AND PROCEDURAL CONSIDERATIONS

The plaintiff in both a class and derivative action is in the position of litigating the rights of others. In a class action, a person who has been injured sues for redress of that injury as an individual and also as a representative of all others similarly situated.¹ In a derivative action, the plaintiff is a stockholder who is suing on behalf of other stockholders to redress an injury to the corporation.² Thus, in a class action, the rights of all members of a class are on trial, while in a derivative action, the rights of the corporation are in issue. Since these nonparticipants may be bound by the outcome, it is essential that their interests be properly adjudicated.³ This proper adjudication only occurs when the plaintiff both secures capable legal counsel and is able to litigate the claim free of interests that may conflict with those of the nonparticipants.⁴ To this end, Federal Rule 23(a)(4) requires as a prerequisite to the institution of a class action that the representative "fairly and adequately protect the interests of the class."⁵ Similarly, Federal Rule 23.1 requires the plaintiff in a derivative action to "fairly and adequately represent the interests of the shareholders or mem-

¹ Rule 23(a) of the Federal Rules of Civil Procedure provides that: One or more members of a class may sue or be sued as representative parties on behalf of all 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.

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

² FED. R. CIV. P. 23.1 provides:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

³ See text at notes 24, 107 *infra*.

⁴ See note 34 and accompanying text *infra*.

⁵ FED. R. CIV. P. 23(a)(4). Federal Rule 23(a) is quoted at note 1 *supra*.

bers similarly situated in enforcing the rights of the corporation."⁶

Concern over the adequacy of representation in a class or derivative action is especially manifested where an attorney seeks to serve the dual role of counsel and complaining party.⁷ It also arises where the counsel has a strong affiliation with the complaining party such that the counsel becomes, in effect, a quasi-plaintiff.⁸ In these situations, the potential for a conflict of interests can become acute due to the competing financial pressures, which stem primarily from the discrepancy between the legal fees received by counsel and the recovery which the action may or may not generate.⁹ An additional source of concern in such actions is that the dual roles will lead to an "appearance of impropriety" in violation of the American Bar Association Code of Professional Responsibility.¹⁰ In class as in derivative actions, then, concerns over the adequacy of representation could well prove to be a pitfall for the unwary attorney.¹¹

This comment will show that in analyzing Federal Rule 23(a)(4) courts have looked upon the attorney's role as class representative with general disfavor because of real or potential conflicts of financial interests that would deprive the class of receiving adequate representation.¹² It will also be shown that in class actions, the quasi-plaintiff situations have presented potential conflicts of interest because of the possibility of a sharing in the legal fees by the class representative.¹³ There is also an ethical concern that a close relationship between counsel and representative presents an "appearance of impropriety."¹⁴ This comment will conclude that the protection of the class action system dictates the discouragement of the counsel serving as either the representative or quasi-plaintiff.¹⁵ The corresponding roles of counsel and representative will also be discussed as they relate to derivative actions under Federal Rule 23.1.¹⁶ Since the problems of conflict of interest and the "appearance of impropriety" are present in derivative suits, several courts and commentators have suggested applying the same criteria utilized in certifying class actions under Federal Rule 23(a)(4) in ruling on the adequacy of representation in a derivative action under Federal Rule 23.1.¹⁷ This article will suggest that

⁶ FED. R. CIV. P. 23.1. Federal Rule 23.1 is quoted at note 2 *supra*.

⁷ See text at notes 43-60 *infra*.

⁸ See notes 61-71 and accompanying text *infra*.

⁹ See text at notes 47-50 *infra*.

¹⁰ See ABA CANONS OF PROFESSIONAL ETHICS No. 9. See text at notes 72-99 *infra*.

¹¹ The lack of specific guidelines as to when these ethical considerations will preclude adequate representation when the attorney serves as representative plaintiff or has a professional or family relationship with the representative, could result in a denial of class action status when the attorney may feel all the requirements of adequacy have been satisfied.

¹² See text at notes 47-60 *infra*.

¹³ See text at notes 70-71 *infra*.

¹⁴ See text at notes 72-99 *infra*.

¹⁵ See text at notes 98-99 *infra*.

¹⁶ See text at notes 101-130 *infra*.

¹⁷ See text at note 113 *infra*.

there are legitimate distinctions in an analysis of adequacy of representation under Rules 23 and 23.1 which courts should recognize in refraining from mechanically adopting some of the 23(a)(4) criteria when considering certain derivative actions.¹⁸ The discussion will conclude that while the concerns in the class action of the attorney qua representative are sufficient to impose the same criteria in derivative actions, the distinctions between the actions may be sufficient to dictate a different standard for the quasi-plaintiff situation.

I. CLASS ACTIONS

The historical impetus for the development of class actions was the need to alleviate the burden on the courts of unnecessary litigation in cases where a claim was common to a number of persons.¹⁹ One factor influencing the general acceptance of class actions has been recognition of the fact that the collective or accumulative technique of this device makes possible an effective assertion of many claims which otherwise would not be enforced for economic or practical reasons.²⁰ Another measure of acceptability of this device has been the effectiveness of the procedural safeguards built into the class certification process. These safeguards are designed to screen out unwarranted litigation and provide protection to those who may be bound by it. The method for achieving this is embodied in Rule 23(a).

A. *The Need for Adequate Representation*

In certifying a class action, the court must first determine if all of the prerequisites to a class action under Rule 23(a) have been met. The class action plaintiff must show: 1) that the class be so numerous that joinder would be impracticable; 2) that the class possess certain questions of law or fact that are common to all members; 3) that the class also hold claims or defenses that are similar to those of individual parties and 4) that the class will receive adequate representation.²¹ The first three requirements of Rule 23(a) are all

¹⁸ See text at notes 124-130 *infra*.

¹⁹ *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973). For a description of the historical development of class actions see 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.02 (1976) [hereinafter cited as J. MOORE].

²⁰ *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973). Some representative examples of the types of class actions are: *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (Antitrust, Sherman Act); *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972) (First Amendment action brought by students suspended under an allegedly invalid regulation governing distribution of printed matter on school premises); *Mead v. Parker*, 464 F.2d 1108 (9th Cir. 1972) (petition for a writ of habeas corpus brought as a class action to redress conditions of confinement); *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972) (class actions brought by employees under the Labor-Management Relations Act); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom. Arthur Anderson & Co. v. Kramer*, 97 S. Ct. 90 (1976) (alleged Securities Act violation); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975) (Truth in Lending Act).

²¹ FED. R. CIV. P. 23(a) is quoted at note 1 *supra*.

aimed at fulfilling the basic purpose of class actions—the avoidance of duplicitous litigation by grouping claims.²² However, the requirement of adequate representation goes to a different issue—protection of parties who are not actively involved with the litigation of the class action.²³ This concern for members of a certified class who have not actually participated in the conduct of the litigation results from the binding nature which courts accord to final judgments entered in certified class actions.²⁴ The justification for this use of *res judicata* is grounded in public policy: efficient court administration is thought simply to outweigh the potential prejudice to persons who are not parties but who may nevertheless become legally bound by the outcome of a class action.²⁵ Still, this *res judicata* effect will only apply if the procedural safeguards of Rule 23 are followed so as to provide due process to those who are not in fact parties to a class action suit.²⁶

²² *Greenfield v. Villager Indus. Inc.*, 483 F.2d 824, 831 (3d Cir. 1973).

²³ see note 24 *infra*.

²⁴ In *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) the Supreme Court stated: It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit . . .

Id.

²⁵ *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973). See also *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

²⁶ Rule 23(b) of the Federal Rules of Civil Procedure provides that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

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

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available

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The fundamental importance, then, of Rule 23(a)(4)'s requirement of adequate representation is not to be underestimated. This prerequisite to class certification lies at the very heart of the pro-

methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)

Rule 23(c) of the Federal Rules of Civil Procedure provides:

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

FED. R. CIV. P. 23(c).

Courts consider the due process right of notice under Rule 23(c)(2) to be extremely important. This was illustrated in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in which the Court considered the notice requirements of Rule 23(c)(2) applicable to class actions brought under Rule 23(b)(3). The Supreme Court decided that the express language of Rule 23(c)(2) leaves no doubt that individual notice must be sent to all members of the class identified through a reasonable effort. *Id.* at 173. There was nothing to indicate in the case that individual notice could not be mailed to each of two and a quarter million class members whose names and addresses were easily ascertainable. Moreover, for these people, individual notice was clearly the "best notice practicable" within Rule 23(c)(2). The fact that costs would be prohibitive to the petitioner or that individual notice might be unnecessary because no prospective member had a large enough stake to justify separate litigation were not found sufficient to dispense with notice requirements. *Id.* at 175-77. See Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975) where the author discusses the inter-relationship between notice and adequate representation; ADVISORY COMMITTEE ON RULES, PROPOSED RULES OF CIVIL PROCEDURE, 39 F.R.D. 69, 104-05 (1966).

cedural safeguards protecting those parties not actively involved in a class action, and as such, is one of the underpinnings upon which public acceptance of the class action device rests.²⁷ The importance of adequate representation as a means of protecting those parties not actively involved in a class action is further demonstrated by the historical development of Rule 23(a)(4). Prior to the 1966 amendments,²⁸ the original version of Rule 23²⁹ required the presence of a class representative who would "fairly insure the adequate representation of all."³⁰ Since under the original Rule only those parties directly before the court in a "spurious"³¹ class action were bound by the judgment, there was no need to question the adequacy of representation, and therefore some courts did not actively enforce this requirement.³² With the 1966 amendments, however, the "spurious" class was discarded and the res judicata effects were extended to all class members regardless of whether or not they were directly before the court. As a result "a court must now carefully scrutinize the adequacy of representation in all class actions."³³

B. Standard of Adequacy

During the decade since the 1966 amendments, courts interpreting Rule 23(a)(4) have focused on two factors in determining the adequacy of the class representation. First, the representative party must forcefully protect the interests of the class by ensuring the proper conduct of the litigation and by procuring a class attorney who is qualified, experienced and generally able to conduct the litigation. Second, the representative party must have interests which are compatible with, and not antagonistic to, those whom he would represent.³⁴

²⁷ See note 24 and accompanying text *supra*.

It is within the discretion of the court to determine whether there has been compliance with the requirements of Rule 23(a), and plaintiffs, as parties seeking class certification, bear the burden of demonstrating that each requirement has been met. See *Demarco v. Edens*, 390 F.2d 836, 845 (2d Cir. 1968).

²⁸ 383 U.S. 1047 (1966).

²⁹ RULES OF CIVIL PROCEDURE 23, 308 U.S. 689 (1939).

³⁰ RULES OF CIVIL PROCEDURE 23(a), 308 U.S. 689 (1939).

³¹ "Spurious" class actions were those brought under old Rule 23(a)(3). 308 U.S. 689 (1939). See 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1752 at 511-37 (1972) [hereinafter cited as WRIGHT & MILLER].

³² *Oppenheimer v. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944). See 7 WRIGHT & MILLER, *supra* note 31, § 1765 at 615-17.

³³ *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

³⁴ *Shulman v. Ritzenberg*, 47 F.R.D. 202, 206-07 (D.D.C. 1069). See *Dolgow v. Anderson*, 43 F.R.D. 472, 493-94 (E.D. N.Y. 1968) (dicta), *reversed and remanded*, 438 F.2d 825 (2d Cir. 1971); *Mersay v. First Republican Corp. of America*, 43 F.R.D. 465, 469 (S.D.N.Y. 1968). See 7 WRIGHT & MILLER, *supra* note 31 § 1761-§1769 at 584-657. Plaintiff has the burden of showing compliance with Rule 23(a)(4), *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 457 (E.D. Pa. 1968), yet it is interesting to note the "interest" that defendants have shown in protecting the rights of plaintiff class members, since most of the challenges to adequacy of representation come from defendants. The Court in *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594 (M.D. Pa. 1974) acknowledged that the defendants in objecting to the adequacy of

In analyzing the representative's forcefulness or interest in the class, the courts have been more concerned with the quality than the quantity of representation. In *Eisen v. Carlisle & Jacquelin*,³⁵ the court stated "we believe that reliance on quantitative elements to determine adequacy of representation . . . is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited . . . but we fail to understand the utility of this approach."³⁶ In focusing on the individual who is instituting the action, courts have applied a standard that the "representatives must be of such a character as to assure the vigorous prosecution or defense of the action, so that the members' rights are certain to be protected."³⁷ Accordingly courts have considered a representative's integrity and have looked at factors "such as the representative's honesty; consciousness, and other affirmative personal qualities" in making a determination under Rule 23(a)(4).³⁸ However, when the class representative also acts as class counsel, the courts have become concerned with both qualitative and quantitative factors.

C. The Counsel as Class Representative

A crucial responsibility of the class representative is the engagement of an attorney who will conduct the litigation.³⁹ However, in conducting a class action the attorney is more than a mere technician. This point was stressed in *Greenfield v. Villager Industries, Inc.*⁴⁰ In this class action suit in which a settlement had been reached, the plaintiffs through their counsel had expressed an intention to send individual notices but instead had given publication in two newspapers. The court felt this substitution was not the "best notice practicable" and expressed strong dissatisfaction with the extremely superficial compliance with class action principles. It felt that class counsel had breached a fiduciary duty to those not before the court by failing to

representation "are probably more interested in preventing class action status than they are in assuring that the prospective class is properly represented."

³⁵ 391 F.2d 555 (2d Cir. 1968).

³⁶ *Id.* at 563. See also *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 714 (7th Cir. 1968). Professor (now Judge) Weinstein in *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 460 (1960) says about adequacy:

A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice.

³⁷ 7 WRIGHT & MILLER, *supra* note 31, § 1766 at 633-34. See *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 714 (7th Cir. 1968).

³⁸ *Carpenter v. Hall*, 311 F. Supp. 1099, 1114 (S.D. Tex. 1970). See, e.g., *Technograph Printed Circuits, Ltd. v. Methode Elecs. Inc.*, 285 F. Supp. 714, 721 (N.D. Ill. 1968).

³⁹ See text at note 34 *supra*.

⁴⁰ 483 F.2d 824 (3d Cir. 1973).

comply with the notice requirements of Rule 23.⁴¹ In vacating an order approving the settlement, the court stressed the importance of counsel's role: "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry."⁴² As has been discussed,⁴³ the requirement of adequate representation can be breached if the representative has interests which are either actually or potentially antagonistic to those of the class itself. This antagonism inevitably arises when the class representative also acts in the role of class counsel. In such a situation the attorney as class representative must maintain interests which are compatible with the class and see that the class interests are enforced by procuring adequate legal services.⁴⁴ The attorney assuming the role of class counsel must act in a fiduciary capacity to the class by following the safeguards of Rule 23.⁴⁵ Additionally in this situation the attorney assumes a third role, because the attorney acting as an attorney must guarantee his livelihood by ensuring that he will collect a fee for his services. This last consideration may create a conflict of interest between the roles of representative and counsel in at least three respects.⁴⁶

The first conflict is a direct result of the complex litigation of a class action which can generate large attorney's fees.⁴⁷ Typically these fees far outweigh any recovery a member of the class may receive.⁴⁸ This discrepancy has concerned courts faced with the attorney as class representative,⁴⁹ and some have used this as a basis to deny class cer-

⁴¹ *Id.* at 832. *Cf. In re Coordinated Pretrial Proceedings, Etc.*, 410 F. Supp. 680, 690 (D. Minn. 1975) (court and counsel have the duty to protect and guard the absent members of the class). It may be asked how far this obligation extends. Is the *Greenfield* court implying that it would entertain a malpractice suit because the "reasonably prudent" attorney would have served notice differently? From the strength of the court's argument, this could be a logical extension.

⁴² 483 F.2d at 832 n.9.

⁴³ See text at note 34 *supra*.

⁴⁴ See note 34 *supra* and accompanying text.

⁴⁵ See notes 40-42 *supra* and accompanying text.

⁴⁶ It has already been shown that if the attorney were incompetent in the role of class counsel the requirements of 23(a)(4) would not be met. See text at note 34 *supra*. The question in issue concerns the attorney's satisfying the second factor in the role of class representative, i.e. having interests compatible with, and not antagonistic to, those whom he would represent.

⁴⁷ For example, the fees allowed in *Alpine Pharmacy, Inc. v. Pfizer & Co.*, 481 F.2d 1045, 1052-53 (2d Cir. 1973), which was a class action antitrust suit, were \$1,960,000 when the recovery was over \$12.5 million. See also *Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58, 61 (7th Cir.), *cert. denied*, 307 U.S. 648 (1939); Comment, *Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines*, 16 B.C. IND. & COM. L. REV. 630 (1975).

⁴⁸ In *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972), the 3,000 class members received an average recovery of approximately \$2,000 while the attorneys received a fee of over \$1 million. *Id.* at 222-26.

⁴⁹ In *Cotchett v. Avis Rentacar Sys. Inc.*, 56 F.R.D. 549, 554 (S.D.N.Y. 1972), the court stated: "The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial in-

tification. The rationale advanced is that where a "person is a member of two groups with distinct and conflicting interests, and if the economic interest in one of his roles significantly outweighs the economic interest in the other, such a person cannot adequately represent the latter group."⁵⁰

Second, the potential for large fees has alerted courts to the problem of solicitation.⁵¹ If an attorney initiates an action as both class representative and class counsel, there arises a strong question of whether the action is being brought to generate attorney's fees. This counsel qua representative situation seems susceptible *prima facie* to criticism as a questionable method of soliciting legal business.⁵² Since solicitation does not "comport with the high quality of objectivity, duty and integrity required of lawyers" the practice is discouraged by denying class certification to the counsel qua representative.⁵³

terest Mr. Cotchett might have in the legal fees engendered by this lawsuit." *See also* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968), where Chief Judge Lombard observed that the "only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them"; Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D. Ill. 1972) where the court relied on the words of an old Italian proverb: "A lawsuit is a fruit tree planted in a lawyer's garden."

⁵⁰ Seiden v. Nicholson, 69 F.R.D. 681, 687 (N.D. Ill. 1976). *See also* Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975); Sweet v. Birmingham, 65 F.R.D. 551, 555 (S.D.N.Y. 1975) (dicta) "[W]here a representative party also serves as counsel, or co-counsel, for the purported class, a conflict of interest clearly arises."; duPont v. Wyly, 61 F.R.D. 615, 623 (D. Del. 1973); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1972).

⁵¹ Blank v. Talley Indus., Inc., 390 F. Supp. 1, 7 (S.D.N.Y. 1975). Client solicitation in a class action should result in no allowance of attorneys' fees.

⁵² Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 450 (D. Ariz. 1972).

⁵³ *Id.* *See also* Graybeal v. American Savings & Loan Ass'n, 59 F.R.D. 7, 14 (D.D.C. 1973).

For an argument that solicitation should be encouraged, see Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1976). The author suggests that because solicitation will provide an increased awareness of potential plaintiffs' rights, freer access to information and price competition, it should be allowed and encouraged. However, EC 2-3 of the ABA Code of Professional Responsibility provides in part:

[The giving of advice to take legal action] is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

ABA CANONS OF PROFESSIONAL ETHICS EC 2-3. Therefore, until this policy is changed it will be assumed, *arguendo*, that solicitation is harmful to the profession and should be discouraged.

For a suggestion that there are valid reasons for allowing the attorney to serve as representative in highly specialized antitrust and securities cases see Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931 n.5 (7th Cir. 1972); 7 WRIGHT & MILLER, *supra* note 31, § 1766 at 635. The suggestion is that in these cases there may be a sizeable recovery to the class, and the high fees may serve as an added incentive, thereby assuring that the interests of the class are adequately represented. This view overlooks the fact that although such fees may serve as incentive to vigorous prosecution, they may also serve as incentive to solicitation, which the legal community generally condemns. Moreover, there is still the concern of many courts in the discrepancy between the amount received by the attorney as a *member* of the class and the amount received as

A third potential role conflict for the plaintiff-attorney arises in the area of settlement. In any class action there is always the temptation to settle the action on terms less favorable to the class if a large fee can be part of the bargain. That temptation is increased where the attorney is the representative and may "stand to gain little as class representative, but may gain very much as attorney for the class."⁵⁴ However, since the court must approve a settlement,⁵⁵ at least one court has decided this approval is a sufficient deterrent to prevent the attorney from settling to collect his fees. In *Lamb v. United Security Life Co.*,⁵⁶ an attorney sought to serve as both counsel and representative in a class action alleging securities violations. The court did not accept the proposition that the attorney was seeking to obtain a greater proportion of the recovery than other class members and thus was an unfit representative.⁵⁷ The court reasoned that any fees earned as an attorney would be for services rendered and it saw no conflict when the same individual sought a sum in redress as a representative. The court was confident that since attorneys' fees would come under court scrutiny, any problem generated by a conflict of interest could be resolved at a later time.⁵⁸

Although this judicial confidence may be reassuring, *Lamb* seems incorrectly decided for two reasons. First, as has been discussed, the dual roles of counsel and representative have inherent conflicts of interests.⁵⁹ Although the settlement may require court supervision and approval, a court usually cannot adequately supervise the attorney to ensure that he is also providing appropriate representation to the class as its representative. With the complexities inherent in a class action, a court simply does not have the capabilities to perform this added task, especially where the economic interests of counsel may outweigh his economic interest in providing adequate representation.⁶⁰ The second reason relates to the basic procedure as-

counsel. See text at notes 47-53 *supra*. A case which supports the theory that money is the root of this evil is *Lorber v. Beebe*, 407 F. Supp. 279, 293 (S.D. N.Y. 1976) in which the plaintiff representative had rendered legal services to the class and expected to continue to do so. The court granted class action status predicated upon satisfactory personal assurance from plaintiff that he would be bound by an order prohibiting him from direct or indirect participation in any legal fees. *Id.*

⁵⁴ *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 13-14 (D.D.C. 1973) (certification denied to counsel qua representative).

⁵⁵ FED. R. CIV. P. 23 (e) states that "[a] class action shall not be dismissed or compromised without the approval of the court"

⁵⁶ 59 F.R.D. 25 (S.D. Iowa 1972).

⁵⁷ *Id.* at 31.

⁵⁸ *Id.* See also *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975).

⁵⁹ See text at notes 47-54 *supra*.

⁶⁰ As stated in the context of a derivative action by the court in *G.A. Enterprises, Inc. v. Leisure Living Communities, Inc.*, 517 F.2d 24 (1st Cir. 1975): "It is true that the suit could not be settled without court approval. However, a court's ability to oversee complex litigation and understand all its nuances is limited by its many other duties. In an adversary system a court must rely largely on the parties." *Id.* at 27.

sure adequate representation. Rule 23(a)(4) requires that adequate representation be demonstrated before the action is certified, not while the suit is being settled and attorneys' fees are awarded. If a court waits until that time, the purpose of Rule 23(a)(4) may have been defeated because the class may have already suffered inadequate representation. Thus a court should be careful from the outset of litigation to deter attorneys from bringing suits as class representatives and should not rely on its ability to approve settlements as a means of ensuring adequate representation.

D. *The Relationship Between the Representative and Quasi-Plaintiff*

With the exception of the *Lamb* decision, courts generally have summarily rejected the proposition that the class counsel may also serve as class representative.⁶¹ Courts have generally decided that in such a situation the interests of the representative and the interests of the class as a whole are conflicting and not compatible, based upon the discrepancy between the potentially large fees awarded to the counsel and the amount awarded to the individual class members. However, the basis for this role conflict is not as apparent when the class representative has an affiliation with the counsel, for example, when the representative is counsel's relative, close friend, or law partner. In this situation while the counsel and representative are not the same person, the relationship may be such that the counsel takes the position of quasi-plaintiff. Of course, unlike the representative qua counsel situations, the class representative will not be paid attorney's fees if the action is successful. As a result there is not direct economic antagonism between the counsel and the representative. However, as will be discussed, the relationship between representative and counsel may be disfavored because of the underlying association between the parties.

On its face, Rule 23(a)(4) imposes its adequacy requirement upon the party bringing the class action. However, if as the court suggested in *Greenfield* "it is counsel for the class representative, and not the named parties, who direct [class actions],"⁶² there is a strong implication that the representative's role is minimal; consequently, the focus for adequacy of representation should be on the counsel. The *Greenfield* statement also suggests counsel in the fiduciary role really performs the representative's functions; therefore, if this analysis is true and the conflicts of interest discussed in the counsel qua representative situation are ignored, then a competent class attorney who can satisfy the procedural requirements of Rule 23 really does ensure that the class is receiving adequate representation. Theoretically then, it should not matter who plays the representative's role, since counsel is the driving force. Furthermore, this line of analysis carried to its

⁶¹ See text at notes 50-54 *supra*.

⁶² 483 F.2d at 832 n.9.

logical conclusion would necessarily maintain that if the counsel is competent, the representative could be the attorney's spouse, sibling, law partner or even the attorney himself without creating a doubt as to the adequacy of representation. Not all courts have shared the *Greenfield* court's perception of the representative's role as being one of a minimal nature. For example, a case which suggests the appropriateness of placing greater emphasis on the representative is *In re Goldchip Funding Co.*⁶³ In this class action the class representatives included a housewife and a student, neither of whom had much business experience or knowledge of the facts, and who consequently were completely relying on their attorneys to direct the litigation. The court denied class certification indicating that "[a]n attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved."⁶⁴

On its surface, *Goldchip* differs from many of the other cases involving the attorney as a quasi-plaintiff since it is concerned more with the degree of the attorney's authority than with the form of the counsel and representative's relationship. The decision itself is based on the court's view that the plaintiffs did not have a keen interest in the progress of the litigation. The court would have rejected a counsel qua representative situation, and equated the attorney with the plaintiff in these circumstances. It undertook an investigation into the capabilities of the named parties. By contrast, the *Greenfield* court would have assumed that the counsel was the driving force, that the representative's role was minimal, and that any thoughts to the contrary were "sheer sophistry." The *Goldchip* court rejected this approach, finding that Rule 23 requires more than a mere puppet representation.⁶⁵ The decision in *Goldchip* thus supports the idea that since potential conflicts exist between the representative's role and the counsel's role when these roles are effectively assumed by the same person, the class is denied adequate representation. The requirement of the representative's role under Rule 23(a)(4) is that he "fairly and adequately protect the interests of the class."⁶⁶ However, the "[p]roper representative can offer more to the prosecution of a class action than mere fulfillment of the procedural requirements of Rule 23."⁶⁷ The *Goldchip* court recognized this in suggesting that the representative can "for example, offer his personal knowledge of the factual circumstances, and aid in rendering decisions on practical and non-legal problems which arise during the course of litigation."⁶⁸ The representative's duties also can include monitoring the class counsel or

⁶³ 61 F.R.D. 592 (M.D. Pa. 1974).

⁶⁴ *Id.* at 595. The court cited *Graybeal v. American Savings & Loan Ass'n*; 59 F.R.D. 7 (D.D.C. 1975). See note 54 *supra*.

⁶⁵ 61 F.R.D. at 594.

⁶⁶ FED. R. CIV. P. 23(a)(4). Rule 23(a)(4) is quoted at note 1 *supra*.

⁶⁷ *Goldchip*, 61 F.R.D. at 594.

⁶⁸ *Id.* at 594-95.

agreeing to a settlement.⁶⁹ These functions require that the representative have enough independence to exercise unconstrained judgment.

This requirement of independence thus disposes of the approach in *Greenfield* which places emphasis on the counsel rather than representative in a class action. The required independence vanishes in the representative qua counsel cases because the two roles engender conflicting financial interests. It is this conflict which adds an unanswerable dimension to the *Greenfield* emphasis on the counsel. The requirement for independence and the concern over a financial conflict of interest also offer a guide to the quasi-plaintiff cases. Theoretically, if the relationship between counsel and representative is one in which the representative would share in attorneys' fees there would be a conflict of interest sufficient to preclude adequate representation. This conflict of financial interests test has been applied to deny certification when the class representative was the law partner⁷⁰ or wife of the class counsel.⁷¹ In these situations where the attorney and representative, because of a family or professional relationship may share in the attorneys' fees, the courts have found a sufficient financial relationship to create a conflict of interest.

However, the use of Rule 23(a)(4) when the attorney acts as a quasi-plaintiff presents a glaring problem: at what point in the relationship between counsel and plaintiff does the relationship become so tenuous as to prevent a claim of conflict of interest. For example may a law partner of class counsel act as class representative with a written agreement that the law partner will not share in the counsel's attorneys' fees? May the class representative be a brother, sister or close friend of the class counsel? Would such a situation create a sufficient financial relationship to warrant a court denying a class action?

E. The "Appearance of Impropriety" Test

A potentially viable solution to resolving these quasi-plaintiff problems is found in *Kramer v. Scientific Control Corp.*⁷² where the court was faced with the appearance of a conflict of interest and utilized ethical considerations to remove the class counsel.⁷³ The case

⁶⁹ See *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093-94 (3d Cir.) (Rosenn, J., concurring), cert. denied sub nom., *Arthur Anderson & Co. v. Kramer*, 97 S. Ct. 90 (1976).

⁷⁰ *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976).

⁷¹ *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974).

⁷² 64 F.R.D. 558 (E.D. Pa. 1974), motion denied, 67 F.R.D. 98 (E.D. Pa. 1975); rev'd, 534 F.2d 1085 (3d Cir.), cert. denied sub nom., *Arthur Anderson & Co. v. Kramer*, 97 S. Ct. 90 (1976). See also, 365 F. Supp. 780 (E.D. Pa. 1973); 352 F. Supp. 1175 (E.D. Pa. 1973).

⁷³ There has been much litigation on attorney conduct in class actions outside the attorney's relationship to class counsel. Most of these cases involve actions taken by the attorney that may be unethical, such as improper discovery procedures. See e.g., *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976); *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972); Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and Reforms*, 12 SAN DIEGO L. REV. 224 (1974).

arose out of a class action in which two law partners, one of whom sought to serve as representative, and whose firm acted as class counsel, filed an action claiming damages in the fraudulent sale of securities.⁷⁴ The defendants maintained that the requirements of Rule 23(a)(4) were not met, alleging that the attorneys had brought the action primarily to generate fees.⁷⁵ The district court granted class action certification and denied a motion to disqualify plaintiffs' counsel. The court declared that whatever the plaintiffs' motives were, based on its observation of the plaintiffs so far in the case, the class would be adequately represented.⁷⁶ The defendants later moved to have the class counsel removed on the grounds that the relationship between the class representative and class counsel constituted a conflict of interest in violation of the Code of Professional Responsibility.⁷⁷ This motion was also denied by the district court.⁷⁸ On appeal the Third Circuit reversed the denial of the disqualification motion,⁷⁹ basing its decision on Canon 9 of the Code of Professional Responsibility, entitled, "A Lawyer Should Avoid Even The Appearance of Professional Impropriety."⁸⁰

During the course of the litigation the representatives had tried to avoid any claim of professional impropriety by agreeing not to share in any attorneys' fees which might come to the law firm because of the action.⁸¹ In addition, the two law partners did not act directly as class counsel but instead employed an associate in their firm to act

⁷⁴ 534 F.2d 1085, 1087 (3d Cir. 1976).

⁷⁵ 64 F.R.D. 558, 559 (E.D. Pa. 1974).

⁷⁶ *Id.* at 559. The court only considered the competency criteria for adequacy, and neglected to consider the requirement that there be no conflicting interests between the representative and the class.

⁷⁷ 534 F.2d 1085, 1087 (3d Cir. 1976) (the district court opinion is unpublished).

⁷⁸ *Id.* at 1087. The defendants had also submitted a motion requesting that the class action certification be revoked. 67 F.R.D. at 99. This motion was also denied by the district court. *Id.* On an interlocutory appeal; the Third Circuit dismissed the appeal holding that a "class certification decision, per se, is not an appealable final order . . ." 534 F.2d at 1087. However, the circuit court did find that the denial of the motion for disqualification of counsel was an order subject to immediate review. *Id.* at 1088. It found that a serious question of impropriety arises in the context of a motion to disqualify counsel. *Id.* at 1088. The court invoked the collateral rule of *Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541, 546 (1949) which would put this question into that small class of rights "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 534 F.2d at 1088.

⁷⁹ 534 F.2d at 1093.

⁸⁰ ABA CANONS OF PROFESSIONAL ETHICS No. 9. EC 9-2 provides in part: Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

⁸¹ 534 F.2d at 1089.

as counsel. This procedure would seem to negate any contention that the interests of the representatives were antagonistic with those of the class, because the lawyers would not share in the recovery of attorneys' fees. Yet the Third Circuit rejected the maneuver on the grounds that, despite the agreement not to accept attorneys' fees, there was still an appearance of impropriety. The court noted that the general public understood the basic function of a partnership such as a law firm, especially as it relates to the sharing of profits.⁸² The Court stated that "[e]soteric internal protection in writing or under oath, insulating the plaintiff-attorney partner from participating in a fee, can hardly dissipate the lay notion that action by one partner is action for the partnership."⁸³ In the court's view, this lay understanding of partnerships, coupled with an attorney acting as counsel to a class representative who is a member of the same law firm, is contrary to the dictates of EC 9-2, which had been incorporated into the local rules of the district.⁸⁴ The court also acknowledged that "[I]mportant as it was that people should get justice, it was even more important that they should be made to feel they were getting it."⁸⁵ A majority of the court believed that from this has emerged what may be described as an axiomatic norm, that "the appearance of conduct associated with institutions of the law be as important as the conduct itself."⁸⁶ Citing case law precedent for disqualifying an attorney "for not only acting improperly, but also for failing to avoid the appearance of impropriety"⁸⁷ the court held that:

No member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fees award would be appropriate.⁸⁸

On its face the holding of the court appears to have a narrow scope, relating only to the question of who may not serve as counsel

⁸² *Id.* at 1092. The court also stated that:

[W]e cannot agree that an appearance of improper conflict of interest inherent in one partner's dual role as class representative and as class counsel vanishes when his partner is substituted as class counsel. To argue as appellees do is to argue against reality, against the vagaries of human nature, and against widely-held public impressions of the legal profession.

⁸³ *Id.*

⁸⁴ A question arises as to the disposition of such cases in jurisdictions that may not have incorporated the Canons or that may have a different view of ethical considerations. See generally note 73 *supra*.

⁸⁵ *Id.* at 1088.

⁸⁶ *Id.*

⁸⁷ *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385-86 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

⁸⁸ 534 F.2d at 1093.

when a fund is created. This view is reinforced by the concurring opinion of Judge Rosenn, who suggested that the majority would prevent an attorney from acting as class counsel only when the action creates a fund from which attorneys' fees are awarded and when the class representative is the class counsel or an attorney professionally associated with the attorney seeking to act as class counsel.⁸⁹ Judge Rosenn did not see the majority's holding as barring an attorney from acting as counsel to a class with claims similar or identical to claims in which the attorney has a beneficial interest as long as the attorney was not the representative.⁹⁰ The distinction is that there is no appearance of financial conflict of interest and no appearance of improper solicitation—"that the attorney-plaintiff and class counsel collusively [used] the class action mechanism to acquire clients."⁹¹

The concurring opinion thus tries to restrict the "appearance of impropriety" test to the narrow bounds of the facts presented in the case, without the same enthusiasm for the expansive reading of Canon 9 that was evidenced by the majority.⁹² Judge Rosenn seems to be testing for a "hint" of impropriety based upon some factual basis rather than the "appearance" of impropriety based upon the mere relationship between counsel and representative that is sufficient for the majority. By testing for this "hint" Judge Rosenn could require a higher threshold of impropriety than the majority. Thus the opinions could have different results in future quasi-plaintiff situations. Both the concurring and majority opinions would probably prevent an attorney from acting as counsel when the class representative is the counsel's spouse because the situation has a "hint" as well as "appearance" of a financial conflict of interest. However, the two opinions may have different results where, for example, the representative is a cousin or close acquaintance of class counsel. If there is no factual basis or a hint of a financial conflict of interest or improper solicitation, under the analytic approach of the concurring opinion the action would probably be permitted to proceed. If the relationship between counsel and representative were close enough to reach a threshold "appearance" of impropriety, then under the majority approach the action would likely be prevented from continuing. Thus, by testing for an "appearance" rather than a "hint" of impropriety the majority opinion would allow fewer quasi-plaintiff actions to proceed than would the concurring opinion.

⁸⁹ *Id.*

⁹⁰ *Id.* Judge Rosenn noted that if a client-stockholder sought advice on the method of bringing a class action against a corporation for fraudulent dealings in shares, there would be no objection if the attorney (also a shareholder) served as class counsel. Also, if the attorney's spouse or law firm in which the attorney is a partner owned stock and sought advice, the attorney need not decline representation. *Id.*

⁹¹ *Id.*

⁹² "If we are to provide force and vigor to Canon 9, a prophylactic rule prohibiting appointment of a partner as counsel is mandated in such circumstances." 534 F.2d at 1092.

ATTORNEY AS PLAINTIFF IN CLASS AND DERIVATIVE ACTIONS

In showing such enthusiasm for proper appearances of justice the Third Circuit may have impliedly incorporated Canon 9 into Rule 23(a)(4). This incorporation may be implied from the fact that *Kramer* deals with the dismissal of *counsel* under Canon 9, while Rule 23(a)(4) is concerned with the ability of the *representative* in conducting the litigation. In *Kramer* the law partners had attempted to dispell any conflict between the roles of representative and counsel by agreeing not to participate in the fee recovery. Accordingly, if the court were faced with a request for class certification under these facts, it could not find the clear antagonistic interests present in cases where attorneys act directly as class representatives. However, the *Kramer* court decided after the district court had granted certification that such an arrangement was unacceptable because of an "appearance of impropriety." Therefore, "this appearance of impropriety" is equally unacceptable at the time the representative seeks certification. Thus, if the *Kramer* court were faced with the same situation at the outset of the litigation, it would probably be unable to certify the class. The basis for this determination would be the requirement that a class representative under Rule 23(a)(4) must be a person of strong character and affirmative personal qualities.⁹³ Clearly the appearance of an impropriety in the representative's use of counsel casts doubt on the representative's ability to provide adequate representation under 23(a)(4). On the basis of the "appearance of impropriety" the class action would therefore be denied. Thus the "appearance of impropriety" standard of EC-9 would be incorporated into the demands of Rule 23(a)(4).

Applying ethical considerations in a Rule 23(a)(4) determination may seem an unjustified expansion of the Rule, but it is not without precedent. A straightforward solution of denying class certification under Rule 23(a)(4) because of ethical concerns in the quasi-plaintiff case was used in *Kruger v. European Health Spa, Inc.*,⁹⁴ in which the plaintiff was a member of the firm acting as class counsel. The court ruled that the plaintiff was an inadequate representative because a burdensome ethical question would be raised if he had to be called as a witness while his firm was employed in the matter.⁹⁵ Since the court found that ethics would require his firm—familiar with the case from the start—to withdraw if he were called as a witness, the class would be disadvantaged if he were to serve as plaintiff.⁹⁶

⁹³ See text at notes 37-38 *supra*.

⁹⁴ 56 F.R.D. 104 (E.D. Wis. 1972).

⁹⁵ *Id.* at 105.

⁹⁶ The court did not make reference to the Code of Professional Responsibility. However, two provisions explicitly support the court's decision. EC 5-9 states: "An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." DR 5-101(B) states in general: "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness" It would appear that this Canon

The incorporation of Canon 9 into Rule 23(a)(4) can be used in any situation where the relationship between counsel and the class representative creates the appearance of impropriety.⁹⁷ Extending this approach to a decision as to whether the class should be certified in quasi-plaintiff situations other than where the representative is the counsel's law partner, the test of adequacy of representation should minimize the "appearance of impropriety" between the counsel and representative. Arguably this standard would deny certification where the representative is the counsel's spouse, sibling or law partner since the impropriety suggested in these situations is the common gain, either familial or professional, to be derived from legal fees. This denial might not extend to close friends or neighbors or others with whom impropriety is not as apparent. However, the granting of class action certification is discretionary and if, in the court's judgment, the "appearance of impropriety" has passed beyond an acceptable threshold, then even in the close friend or neighbor situation, the certification should be denied.⁹⁸ This stringent "appearance of impropriety"

could also be used by courts in the counsel qua representative cases. See also text at notes 43-45 *supra*.

⁹⁷ This improper relationship refers to an appearance of impropriety in the quasi-plaintiff situation, giving rise to inadequate representation under 23(a)(4) due to the ethical concerns discussed. Ethical violations caused by other than this appearance, such as attorney conduct that may cause disqualification of counsel are beyond the scope of this discussion. The remedies appropriate in such situations will not be considered. For a discussion of alleged conflicts of interest arising from a present or former representation of an interest adverse to that of a current client, see note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U. L. REV. 343 (1976). See note 73 *supra*.

⁹⁸ However, in some cases, the court may not be able to enforce Rule 23(a)(4) because the improper relationship may not surface until the class has been certified. At this point the court may dismiss the action because the class is inadequately represented, disqualify the counsel, or allow the action to proceed and issue an appropriate order under Rule 23(d), such as substitution of class representative. It should be emphasized that the court has a great deal of discretion under Rule 23(d) and (e), and depending upon the circumstances of the case, it may fashion its remedy accordingly. Federal Rule of Civil Procedure 23(d) provides that:

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

FED. R. CIV. P. 23(d).

ety" standard would hopefully address two concerns which have also arisen in the representative *qua* counsel cases. The first is the protection of the class action as a device for individual claimants to seek redress free from champertous litigation that could serve to defeat the basic purposes of this procedure. The class action is a device for effective assertion of claims otherwise unenforceable,⁹⁹ not a means for securing large legal fees. By restricting the certification of class actions to those which appear to be brought for the purpose of asserting these claims and not for the mere benefit of attorneys, the courts will help provide protection to the class action system. The second concern addressed by the "appearance of impropriety" approach is the suspicion with which attorneys are viewed today. With recent revelations of misdeeds by lawyers on a national level, attorneys face increased public scrutiny. By refusing to allow an action to proceed if any impropriety appears to exist, the use of ethical considerations in Rule 23(a)(4) will help to preserve the integrity of the legal profession.

II. DERIVATIVE ACTIONS

As has been demonstrated in the previous discussion, the procedural structure of a class action can raise several questions as to the propriety and adequacy of representation if counsel also acts as class representative or as quasi-plaintiff. In considering these questions in the context of derivative actions, several courts and commentators¹⁰⁰ have suggested that the principles that apply in class actions should also be applied to derivative actions. They argue that the same conflicts of interests that may preclude adequate representation in class

Federal Rule of Civil Procedure 23(e) provides that: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

FED R. CIV. P. 23(e).

As examples of the kinds of actions the court may take, if at the commencement of the suit the court determines that the representation is not adequate, it may: dismiss the action (*Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976)); deny class certification but allow the proceedings to continue solely for the benefit of or against the named parties (*Cox v. Hutcheson*, 204 F. Supp. 442 (S.D. Ind. 1962)); issue an appropriate order to establish subclasses (*Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969)); limit the class to those persons who would be adequately protected by the named parties (*Long v. Robinson*, 436 F.2d 1116, 1119 (4th Cir. 1971)); or consider augmenting the representative group to insure adequate representatives of the entire class (*Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974)). See also 7 WRIGHT & MILLER, *supra* note 31, § 1765 at 623-25.

An important consideration in *Kramer* was the court's belief that disqualification of counsel did not deprive the class of counsel's familiarity with the case, since the issue of liability was not so complex as to require new counsel an inordinate amount of time to become sufficiently familiar with the case to proceed to trial. Thus the class did not suffer and could be adequately represented under Rule 23(a)(4) since a new, competent attorney could be quickly familiarized with the case. 534 F.2d at 1092.

⁹⁹ See text at notes 19-20 *supra*.

¹⁰⁰ See text at note 113 *infra*.

actions are also present in derivative actions.¹⁰¹ Thus, the legal standards for determining adequacy of representation should be the same. This comment will suggest that there are several important distinctions between class and derivative actions and these distinctions may dictate a different standard for measuring adequacy of representation.

A. An Overview of Derivative Actions

Federal Rule 23.1 which defines the procedural context of derivative actions, permits a shareholder to sue on behalf of a corporation to enforce a right that the corporation may have failed to pursue.¹⁰² This right of action was created essentially to protect shareholders from the "designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves."¹⁰³ The plaintiff's cause of action then, is not based upon a personal right that is being asserted, because the action is derivative of the corporation's right.¹⁰⁴ Thus, any recovery in a derivative action goes to the corporation and not to the individual plaintiff or shareholders whom he may represent.¹⁰⁵

¹⁰¹ See note 113 *infra*.

¹⁰² FED. R. CIV. P. 23.1 is quoted at note 2 *supra*.

¹⁰³ *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

¹⁰⁴ It is derivative when the action is based upon a primary right of the corporation but which is asserted on its behalf by the stockholder because of the corporation's failure, deliberate or otherwise, to act upon the primary right. As the Supreme Court has noted:

[T]he cause of action which such a plaintiff brings before the court is not his own but the corporation's. [The corporation] is the real party in interest and [the plaintiff] is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual . . . disabled from protecting itself.

Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522-23 (1947). See W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 5908 *et seq.* (1970) [hereinafter cited as FLETCHER].

¹⁰⁵ In *Smith v. Sperling*, 354 U.S. 91 (1957), the United States Supreme Court stated:

The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties. Whatever money or property is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such a suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion, is unwilling to initiate. This is a wholly different situation from that which arises when the corporation is charged with invasion of the stockholder's independent right. Thus, for instance, if a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest.

Id. at 99.

Although the plaintiff in a derivative action is asserting a corporate right and the representative in a class action is protecting the class interest, there are similarities in the actions. For a class action to be binding upon non participants the demands of Rule 23 must be fulfilled.¹⁰⁶ Likewise, a judgment in a derivative action will not be considered *res judicata* unless the procedural requirements of Rule 23.1 are met.¹⁰⁷

The derivative action is also subject to some of the same abuses as the class action. One of the concerns in class actions is the possibility of counsel settling the action to the detriment of the class if a large fee is part of the bargain.¹⁰⁸ A similar problem in derivative actions is the type of suits which as noted by the Supreme Court

sometimes were brought not to redress real wrongs, but to realize upon their nuisance value. These suits were bought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payments from corporate assets. These litigations were aptly characterized in professional slang as 'strike suits.'¹⁰⁹

Rule 23.1 is designed to protect against this abuse by requiring court approval for any dismissal or compromise.¹¹⁰ In addition, as with a class action, the complex litigation of a derivative action can often result in large attorneys' fees, which could serve as incentive to solicitous litigation.¹¹¹ One means of controlling this solicitation in class actions is to deny class certification because of inadequate representation. Federal Rule 23.1, in response to the problems of ensuring adequate representation in derivative suits, states that "the derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."¹¹² If the "adequate representation" criteria to be followed in derivative actions were the same as that in class actions because of the similarities in the actions, then the principles that have developed around Rule 23(a)(4) could be directly applied to derivative actions. In the view of one commentator:

Thus, the new rule does not represent a change in substance; it simply makes explicit the point that adequate representation is important in derivative, as well as in class, actions, which means that decisions on this subject under the

¹⁰⁶ See text at notes 24-26 *supra*.

¹⁰⁷ See Note, *Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff*, 71 MICH. L. REV. 1042 (1973).

¹⁰⁸ See text at note 54 *supra*.

¹⁰⁹ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949).

¹¹⁰ FED. R. CIV. P. 23.1 is quoted at note 2 *supra*.

¹¹¹ See text at notes 51-53 *supra*.

¹¹² FED. R. CIV. P. 23.1.

former rule continue to be authoritative. . . . [I]t seems clear that many of the factors that are considered when determining the adequacy of representation in a class action under Rule 23 also should apply in the context of derivative suits.¹¹³

B. *The Standard of Adequate Representation in Derivative Actions*

Although there are similarities in class and derivative actions, there may be distinctions between them that are sufficient for a different analysis of adequacy of representation under Rule 23(a)(4) and Rule 23.1.

The first step in determining a standard of adequacy of representation in a derivative action is an examination of the interests involved. In a class action, the financial interests at stake include the recovery of a monetary judgment which the members of the class will apportion among themselves. In the derivative action, the interest is to enforce the right of the corporation. Any recovery will go to the corporate treasury and not to the shareholders directly. Thus, in a class action, those "similarly situated" are the real parties in interest. In order to receive adequate representation, those parties need a representative who will participate in a recovery with them. Conversely, those "similarly situated" in a derivative action need an advocate for the right of the corporation, which is the real party in interest.¹¹⁴

¹¹³ 7A WRIGHT & MILLER, *supra* note 31, § 1833 at 393. See 3B J. MOORE, *supra* note 19, ¶ 23.1.16 at 23.1-59-60 (1976) ("Thus the degree of antagonism or conflict of interest with other shareholders as will preclude fair and adequate representation is measured by the same standards applicable to class actions."). In *G.A. Enterprises, Inc. v. Leisure Living Communities, Inc.*, 517 F.2d 24 (1st Cir. 1975), the court disallowed the derivative action that had been commenced because the plaintiff had other complex business dealings with the defendant, making him an inadequate representative. It said that standards for Rule 23(a)(3)-(4) are essentially the same for derivative suits and "cases interpreting Rule 23 may be effectively utilized in analyzing the requirements of Rule 23.1." *Id.* at 26 n.3. In *Ash v. Brunswick Corp.*, 405 F. Supp. 234 (D. Del. 1975) the plaintiff was represented by an attorney with whom he was a partner at law. Based upon the decision in *In re Goldchip Funding Co.*, 61 F.R.D. 592 (M.D. Pa. 1974), the court would not allow the plaintiff to maintain a class action, nor a derivative suit. The court applied the same reasons used in disqualifying the plaintiff from the class action as it did in disqualifying the derivative action. *Cf. Hornreich v. Plant Indus., Inc.*, 535 F.2d 550, 552 (9th Cir. 1976), where the court used the same adequacy standard in class and derivative actions.

¹¹⁴ *Shulman v. Ritzenberg*, 47 F.R.D. 202 (D.D.C. 1969) involved a derivative suit that was brought by a member of a minority shareholder group whose adequacy was attacked because he did not represent the views of the majority group. The court certified his right, saying "it seems clear that fair and adequate representation of those similarly situated means something different in Rule 23.1 from fair and adequate protection of interests of the class in Rule 23." *Id.* at 211. The court felt the very essence of a derivative suit was such that the majority stockholders could not annul the suit; otherwise there would be no derivative actions. *Id.*

For an opinion on the meaning of the words "similarly situated" see 7A WRIGHT & MILLER, *supra* note 31, § 1833 at 394-95 pointing out the seemingly contradictory requirement of the plaintiff in a derivative action representing the corporation, i.e. shareholders, while the objective of the litigation coincides with only a minority of the

The distinction between representing a class and advocating the interests of a corporation is reinforced by the wording of Rules 23(a)(4) and 23.1. Under Rule 23(a)(4) the class representative must adequately "protect" the interests of the class, whereas a plaintiff in a derivative action under 23.1 must adequately "represent" the shareholders. This difference in function, as described by the language, between the protection and representation for the interested parties suggests a difference of responsibility between the roles. The distinction is also implied from the language of Rule 23(a)(4) that a class is protected by a *representative*¹¹⁵ in a class action and Rule 23.1 that the shareholders are represented by a *plaintiff*¹¹⁶ in a derivative action. Other language in the federal rules similarly suggests different standards for measuring adequacy. Rule 23(a) imposes upon the representative certain prerequisites that must be demonstrated before the class action can be certified. One of these requirements is adequacy of representation, which must be proved by the plaintiff.¹¹⁷ Thus the action may not proceed until this burden of proof is satisfied. By contrast, Rule 23.1 states in effect that the action may not be maintained if it appears there is not adequate representation. Unlike in the class action, then, this language can and has been construed to place the burden of disproving adequacy upon the defendant.¹¹⁸ Thus the action will proceed until inadequate representation is established. This should have the effect of proceeding with the suit unless the defendant carries the burden.

Taken in the aggregate these conceptual and statutory distinctions demonstrate a difference in the degree of representation necessary under Rules 23(a)(4) and 23.1. Since the consequences of the litigation will affect the personal rights of the members in a class action, under 23(a)(4) the representative and attorney must act in a fiduciary capacity to the class in protecting its interests. Since the personal rights of individuals are not at stake in the derivative action, under Rule 23.1 the plaintiff is held to a standard of providing

stockholders. The analysis finds that "similarly situated" members are the minority stockholders and that the adequacy criteria in Rule 23 should be applied in Rule 23.1 to determine the adequacy of the plaintiff to represent these minority stockholders: "In effect what is taking place is a narrowing of the class to include only minority stockholders followed by an inquiry into the adequacy of plaintiff's representation of that group." *Id.* at 395. Accepting this as a plausible explanation of the persons involved, this comment suggests that the measure of their adequacy of representation is different in class and derivative actions.

¹¹⁵ FED. R. CIV. P. 23(a) is quoted at note 1 *supra*.

¹¹⁶ FED. R. CIV. P. 23.1 is quoted at note 2 *supra*.

¹¹⁷ See note 27 *supra*.

¹¹⁸ See *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592-93 & n.15 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), where the court said that although the district court was empowered to dismiss a derivative action should it appear the plaintiff does not adequately represent the shareholders in enforcing the rights of the corporation, a finding in the alternative is not required before the derivative action may go forward. It felt the burden was on the defendant to obtain a finding of inadequate representation and no such finding was obtained below.

proper legal advocacy for the rights of the corporation. At the very least, because of the difference in the role there should be no automatic transfer of standards between class and derivative actions.¹¹⁹ The demands of the representative's role in class actions require courts to restrict counsel from serving as representative or quasi-plaintiff, but the difference between the representative's role in class actions and plaintiff's role in derivative actions may dictate a standard which includes a more thorough review of the relationship between plaintiff and counsel in derivative actions. If in this review the conflicts of interest between the representative and counsel which were of concern in class actions are as strong in the derivative action, then there may be legitimate reasons for applying the same stringent standard to the determination of adequacy of representation. The following analysis will examine those conflicts found in class actions and discuss their applicability in the counsel qua plaintiff and quasi-plaintiff situations in derivative actions.

C. *The Attorney as Plaintiff*

In considering whether a different standard of adequacy of representation applied in class actions should be applied in derivative actions when the counsel acts as plaintiff, one must determine if the distinctions between the actions are sufficient to overcome the concerns that arise when counsel acts as plaintiff in representing the interests of a class. This comment suggests that the following concerns outweigh the distinctions between the actions and that the same standard of disallowing the actions should apply. First, many of the same financial conflict of interest and ethical considerations are present in class and derivative actions when the counsel is the plaintiff. Since derivative actions can involve complex litigation as in a class action, the potential attorneys' fees can be substantial. This potential may serve as an incentive for an attorney to bring an action and may involve the same type of champertous litigation condemned in the class actions.¹²⁰ Second, the attorney as plaintiff is torn between the two roles when a possible settlement arises. The attorney may be tempted to extend the litigation and thereby increase fees at the expense of a reasonable recovery for the corporation.¹²¹ Third, the attorney-plaintiff role conflict in derivative suits presents the same flagrant "appearance of impropriety" that was disfavored in the class actions. Thus, the same considerations in the protection of appearances that were favored by the *Kramer* court apply as strongly to the attorney-plaintiff in the derivative suits.¹²² Therefore, the attorney qua plaintiff situation should

¹¹⁹ Sweet v. Birmingham, 65 F.R.D. 551, 553 (S.D.N.Y. 1975). See text at notes 124-130 *infra*.

¹²⁰ See text at notes 51-53 *supra*.

¹²¹ See text at note 54 *supra*.

¹²² See text at notes 72-95 *supra*.

continue to be discouraged in derivative actions as it is in class actions.¹²³

D. *The Attorney as Quasi-Plaintiff*

While the distinctions between class and derivative actions may not be severe enough to warrant different standards of adequacy of representation when the attorney acts as plaintiff in a derivative action, they may be sharp enough to warrant different standards when the attorney acts as quasi-plaintiff. The opinion in *Sweet v. Bermingham*¹²⁴ exemplifies this reasoning, and provides extensive arguments against the application of a Rule 23(a)(4) analysis to a quasi-plaintiff situation in a derivative action.

In *Sweet*, a stockholder derivative action was brought by the wife of a partner in the law firm which represented her in the litigation.¹²⁵ In ruling on a motion to dismiss alleging that the plaintiff was an inadequate representative, the district court found that due to the special nature of a derivative action a more limited analysis must be utilized in considering representation questions under Rule 23.1 than under Rule 23(a)(4).¹²⁶ Concluding that the question of adequacy of representation for shareholders must be viewed through a different looking glass, it promulgated the rule that:

[W]hen a derivative plaintiff demonstrates to the court an intent and desire to vigorously prosecute the underlying corporate claim and when he has engaged competent coun-

¹²³ See note 113 *supra* for cases applying the same standard of adequacy in class and derivative actions. Much litigation over the attorney qua plaintiff in derivative actions has occurred when the attorney petitioned for fee recovery. Courts that have taken a dim view of the attorney serving as plaintiff have voiced discouragement by not permitting fee recovery, while others have reasoned that the corporation received a benefit from the action and have allowed recovery. The court refused to compensate a plaintiff for his own legal services in *Eisenberg v. Central Zone Property Corp.*, 1 App. Div. 2d 353, 149 N.Y.S.2d 840 (1956), *aff'd*, 3 N.Y.2d 729, 163 N.Y.S.2d 968, *cert. denied*, 355 U.S. 884 (1957). Fees were awarded to a plaintiff-attorney in *Ontjes v. MacNider*, 234 Iowa 208, 12 N.W.2d 284 (1943), where the court found that it was capable of estimating a reasonable fee when the action was well founded and prosecuted to a successful conclusion. This concept is faulty for using the same after-the-fact logic that was criticized in the class action cases. See text at note 60 *supra*. See Comment, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164, 182 (1972), where it is argued that if the plaintiff-attorney works on a contingent fee basis, the attorney's desire to be recompensed for his time is the main deterrent to the filing of unmeritorious actions, whether the suit is brought on behalf of a client or in the attorney's own name. See *Dann v. Chrysler Corp.*, 42 Del. Ch. 508, 215 A.2d 709 (Ch. Ct. 1965), *aff'd*, 43 Del. Ch. 252, 223 A.2d 384 (Sup. Ct. 1966).

¹²⁴ 65 F.R.D. 551 (S.D.N.Y. 1975).

¹²⁵ *Id.* at 552.

¹²⁶ *Id.* at 553. The court disagreed with the authors in 7A WRIGHT & MILLER, *supra* note 31, § 1833 at 393. See note 113 *supra* and accompanying text. In distinguishing class action cases, the court notes that where a representative party also serves as counsel, or co-counsel, for the purported class, a conflict of interest clearly arises. 65 F.R.D. at 555. This suggests that the court may not have been willing to extend its limited analysis of representation to allow the counsel or counsel's law partner to serve as plaintiff.

sel to assist in that endeavor then, absent either a conflict of interest which goes to the forcefulness of the prosecution or the existence of antagonism between the plaintiff and other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim, the representation requirement of Rule 23.1 is met.¹²⁷

Based upon this rule, the court decided that the simple fact that the plaintiff was the wife of an attorney in the firm representing her was an insufficient ground to dismiss the action.¹²⁸ The *Sweet* court's holding thus creates a more liberal standard than that used in class actions. Specifically, the typical class action analysis requires the representative to have interests compatible with, and not antagonistic to, those whom he would represent. Although the requirement of lack of conflict or antagonism of interests is the same in derivative actions, the court in *Sweet* attached different weight to these words. In *Sweet* the relationship was not condemned, first because the conflict was found not to relate "to the forcefulness of the prosecution" and second, because there was no evidence that antagonism arose from "differences of opinion concerning the best method of vindicating the corporate claim."¹²⁹ This court's approach would definitely allow more of the quasi-plaintiff derivative actions to be certified, and correctly takes into account that the nature of the claim is one of a corporate surrogate whose advocacy capabilities rather than status or relationship to the counsel should be the crucial factor.

Nevertheless, in these quasi-plaintiff cases, there are still both the "appearance of impropriety" and the Canon 9 considerations that were present in *Kramer*.¹³⁰ Presumably if there were indications of unethical conduct or champerty on the part of the attorney, then a denial of certification might be proper; but perhaps the prohibition should not be automatic as it usually is in the class actions. Admittedly to a lay person the distinction between a derivative and class action may not be evident, and thus an "appearance of impropriety" in one is the same as an "appearance of impropriety" in the other. However, this comment has suggested that the legal distinctions between the actions require a more limited standard for measuring the adequacy of representation in certain situations. Thus, while procedural and conceptual distinctions are not sufficient to overcome the concerns of the counsel qua plaintiff, they are enough to at least mandate a more thorough review of the quasi-plaintiff situation in derivative actions.

¹²⁷ 65 F.R.D. at 554.

¹²⁸ *Id.* at 556-57.

¹²⁹ *Id.* at 557. The court does mention that it could oversee the case by reviewing any settlement. *Id.* at 557. However, this should be used as a secondary consideration once the adequacy of representation standard is met. The reviewing of fees should not be used as a substitute for adequacy of representation itself. This consideration is the same in class actions. See text at notes 56-60 *supra*.

¹³⁰ See text at notes 72-95 *supra*.

CONCLUSION

Courts have overwhelmingly rejected certifying a class action when the counsel seeks to serve as class representative. When counsel has a family or professional relationship with the representative, i.e. is a quasi-plaintiff, certification of a class action has generally been denied because of a failure to satisfy Rule 23(a)(4). The dismissals are usually based upon a real or potential conflict of interest regarding the discrepancy between the amount of individual recovery and attorney's fees for the quasi-plaintiff. Courts have also disfavored the practice because it offers an "appearance of impropriety" or other violations of the Code of Professional Responsibility. Depending upon the facts of the case, either approach may be appropriate in order to effectuate the purpose of Rule 23(a)(4) and to protect the interests of the class.

In derivative actions under Rule 23.1 the attorney-plaintiff faces the same judicial attitude as in class actions, although there is some opinion in opposition. The judicial treatment of the quasi-plaintiff is less clear in derivative actions than in class actions. However, the practitioner should be aware that many of the decisions and commentators have followed the class action criteria. This comment has suggested that the criteria for determining the adequacy of representation in certain quasi-plaintiff situations should not be as rigid as in class actions. This less rigid standard was demonstrated in the case of a plaintiff whose spouse's law firm was serving as counsel. In such a situation, there should be a more thorough scrutiny to determine if an actual, and not an apparent conflict of interest exists. The differences between the role of the representative in the class action and the role of the advocate in the derivative action dictate this distinction.

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