

Selecting and Protecting Class Representatives: Defending Plaintiff Depositions; Proving Adequacy, Typicality

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Today's faculty features:

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December 15th, 2022

Phong-Chau Nguyen

**Lieff
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David Birka-White

BIRKA-WHITE
L A W O F F I C E S

Audience Poll Question 1

How long have you been practicing?

A. 0-2 years

B. 3-5 years

C. 5-10 years

D. 10+ years

E. I am not an attorney

Audience Poll Question 2

Which of the following best describes your practice?

- A. My firm represents mainly plaintiffs.
- B. My firm represents mainly defendants.
- C. My firm represents both plaintiffs and defendants.
- D. None of the above.

Audience Poll Question 3

Which of the following best describes your practice?

- A. Most of my cases are in federal court.
- B. Most of my cases are in state court.
- C. My cases are in both federal and state court.
- D. None of the above.

Introduction

- **Scope of Presentation**

- Federal court
- Different considerations for securities litigation

- **Topics**

- Class Representative selection/screening
- Rule 23 considerations
- Class Representative discovery
- Strategic considerations

What is a Class Representative?

- Named Plaintiff
- Brings claims individually and on behalf of the proposed class(es)
- Similarly situated to other members of the proposed class(es)
- Face of the case—claims rise and fall with the Class Representatives

What are the responsibilities of a Class Representative?

- Tell the truth
- Represent interests of the class
- Preserve evidence
- Serve as named plaintiff in complaint
- Stay engaged in litigation

What are the responsibilities of a Class Representative?

- Provide testimony and discovery to support claims
 - Review discovery requests
 - Verify interrogatory responses
 - Testify at deposition
- Testify at trial
- Approve class settlement

Where do you find potential class representatives?

- **Referrals/organic sources**
- **Advertising**
 - Web Intakes/Inquiries
 - Social media
 - Attorney advertising disclaimer
- **Be cautious of intake aggregators**



Class Representative Advertising

Be aware of ethical rules in your jurisdiction regarding advertising and solicitation.



Ethical Rules

California Rules of Professional Conduct Rule 7.1

(a) A lawyer shall **not make a false or misleading communication** about the lawyer or the lawyer's services. A communication is false or misleading if it contains a **material misrepresentation of fact or law, or omits a fact necessary** to make the communication considered as a whole not materially misleading.

Ethical Rules

California Rules of Professional Conduct Rule 7.2

(b) A lawyer shall not compensate, promise or give anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this rule;
- (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. . . .

[Other Exceptions]

Ethical Rules

California Rules of Professional Conduct Rule 7.3

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:
- (1) is a **lawyer**; or
 - (2) has a **family, close personal, or prior professional relationship with the lawyer.**

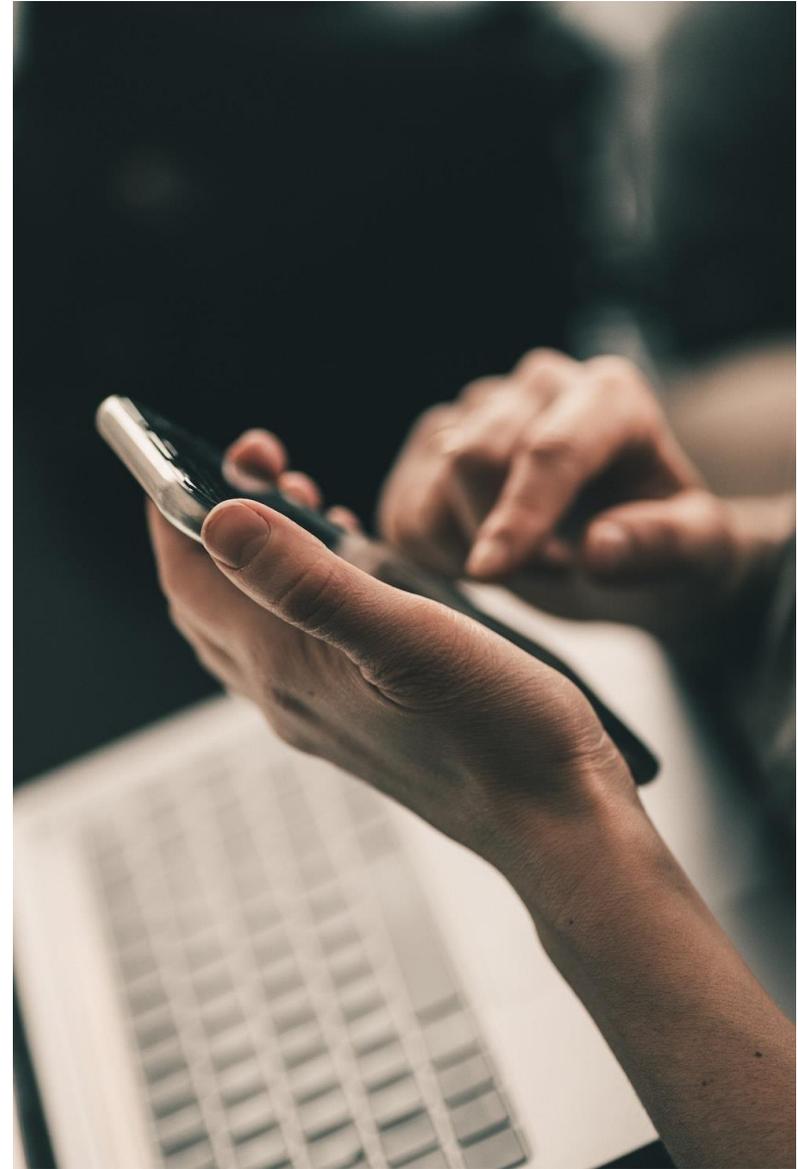
Ethical Rules

California Rules of Professional Conduct Rule 7.3

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person known to be in need of legal services in a particular matter **shall include the word “Advertisement” or words of similar import on the outside envelope**, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

Initial Contact with Prospective Class Representative

- **Prospective Class Rep should make first contact**
- **Two-way interview:** you're both evaluating each other
- **Multiple conversations/ongoing dialogue**
- **Topics to discuss**
 - Explain nature of case
 - Duties of class representative
 - Preservation of evidence
 - Evaluate injury/standing



Initial Contact with Prospective Class Representative

- **Other important topics:**
 - Scope of your representation—what happens if the class is not certified?
 - Fee structure
 - Service awards—not guaranteed and amounts vary
 - No special treatment



What makes a good Class Representative?

- Interested and engaged in the case
- Seeks accountability on behalf of the class
- Responsive
- Credible
- Thinks critically about the issues
- Ready to protect the interests of the class

Class Representative Screening and Assessment of Claim

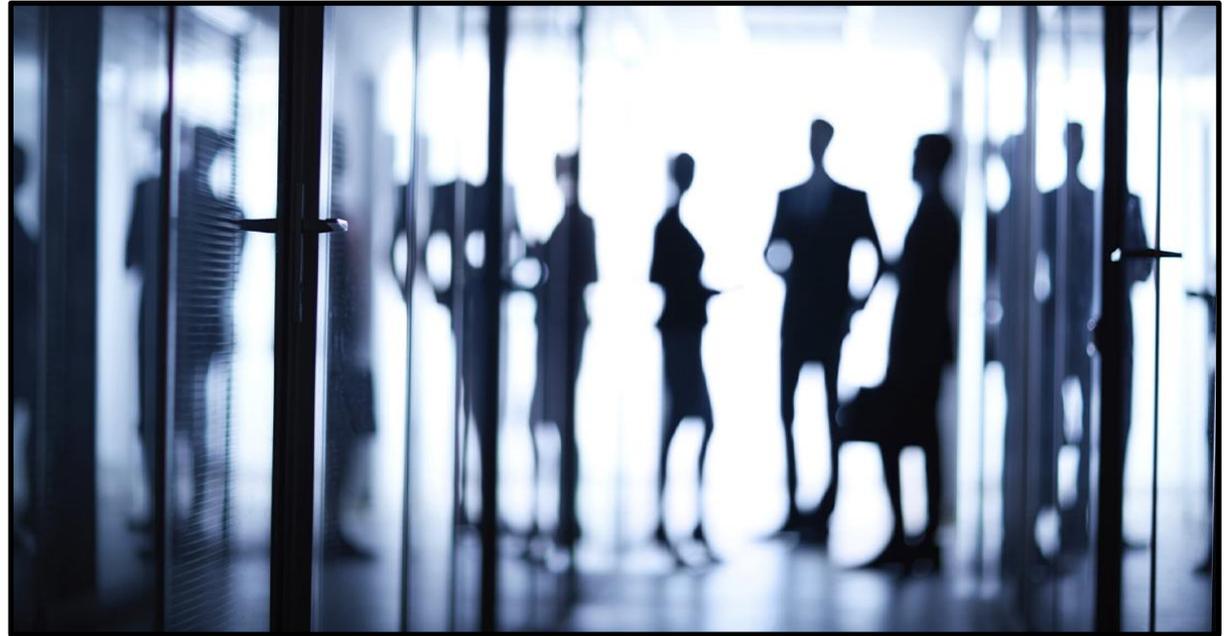
▪ **Background checks**

- Bankruptcies
- Criminal history
- Liens/judgments
- Spouses/divorces
- Social media

▪ Are they **credible**?

▪ Are they **likeable**?

▪ How will they be perceived in front of a judge or jury?



Class Representative Screening and Assessment of Claim

- **Prior/ongoing litigation**—serial litigant?
- **Arbitration** agreement/class action waiver?
- Do they fit the **class definition**?
- Analyze **viability of claim**, possibly with expert assistance
- Evaluate potential **individual defenses**



Rule 23(a) Requirements

- **Rule 23 (a)(3):** the claims or defenses of the representative parties **are typical** of the claims or defenses of the class
- **Rule 23 (a)(4):** the representative parties will fairly and **adequately protect** the interests of the class.

Rule 23(a)(3) – Typicality

Same or similar injury based on same course of conduct:

“The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.”

***Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)
(citations omitted)**

Rule 23(a)(3) – Typicality

Claims need not be identical:

“[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.”

***Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).**

Rule 23(a)(4) – Adequacy

Adequacy inquiry raises two questions:

- (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and
- (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?

***Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)**

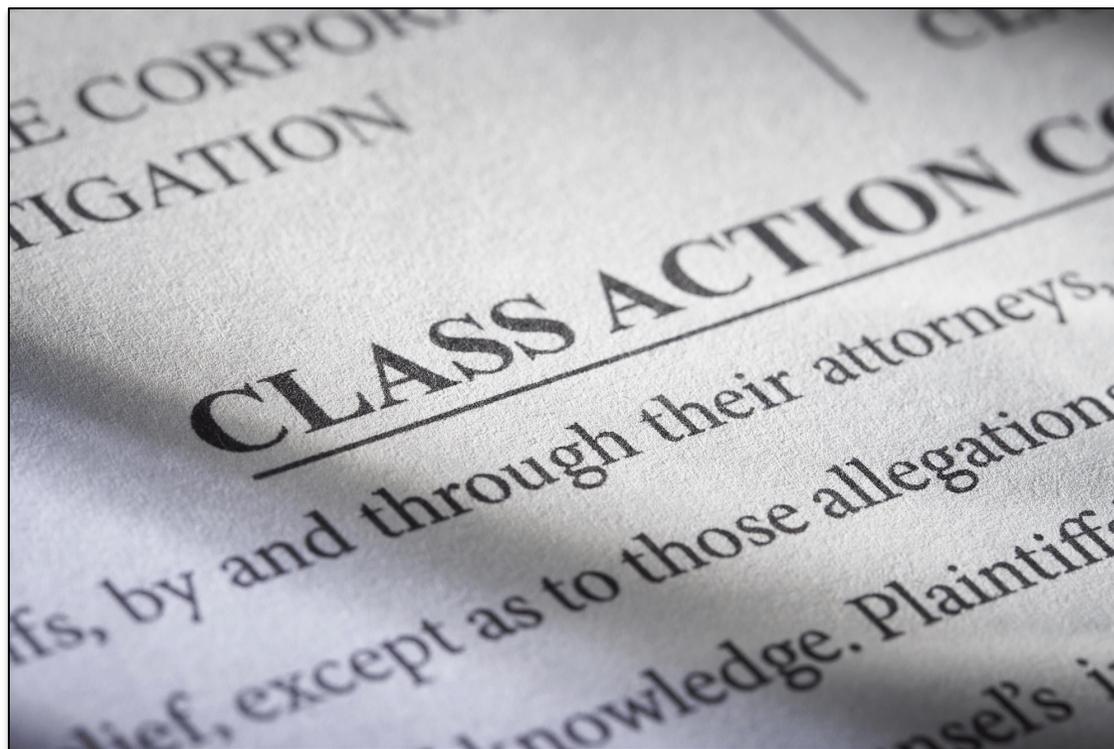
Rule 23(b)(3) – Predominance and Superiority

Predominance: do questions of law or fact common to class members predominate over any questions affecting only individual members?

Superiority: is a class action superior to other available methods for fairly and efficiently adjudicating the controversy?

Class Representative Standing

What is the basis for the claims?



Class Representative Standing

“First, the plaintiff must have suffered an **injury in fact** – an invasion of a legally protected interest which is **(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical**. Second, there must be a **causal connection** between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be **redressed** by a favorable decision.”

***Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)**

Class Representative Standing

1. Is there an injury-in-fact?

- What is the nature of the Class Rep's injury?
- Is it an actual concrete harm?

“Article III standing requires a concrete injury even in the context of a statutory violation. . . . [A] bare procedural violation, divorced from any concrete harm, and [cannot] satisfy the injury-in-fact requirement of Article III.”

***Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)**

Class Representative Standing

2. Is the Class Representative's injury causally linked to the defendant(s)?

- Is the injury traceable to the defendant(s)' conduct?
- What is the theory of liability?

Class Representative Standing

3. Is the injury redressable?

- What is the relief sought?
- What is the theory of damages?
- Has the Class Representative already been made whole?

Class Representative Standing

Other Standing Considerations:

- Is the Class Rep the right person to bring the claim?
 - Who suffered the injury?
 - Which Class(es) are they representing?
- Jurisdiction/Choice-of-law: where was the Class Rep harmed?
- Is the Class Rep still injured?

Strategic Considerations

- **Multiple class representatives**
 - Fit all sub-classes and jurisdictions
 - Substitutes
- **Nurture ongoing client relationship**
 - Evidence preservation and confidentiality reminders
 - Frequent and regular case updates
 - Send case documents
 - Maintain open line of communication
- **Social media privacy**
- **ARA may be discoverable**



Class Representative Discovery

- Immediately advise class representatives of discovery requests and their responsibilities
- Interrogatories
 - Participate in interrogatory responses
 - Review final responses before verification and service
- Duty to diligently search for responsive documents
- Make evidence available for production/inspections

Class Representative Discovery

Electronically Stored Information (ESI)

- Determine sources of ESI
 - Computers
 - Mobile devices
 - Emails
 - Social media/forums
- Negotiate search terms
- Emphasize preservation
- Imaging of devices



Class Representative Depositions

- Outline of anticipated topics and questions
- Witness confidence and responsibilities of counsel during deposition
- Explain objections and instructions not to answer
- Discoverability of witness preparations
- Adequate knowledge of case

Class Representative Depositions

- Witness preparation on case
 - Duties of class representative
 - Class definition
 - Class claims and requested relief
 - Parties, venue, and procedural posture
 - Damages theory

Class Representative Depositions

- Witness preparation on personal background
 - Document collection/ESI
 - Discovery responses
 - Online/Social media
 - Circumstances of attorney retention

Class Representative Depositions

Common Questions:

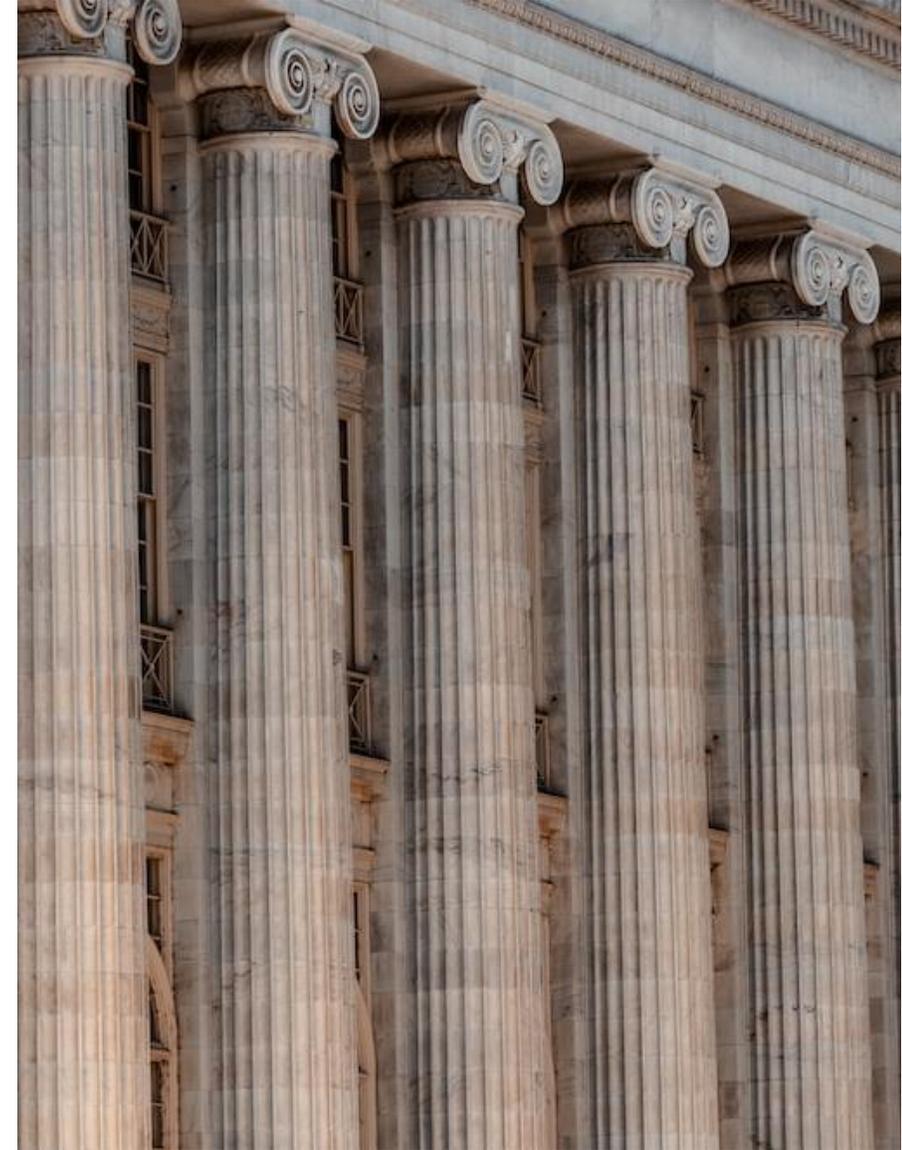
- How did you find your attorney?
- What are the claims in your lawsuit?
- Who is the judge? Who/where are you suing?
- What is your role in this case?
- How were you harmed? What are your damages?
- How did you collect your documents?

Class Certification

- **Can you still proceed with the Class Representative?**
 - Does the Class Representative still fit the class definition?
 - Does the Class Representative still have standing?
 - Does the alleged harm match your theory of the case?
- **Can you show adequacy and typicality?**
- **Strength of discovery**
 - Do you need declarations from the Class Representative?
 - Common evidence?

Class Representatives at Trial

- Duty to testify
- Check Class Rep's availability
- Plan ahead: discuss trial schedule and logistics
- Similar to deposition preparation, intensified by environment of courtroom



Settlement Considerations

- Class counsel must explain terms of settlement
- Obtain Class Representative approval on behalf of class
- Class Representative has the right to object to the class settlement or fee application
- List of settlement class representatives may be different

Settlement Considerations

Service awards

- Cannot be the basis for obtaining the Class Representative's settlement approval
- Not guaranteed and may be prohibited in some jurisdictions
 - *See, e.g., Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1261 (11th Cir. 2020) (service award precluded as “part salary and part bounty” based on nineteenth-century Supreme Court precedent)
- Amount may vary based on work involved
 - May need declaration documenting hours

Questions?

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