

LAWYER, CLIENT, COMMUNITY: TO WHOM DOES THE EDUCATION REFORM LAWSUIT BELONG?

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Abstract: Important education reform litigation is often undertaken by lawyers with admirable intentions. It is too easy, however, particularly in the context of large, enduring, complex litigation where it is difficult to identify the class, much less name and pursue the class's goals, to lose sight of the client-lawyer relationship and the significance of client autonomy. Several recent lawsuits concerning the enforceability of No Child Left Behind exemplify issues that arise in class representation. In devising legal strategies, lawyers must balance the need to address clients' immediate problems with the pursuit of longer-term strategies for change, such as organization and mobilization. It is difficult work, but only through careful attention to relationships with and among clients and communities will lawyers participate effectively in achieving meaningful education reform.

INTRODUCTION: DEFINING THE ISSUES

By definition, the public interest law firm begins with a concept of the public interest and fashions its clients around that. This reverses the traditional process where attorneys begin with clients and then fashion a concept of the public interest to correspond to the interests of their clients.

—Kenney Hegland¹

Important education reform litigation is often undertaken by lawyers with admirable intentions.² It is too easy, however, particularly

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¹ Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 811 (1971).

² See generally, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (challenge to school segregation); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (challenge to adequacy of education provided in Massachusetts public schools); *Campaign for Fiscal Equity v. State*, 814 N.Y.S.2d 1 (App. Div. 2006) (challenge to adequacy of funding of New York public schools).

in the context of large, enduring, complex litigation where it is difficult to identify the class, much less name and pursue its goals, to lose sight of the client-lawyer relationship and the significance of client autonomy.³ In devising legal strategies, lawyers must balance the need to address clients' immediate problems with the pursuit of longer-term strategies for change, such as organization and mobilization.⁴ Representing a class is further complicated by the fact that plaintiffs are frequently disempowered by the very system they are challenging, by race and class differences between lawyers and their clients, and by the limited preparation lawyers receive for working effectively with communities.⁵ The disconnect between public interest lawyers and their clients in education and other structural reform litigation is further exacerbated by time constraints, making meaningful client-lawyer communication difficult, and by potentially divergent interests among a group of clients and between the lawyer and the client.⁶ Lawsuits concerning the enforceability of the No Child Left Behind Act (NCLB)⁷ exemplify many of these issues.

This article begins in Part I with a brief description of several recent lawsuits involving NCLB. Part II highlights concerns that arise in the context of lawyering for social justice, particularly through complex litigation, and examines the manifestation of these issues in the lawsuits described above. Part III discusses strategies courts and lawyers may employ to alleviate these concerns, and the article concludes by applying these recommendations in the context of education reform.

³ See Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 389 (1987) (asserting that class actions are unique because of the degree of management required and the inherent problems of client control and conflicts of interest).

⁴ See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 956 (1992).

⁵ See Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1024 (1970).

⁶ See Kane, *supra* note 3, at 386.

⁷ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified as amended primarily in scattered sections of 20 U.S.C.).

I. LAWSUITS CONCERNING THE ENFORCEABILITY OF NCLB

It was all white people on this side [of the courtroom], and all white people on [that] side—and the argument is about our children.

—Connecticut NAACP President Scot X. Esdaile⁸

Lawsuits addressing inequities in school funding have enjoyed only limited success in terms of impact on the quality of education that children attending high-poverty schools receive.⁹ As a result, education reformers have examined other rights that may be enforceable in courts, including those provided in NCLB.¹⁰ At the same time, one State and a group of school districts from several states, joined by a national teachers' union and a number of its local affiliates, have separately challenged NCLB in court as an unenforceable unfunded mandate.¹¹ A brief recounting of some of these lawsuits, and their conflicts with each other, will provide context for the remainder of

⁸ Robert A. Frahm, *NAACP Details Opposition to "No Child" Lawsuit*, HARTFORD COURANT, Mar. 23, 2006, at B1 (describing Esdaile's comment to a mostly black audience about why the State NAACP opposes a lawsuit filed by the Connecticut Attorney General challenging NCLB).

⁹ See, e.g., *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (holding that the Commonwealth had satisfied its constitutional duty with respect to public schools); *Campaign for Fiscal Equity v. State*, 814 N.Y.S.2d 1 (App. Div. 2006) (holding as violative of separation of powers an order directing the State to adopt certain measures to adequately fund schools). These inequities facing high-poverty schools have been documented in a number of publications. See generally SCOTT JOFTUS, ALLIANCE FOR EXCELLENT EDUC., EVERY CHILD A GRADUATE: A FRAMEWORK FOR AN EXCELLENT EDUCATION FOR ALL MIDDLE AND HIGH SCHOOL STUDENTS 1-2 (2002), available at <http://www.all4ed.org/publications/EveryChildAGraduate/every.pdf>; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE SOCIAL CONTEXT OF EDUCATION (1997), <http://nces.ed.gov/pubs97/97981.pdf>; Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88 (Jay P. Heubert ed., 1999).

¹⁰ See, e.g., Nat'l Law Ctr. on Homelessness & Poverty, *R.I. v. New York (NLC)*, 224 F.R.D. 314, 319 (E.D.N.Y. 2004) (rights of homeless students); Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ. (ACORN), 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (students' rights to transfer and supplemental educational services (SES) and parents' notification right). A detailed discussion of the rights contained in NCLB, and theories developed to enforce those rights, is beyond the scope of this article, but interested readers may consult C. Joy Farmer, Note, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443 (2005); Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011 (2005); Amy Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667 (2004).

¹¹ See Sch. Dist. of Pontiac v. Spellings, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545, at *1 (E.D. Mich. Nov. 23, 2005).

the discussion. These particular lawsuits are highlighted because, although the lawyers involved in them were doing good work, in combination they reveal some of the tensions faced by those who represent communities. Awareness of these tensions may further inform effective class action practice.

A. *Attempts to Enforce Various Provisions of NCLB*

In 2003, in *Association of Community Organizations for Reform Now v. New York City Department of Education (ACORN)*, a group of parents and community associations filed a lawsuit against the New York City Board of Education and the Albany School District and their respective Chancellor and Superintendent alleging, *inter alia*, that the defendants had violated several provisions of NCLB.¹² Specifically, the plaintiffs claimed that the defendants had failed to provide students attending schools in need of improvement, corrective action, or restructuring, with the rights to transfer to different schools and obtain supplemental educational services (SES).¹³ Also, the defendants allegedly had failed to inform parents of the schools' inclusion in these categories and the corresponding right to request a transfer or SES.¹⁴ A judge in the U.S. District Court for the Southern District of New York held that the plaintiffs could not maintain their action pursuant to 42 U.S.C. § 1983, because NCLB "does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights."¹⁵

The following year, in *National Law Center on Homelessness and Poverty, Rhode Island v. New York (NLC)*, a judge in the U.S. District Court for the Eastern District of New York denied the State's motion to dismiss a lawsuit alleging, *inter alia*, that the plaintiffs, parents of homeless children residing in Suffolk County, New York, had been deprived of their rights secured by the McKinney-Vento Act, a pre-existing law

¹² *ACORN*, 269 F. Supp. 2d at 339. The plaintiffs focused on the provisions of NCLB appearing at 20 U.S.C.A. § 6316 (b) (1) (E), (b) (5) (A), (b) (7) (C), and (b) (8) (A) (i) (transfer provisions); § 6316 (b) (5) (B), (b) (7) (C) (iii), (b) (8) (A) (ii), and (e) (provisions governing SES); and § 6316 (b) (6) (parental notification). *See id.* at 339-46. Nearly two years later, relying on *ACORN*, a federal district court judge in Ohio similarly concluded that NCLB did not confer rights upon private providers of tutoring services to bring an action enforceable under 42 U.S.C. § 1983 or by an implied private right of action. *See Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005).

¹³ *ACORN*, 269 F. Supp. 2d at 339.

¹⁴ *Id.*

¹⁵ *Id.* at 347.

reauthorized as part of NCLB in 2002.¹⁶ The judge also allowed the plaintiffs' motion for class certification.¹⁷ In concluding that the plaintiffs' rights were enforceable under § 1983, the judge explained that Congress clearly intended that the McKinney-Vento Act confer individually enforceable rights.¹⁸ He distinguished McKinney-Vento from the provisions of NCLB that the judge in *ACORN* had determined did not confer such enforceable rights.¹⁹ In documents submitted to the court, the *NLC* plaintiffs' counsel drew the same distinction, adopting the *ACORN* court's analysis of NCLB and describing the earlier lawsuit as addressing an "entirely different statutory regime."²⁰ In so doing, they strengthened some of their clients' educational rights (those secured specifically for homeless children by the McKinney-Vento Act), while adopting arguments that weakened any claim their clients might make in the future to other rights held by homeless and non-homeless children alike, specifically rights to the parental notice, SES, and transfer provisions of NCLB.

B. Challenges to NCLB

Although children and their parents have not challenged NCLB as a class, other plaintiffs have done so.²¹ Their actions have colored the landscape for those seeking to pursue education reform through the courts. School districts in several states, joined by a national teachers' union and ten of its local affiliates, filed a thus far unsuccessful lawsuit against the Secretary of the U.S. Department of Education in her

¹⁶ 224 F.R.D. 314, 314, 318, 321 (E.D.N.Y. 2004). The purpose of the McKinney-Vento Act, 42 U.S.C. §§ 11431–11435, is to "ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths." 42 U.S.C. § 11431 (2002); see *NLC*, 224 F.R.D. at 318.

¹⁷ *NLC*, 224 F.R.D. at 326.

¹⁸ *Id.* at 319–20.

¹⁹ *Id.* at 320–21. The judge specifically noted several distinctions between McKinney-Vento and NCLB. *Id.* NCLB seeks aggregate education reform by holding states and educational agencies (LEAs) accountable, focuses on whether LEAs are making adequate yearly progress, and provides for federal enforcement. *Id.* McKinney-Vento, in contrast, imposes on the State a mandatory requirement to provide for each homeless child the "same opportunity and access to education as a nonhomeless child," provides for specific entitlements for specific individuals "by directing [LEAs] to carry out specific activities," and lacks any mechanism for administrative enforcement. *Id.* at 320.

²⁰ See Plaintiff's Opposition to State Defendants' Motion to Dismiss, *NLC*, 224 F.R.D. 314 (E.D.N.Y. 2004), filed July 8, 2004, at 19–20 (on file with author).

²¹ See, e.g., *Sch. Dist. of Pontiac v. Spellings*, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), *appeal docketed*, No. 05-2708 (6th Cir. Mar. 22, 2006); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

official capacity, alleging that NCLB is an unenforceable, unfunded mandate.²² The Attorney General of Connecticut, claiming to be fighting in the public interest to close the achievement gap, obtain adequate federal funding for all classrooms; and "vindicate the rights of our children,"²³ filed a separate lawsuit on similar grounds.²⁴ Highlighting conflicts among those who claim to speak for children attending persistently failing schools, the NAACP in Connecticut, accompanied by several minority schoolchildren, filed a motion to intervene in the Connecticut case on the side of the defendant federal government.²⁵ The NAACP and other opponents of Connecticut's action fear that the Attorney General's lawsuit could set dangerous precedent for other civil rights laws, hurt minority and poor children by allowing a state to

²² See generally *Spellings (Pontiac)*, 2005 WL 3149545 (filed by several school districts in Michigan, Texas and Vermont; the National Education Association (NEA); and NEA-affiliates in Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Pennsylvania, Texas, Utah and Vermont). The lawsuit was dismissed, but that dismissal was appealed to the U.S. Court of Appeals for the Sixth Circuit. A group of six States and the District of Columbia filed an amicus brief in support of the plaintiffs' appeal, as did the Governor of Pennsylvania and several state and local elected officials. See Amici Curiae Brief of the States of Connecticut, Delaware, Illinois, Maine, Oklahoma, Wisconsin, and the District of Columbia, *Sch. Dist. of Pontiac v. Spellings*, No. 05-278 (6th Cir. 2006), filed March 31, 2006, available at <http://www.nea.org/lawsuit/images/connamicus.pdf>; NEA, Stand Up for Children: *Pontiac v. Spellings*, <http://www.nea.org/lawsuit/index.html> (last visited Oct. 25, 2006).

²³ Press Release, Conn. Attorney Gen.'s Office, Attorney General Files Amended NCLB Lawsuit; Says Federal Education Funding Inadequate Even with Cheaper Testing Model (Feb. 28, 2006), available at <http://www.ct.gov/ag/cwp/view.asp?A=2426&Q=310496>; Press Release, Conn. Attorney Gen.'s Office, Attorney General's Statement on NAACP Petition to Support Federal Motion to Dismiss NCLB Suit (Jan. 30, 2006), available at <http://www.ct.gov/ag/cwp/view.asp?A=2426&Q=309542> [hereinafter Press Release, Statement on Petition].

²⁴ See Plaintiff's Complaint for Declaratory and Injunctive Relief, *Connecticut v. Spellings*, No. 3:05-CV-01330 (D. Conn. Aug. 22, 2005), available at <http://www.lawyerscomm.org/2005website/projects/education/educationpics/nclb%20original%20complaint.pdf>. Three of four counts were dismissed recently on jurisdictional grounds; the judge held that state officials cannot maintain a pre-enforcement challenge to NCLB. *Spellings*, 453 F. Supp. 2d at 489, 491 (dismissing Count I); *id.* at 494 (dismissing Count II); *id.* at 501 (dismissing Count III); *id.* at 503 (granting in part and denying in part defendant's motion to dismiss as to Count IV).

²⁵ Press Release, Lawyers' Comm. for Civil Rights Under Law, State NAACP Seeks to Intervene in No Child Left Behind Suit (Jan. 30, 2006), available at <http://www.lawyerscomm.org/2005website/publications/press/press13006.html> [hereinafter Press Release, State NAACP]. The judge granted permission for the NAACP to file a response, but later denied the motion to intervene without prejudice to its renewal pending resolution of the issue of subject matter jurisdiction. *Spellings*, 453 F. Supp. 2d at 466-67. Having resolved these issues, the court recently invited interested non-parties to file motions to intervene. *Id.* at 503.

avoid its obligations to them under NCLB, and squander state resources that could otherwise be used to improve schools.²⁶

II. TENSIONS IN STRUCTURAL REFORM LAWSUITS

Idealism, though perhaps rarer than greed, is harder to control.

—Derrick A. Bell, Jr.²⁷

Several tensions manifested in the lawsuits discussed above arise frequently in the context of lawyering for education and other structural reform, and can limit the efficacy of both process and results. These tensions include the strength of lawyers' ideological commitments, attenuated relationships between class counsel and their clients, and the role of client autonomy in group representation.

A. Lawyers' Ideological Commitments

The Attorney General of Connecticut's choice to challenge NCLB indicates that he views such an action as consistent with his obligation "to represent the interests of the people of the State of Connecticut in all civil legal matters involving the state to protect the public interest."²⁸ The NLC plaintiffs' attorneys aimed to secure education for homeless children.²⁹ Yet both of their approaches have potentially negative ramifications for the very populations they seek to protect.³⁰

This is not an unusual situation, though it is not an unproblematic one.³¹ Legal actions based on attorneys' ideological commitments

²⁶ See Press Release, State NAACP, *supra* note 25; see also Robert A. Frahm, *NAACP Opposes State Lawsuit: Attacking Federal No Child Left Behind Act Could Harm Minorities*, *Group Says*, *HARTFORD COURANT*, Jan. 21, 2006, at A1.

²⁷ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 504 (1976).

²⁸ See Conn. Attorney Gen.'s Office, *About Us*, <http://www.ct.gov/ag/cwp/browse.asp?a=2175> (last visited Oct. 25, 2006).

²⁹ See *supra* text accompanying notes 16–20.

³⁰ Although this paper criticizes lawsuits for structural reform that appear to neglect meaningful client and community input or compromise class members' rights without their informed consent, the author in no way means to suggest that it is easy or convenient to engage clients and communities in crafting lawsuits and other responses to problems such as inadequate educational opportunity. As the circumstances of these cases reveal, there are significant trade-offs involved. Had the lawyers in the NLC case not distinguished the McKinney-Vento Act from other provisions of NCLB, for example, they may well have lost their case. See NLC, 224 F.R.D. 314, 320–21 (E.D.N.Y. 2004).

³¹ See Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207, 231 (1976) (asserting that public interest practitioners, including estab-

may be simply the manifestation of what lawyers think is important, rather than an expression of the concerns of clients, class, or community.³² Their concerns about the potentially broad impact of NCLB drove the actions of the Attorney General, school districts, teachers' unions, the Connecticut NAACP, and the plaintiffs' lawyers in *NLC*. This typifies the focus of "cause lawyers" on the "broad stakes involved in representing their client community."³³ The Attorney General decided to challenge NCLB in court because he believed children are "ultimately the victims of unkept federal promises and inadequate resources resulting from unfunded federal mandates."³⁴ He viewed the endorsement of the lawsuit by a large number of school boards across the state as a "groundswell of grassroots support—crossing all geographic, political and socio-economic borders."³⁵ Yet he filed the lawsuit before ascertaining whether a large number of students and their parents, whose lives would be affected directly by the lawsuit, wished to pursue it.³⁶ The moral implications of such decisions by lawyers raise the "critical question of accountability in a democratic society," because in choosing which claims to bring, lawyers serve as gatekeepers to the legal system.³⁷

Many education reform plaintiffs' lawyers may believe they have adequate information upon which to base their strategic decision-making, even without client input, because they have spent decades

lished law reform organizations, have been historically "selective in defining litigation priorities within a broad range of . . . grievances").

³² See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1637–38 (1997) (discussing the fact that while lawyers were debating about when to bring forward a case to press the issue of gay marriage, lesbians and gay men started filing their own legal actions without support from legal experts).

³³ See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1932 (1999).

³⁴ See Press Release, Statement on Petition, *supra* note 23.

³⁵ Press Release, Conn. Attorney Gen.'s Office, Attorney General, Superintendents Announce 109 School Board Endorsements of NCLB Suit (Jan. 17, 2006), <http://www.ct.gov/ag/cwp/view.asp?A=2426&Q=308722>.

³⁶ See Frahm, *supra* note 8. The NAACP's intervention on behalf of minority plaintiff children reveals the lack of unified community support. See *id.* ("The NAACP's decision to back [NCLB] is an effort to guarantee that poor and minority children are represented in the courtroom argument over how it will be applied in Connecticut.")

³⁷ Cahn & Cahn, *supra* note 5, at 1008 (asserting that because a group of independent lawyers remains "free to choose [its] own version of the public interest . . . [w]hether public interest law will develop new methods of ensuring democratic control of the nation's resources and programs or whether it will be a further entrenchment of the most elitist tendencies in the law remains to be seen").

pursuing educational equity.³⁸ The disparity in expertise possessed by lawyers and their clients, however, raises additional concerns, as it may increase client dependence and permit lawyers to manipulate clients in the guise of providing assistance.³⁹ In addition, many idealistic lawyers may choose the class action as a litigation strategy because it advances broad idealistic goals and affects large numbers of people while potentially providing the self-reinforcement of winning a big case.⁴⁰ Given the level of their investment, it may be difficult for lawyers to step back from their own strategies to consult with clients who may disagree with them.⁴¹ This problem is exacerbated by a lack of clarity as to the precise identity of the client. The Connecticut Attorney General, for example, represents the state and the "public," entities difficult to define. Although they represent specific clients, the Connecticut NAACP and the NLC plaintiffs' attorneys, like many public interest lawyers, may "see themselves as advocates for a much more loosely defined constituency or community."⁴² Furthermore, many education reform lawsuits are filed on behalf of young people under the age of eighteen, which raises a plethora of additional issues, detailed discussion of which is beyond the scope of this article.⁴³

³⁸ See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714 (1941) (observing that the individuals making up a group in a class action are usually in no position to act for themselves because they lack knowledge and because the expense of seeking redress is much greater than their individual stake in a controversy); see also Bell, *supra* note 27, at 491 & n.63 (noting that the willingness of many attorneys to assume that they know best may lead to a lack of accountability to clients). In *Serving Two Masters*, Professor Derrick Bell discusses the consequences of the NAACP's pursuit of integration as the only acceptable remedy for the poor quality of education that black students were receiving. See Bell, *supra* note 27, at 476 & n.21. Many of Bell's critiques of the NAACP's legal strategy in school desegregation cases, written thirty years ago, apply with equal force to lawsuits concerning the enforceability of NCLB today.

³⁹ Cahn & Cahn, *supra* note 5, at 1040 ("We have seen this take place in the legal service programs—where lawyers 'for' the poor decide what in their professional collective wisdom is in the best interests of the poor.").

⁴⁰ Bell, *supra* note 27, at 493.

⁴¹ See *id.* (asserting that psychological motivations may underlie lawyers' tendency to direct a class action lawsuit toward their own goals rather than those of their clients).

⁴² See *id.* at 491 & n.63 (citing Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1124–25 (1970)).

⁴³ In addition to the difficulties many public lawyers have in defining their clients, the context of education further complicates the issue. Named plaintiffs may include students under the age of eighteen, though their parents hold many of their educational rights, such as those provided in the Individuals with Disabilities in Education Act, and may be included as "next friends" or plaintiffs in their own right. See, e.g., *NLC*, 224 F.R.D. 314, 316 (E.D.N.Y. 2004) (concerning action commenced by parents of homeless children); *ACORN*, 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003) (concerning claim initiated by parents of schoolchildren). Where students' goals diverge from those of their parents, additional

B. *Attenuated Relationships with Clients*

It is difficult in the context of complex litigation for lawyers to fulfill their ethical obligations to consult with clients regularly and fully inform them of relevant considerations.⁴⁴ Typically, parties in a class action exercise little control over their lawyers; the usual employer-employee relationship is absent, as class action lawyers must represent the interests of an amorphous group of clients.⁴⁵ The distance between class action lawyers and their clients may lead lawyers to underestimate their clients' stake in the matter or to fail to recognize potential conflicts that require their attention.⁴⁶

Members of the plaintiff classes in *ACORN* and *NLC* and the intervenor class in Connecticut are numerous and potentially divided, making it difficult for lawyers to figure out whom to consult for guidance in strategic decision-making.⁴⁷ Even if class members are easily identifiable, should the class action lawyer's obligation run to the representative party, someone who is typically not chosen by class members but either comes forward as a volunteer or is sought out by the lawyers, or to the class as a whole?⁴⁸ Counsel may limit interaction

conflicts are raised for lawyers who represent children. A more detailed discussion of these issues, which raise important considerations for lawyers representing young people, is beyond the scope of this article. Interested readers may consult Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 266 (2005) and Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1439 (1996).

⁴⁴ Bell, *supra* note 27, at 504.

⁴⁵ Kane, *supra* note 3, at 389; see Bell, *supra* note 27, at 491 (noting that civil rights attorneys frequently are isolated from their clients).

⁴⁶ An example of such an underestimation is provided in Rabin's assertion that "[t]he classical tension that the poverty or criminal lawyer sometimes confronts between establishing broad precedent and safeguarding the rights of his client is hardly ever an issue because public interest advocates simply do not have discrete clients whose personal liberty or property is at stake." Rabin, *supra* note 31, at 234.

⁴⁷ See Bell, *supra* note 27, at 504 (discussing these concerns in the context of school desegregation litigation); see also *supra* note 43, and accompanying text (describing special issues that arise in representing underage clients). In *NLC*, for example, one of the plaintiffs was no longer homeless by the time the case reached resolution and, as a result, that plaintiff's priorities may have shifted during the course of the litigation. See 224 F.R.D. at 325.

⁴⁸ See Bell, *supra* note 27, at 511. Bell suggests, further, that lawyers' obligations to their clients may be compromised because of how their work is funded or because some groups are more effective than others in getting their attention. See *id.* at 489 (noting that because established civil rights groups fighting school segregation were funded by middle class blacks and whites who believed in integration, civil rights attorneys favored this strategy over others); *id.* at 491 (suggesting that civil rights attorneys may feel as though they must

with named plaintiffs because fiduciary obligations run to the class as a whole, such that named plaintiffs' directives are not of controlling significance.⁴⁹ Yet this obligation to represent the interests of all members of a class frequently results in numerous potential conflicts between the interests of lawyers, named class representatives, and unnamed class members.⁵⁰ Especially where such conflicts exist, it may be difficult for a lawyer with "strong prudential or ideological preferences" herself to decide who should be heard.⁵¹

C. *The Role of Client Autonomy*

The difficulties discussed above may lead lawyers pursuing structural reform to underestimate the importance of ascertaining the interests of their clients or community. Even if they are aware of clients' concerns, lawyers may choose not to pursue narrower client interests that conflict with the larger cause as they perceive it.⁵² The strength of their passions and commitments may lead lawyers to prioritize their own ideologies or strategic concerns over individual autonomy, a problematic notion for an adjudicative system that holds that clients, not their lawyers, are responsible for defining the objectives of litigation.⁵³ The issue of client autonomy is further complicated within class actions by the concept of group autonomy and the question whether it is more appropriate to emphasize individual autonomy, some form of group consensus, or more abstract notions of collective justice.⁵⁴

1. Individual Autonomy as a Guiding Principle for Client-Lawyer Relationships

The foundation of client-centered lawyering is the premise that an individual should make her own legal decisions.⁵⁵ The lawyer is an employee of the client whose professional duty is to advocate for her

answer only to those whom they consult in defining the goals of the litigation; concerns of those who do not have access to the lawyers may go unaddressed).

⁴⁹ Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1203 & n.82 (1982) (citing *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982)).

⁵⁰ Kane, *supra* note 3, at 394-95.

⁵¹ Rhode, *supra* note 49, at 1212.

⁵² See Calmore, *supra* note 33, at 1932-36.

⁵³ See Rhode, *supra* note 49, at 1183.

⁵⁴ See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 916 (1998).

⁵⁵ See Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1128 (1992).

employer's best interest.⁵⁶ It is the client, not the lawyer, who determines what is in the client's best interest.⁵⁷ This paradigm requires that lawyers gain their clients' trust and cooperation in order to facilitate communication.⁵⁸ By making an effort to understand their clients' situations; engaging clients in identifying their own objectives, alternatives, and concerns; and offering empathy, client-centered lawyers assist clients in making their own decisions and thereby protect individual autonomy.⁵⁹

It is unclear to what extent the lawyers involved in the lawsuits concerning the enforceability of NCLB have considered client autonomy. In *ACORN*, plaintiffs included parents of children attending schools in two very different districts.⁶⁰ Had the litigation not been dismissed at such an early stage, some plaintiffs' schools may have achieved sufficient progress to be removed from the list of schools identified for school improvement, corrective action, or restructuring, such that those students would no longer be entitled, under NCLB, to receive SES or tutoring.⁶¹ At that point, their lawyers (or the court) may have considered separate representation or sub-classes for distinct factions of the plaintiff class.⁶² In *NLC*, at least one of the initial plaintiffs was no longer homeless at the time the class was certified.⁶³ A legal strategy that emphasized the rights of homeless students to the detriment of the rights of all students attending failing schools may no longer have been that plaintiff's individual choice.⁶⁴

⁵⁶ Cahn & Cahn, *supra* note 5, at 1041.

⁵⁷ *Id.*

⁵⁸ See Ellman, *supra* note 55, at 1128. An in-depth review of the principles of client-centered lawyering is beyond the scope of this article, but for more information the reader may consult DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). Prevailing client-centered models have, however, been critiqued for their failure to fully account for issues of race and class. See generally Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 *GOLDEN GATE U. L. REV.* 345 (1997).

⁵⁹ See Ellman, *supra* note 55, at 1128-29.

⁶⁰ See *ACORN*, 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003) (recognizing that plaintiff children attended schools in Albany and New York City).

⁶¹ Cf. 20 U.S.C.A. § 6316(b)(5)(B), (b)(7)(C)(iii), (b)(8)(A)(ii), (e) (West 2003) (setting forth provisions governing SES available to students attending schools failing to make adequate yearly progress).

⁶² See *infra* notes 93-94, 97 and accompanying text.

⁶³ *NLC*, 224 F.R.D. 314, 325, 326 (E.D.N.Y. 2004).

⁶⁴ See *supra* notes 16-20 and accompanying text. Although it may have been sound legal strategy, the *NLC* plaintiffs' lawyers' choices not to challenge the *ACORN* court's determination that many rights provided by NCLB are unenforceable and to distinguish, instead, those rights provided by the McKinney-Vento Act, would make it more difficult for

2. Autonomy in the Context of Group Representation

The trust and cooperation that a lawyer must build with her clients becomes more difficult in the context of community lawyering, which requires lawyers to take into account both individual autonomy and their clients' choices to make connections.⁶⁵ The group lawyer's responsibility runs to the group and its interests, not solely to individual clients.⁶⁶ Maintaining the autonomy of group clients requires that lawyers help group members to clarify their goals, identify and evaluate their options, and ultimately choose a course of action.⁶⁷ This model promotes group-based decision-making by placing responsibility for litigation decisions concerning a group in the hands of the group as a whole, rather than an individual within the group.⁶⁸ Unfortunately, the group that convenes to participate in a democratic decision-making process may not actually reflect the interests and concerns of the group it purports to represent.⁶⁹ Furthermore, where disagreements among group members manifest themselves, the lawyer for that group must develop an understanding of the nature of any such conflicts, maintain her loyalty to the group as an entity, and refrain from abandoning her duties to all members.⁷⁰ As she seeks

their clients, whether they remained homeless or not, to enforce their rights to, for example, SES.

⁶⁵ See Ellman, *supra* note 55, at 1107 (indicating that lawyers representing communities must understand and respect community norms and monitor empathic responses, choices, and values).

⁶⁶ See Rubenstein, *supra* note 32, at 1679; see also Rhode, *supra* note 49, at 1203.

⁶⁷ See Ellman, *supra* note 55, at 1132; see also Rubenstein, *supra* note 32, at 1634 (asserting that client-centered lawyering for groups requires the development of democratic means of group member involvement).

⁶⁸ Rubenstein, *supra* note 32, at 1655. Under this model, the decision to go to court belongs to the group collectively, and decisions regarding litigation require the input and assent of those whose rights are at issue. *Id.* This model increases litigation's claim to legitimacy and individuals' confidence in their community. *Id.* at 1655-56. As a result of democratic decision-making, the community becomes more involved with decisions that affect it, and community members become more actively engaged with each other, with the law, and with their "advocate-experts." *Id.* at 1656.

⁶⁹ See *id.* at 1658; Rhode, *supra* note 49, at 1233-37 (observing that few class members attend meetings convened by attorneys in civil rights cases, and those who do respond or attend are often neither knowledgeable nor unbiased).

⁷⁰ See Ellman, *supra* note 55, at 1159-60. Ellman emphasizes that the lawyer's ethical duty is to represent the position endorsed by the organization, rather than withdraw. *Id.* at 1160. If disagreements persist, the group's lawyer should ask those who dissent from the organization's position whether they want to pursue the issue themselves and, if so, advise them to obtain separate counsel. *Id.* at 1161.

consensus within the group, the lawyer must prevent herself from taking over the process.⁷¹

If the attorneys for the Connecticut NAACP and the plaintiffs' lawyers in *NLC* view not individuals, but a group or groups as their client, it might be difficult for them to ascertain the group's autonomous wishes. For example, the Connecticut NAACP may view itself as representing the individual plaintiffs on whose behalf it intervened, all poor and minority children in Connecticut, or the broader civil rights community, groups whose interests may or may not overlap. Depending upon which group or groups the plaintiffs' lawyers viewed as their client, the principles discussed above would drive a different process of nurturing and maintaining group autonomy. This feat becomes even more challenging in the absence of an established group that can be said to represent all students subject to both the requirements and the benefits of NCLB.⁷² In the event that one or more groups claim to represent these students, tensions might emerge between the groups and communities across the nation.

3. Autonomy in Class Actions

The Model Rules do not address adequately how to establish a community's legal goals and determine the best ways to achieve them.⁷³ Because an individualist model drives rules of civil procedure and professional ethics in the American adjudicative system, an individual group member may claim to represent and bind those similarly situated, and her attorney may determine how the case will be pursued.⁷⁴ Because the class action lawyer owes a duty to the class, rather than to individuals, she must approach client autonomy with a particular sensitivity to her professional and ethical responsibilities.⁷⁵ She

⁷¹ See *id.* at 1141, 1154; Rubenstein, *supra* note 32, at 1679. Ellman also emphasizes that the lawyer must be careful to remain balanced and avoid making promises of confidentiality or seeming partial to some subset of the group. See Ellman, *supra* note 55, at 1137-38. He further cautions that although a lawyer can empower groups by facilitating access to court, she must be aware that the class is not empowered against the lawyer herself. *Id.* at 1118.

⁷² See Ellman, *supra* note 55, at 1119.

⁷³ Rubenstein, *supra* note 32, at 1676.

⁷⁴ *Id.* at 1624.

⁷⁵ See *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982); see also Ellman, *supra* note 55, at 1119 (noting that under Fed. R. Civ. P. 23(e), with court approval, lawyers may settle a case even where a majority of named class representatives object). As Ellman indicates, the absence of a decision-making structure for a class as a whole frequently means that the class lacks the power to direct a lawyer's actions. Ellman, *supra* note 55, at 1119. As

must make decisions about how to resolve disputes that arise among community members in order to represent the community effectively.⁷⁶ Within a class action, the issue of client autonomy is further complicated by the popular view that the lawyer's responsibility runs to the class as a whole, including unnamed representatives.⁷⁷ Regarding the class as client enables the attorney to protect the interests of unnamed (and unidentified) class members unable to protect their own interests.⁷⁸ Furthermore, considering the class as client while fostering autonomy encourages attorneys to be mindful of the balance between the needs of current and future class members.⁷⁹ This balance is especially important in the context of settlement negotiations, as class attorneys often pursue an institutional action to further certain public improvements rather than the interests of any particular client.⁸⁰ Recognizing the tensions between the immediate interests of named plaintiffs and broader concerns animating lawyers' or groups' involvement in a structural reform lawsuit does not resolve these tensions, but may lead to increased disclosure and improved communication between class action plaintiffs and their lawyers.⁸¹

Many of these conflicts have not yet manifested themselves in litigation concerning the enforceability of NCLB, and for this reason,

a result, the lawyer has a profound responsibility for gauging what is in the class's best interests. *Id.*

⁷⁶ See Rubenstein, *supra* note 32, at 1626. Rubenstein recommends that where there are disputes among community members, decision-making regarding goals of litigation should be more democratic, whereas more reliance on experts is appropriate for resolution of technical disputes about methods of litigation. *Id.*

⁷⁷ See Kane, *supra* note 3, at 394; Rhode, *supra* note 49, at 1204-05, 1214-15.

⁷⁸ See Rhode, *supra* note 49, at 1215 (indicating that these groups frequently will not know the likely consequences of litigation nor the extent of their stake in the outcome, and will therefore be unable to gauge whether or not they need their own representative to protect their interests); see also Kane, *supra* note 3, at 394 & n.56 (noting that because absent class members may be bound and their decisions might not accord with those of the self-appointed named representative, the class action lawyer's role is more dominant than that of a lawyer in the traditional adversarial model).

⁷⁹ See Kane, *supra* note 3, at 396 (asserting that institutional litigation class attorneys often urge settlements favoring prospective relief and policy changes rather than relief for past harmful practices).

⁸⁰ See *id.*; Rhode, *supra* note 49, at 1186.

⁸¹ See Bell, *supra* note 27, at 501-02 (discussing implications of Justice Harlan's dissent in *Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963)). Bell observes that, particularly in school cases where an individual plaintiff might prefer a compromise that would frustrate attainment of the larger group's goals, the choice between an immediate small gain and possible later achievement of a larger aim should belong to the named plaintiff, not to her attorneys. *Id.* (quoting Robert H. Birkby & Walter F. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 TEX. L. REV. 1018, 1036-37 (1964)).

this article aims not to suggest how the lawyers in these particular cases could have acted differently, but to raise awareness of potential pitfalls to avoid in the future. The *NLC* lawsuit was filed in February of 2004, and the plaintiffs reached a court-approved settlement with the defendants in October of 2004, four days after the judge denied the defendants' motion to dismiss and certified the plaintiff class.⁸² This left little time for intra-group conflict to develop prior to settlement. An assessment of the role of client autonomy in the NAACP's intervention in the Connecticut lawsuit would be premature, as the motion was filed in January of 2006 and denied without prejudice in August of 2006.⁸³ The court has recently invited a motion to intervene as to the remaining count of the complaint, and whether the NAACP will accept that invitation remains to be seen.⁸⁴ The case is far from the remedy stage, where potential conflict among clients is likely to materialize.⁸⁵ The strategies discussed in Part III may assist courts and lawyers as this action develops, and in future complex education reform litigation.

III. ADDRESSING THESE CONFLICTS: RECOMMENDATIONS FOR COURTS AND LAWYERS ENGAGED IN STRUCTURAL REFORM LITIGATION

[S]tructural reform litigation is an interest group strategy to change policy outcomes This kind of litigation reflects "an understanding by organized interests that a class action suit could call governmental attention to problems that were not being addressed"

—Anthony M. Bertelli & Sven E. Feldmann⁸⁶

The decision to file a lawsuit as a class action, or to intervene on behalf of an existing class in a lawsuit, indicates that a particular issue has implications beyond the named plaintiffs, and the litigation is, to

⁸² Press Release, Nat'l Ctr. on Homelessness & Poverty, Homeless Students Triumph over State and Local Officials (Oct. 2004), <http://www.nlchp.org/Press/detail.cfm?PRID=35>.

⁸³ *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 466–67 (D. Conn. 2006).

⁸⁴ *Id.* at 68.

⁸⁵ See Rhode, *supra* note 49, at 1188–89 (noting that conflicts among clients in structural reform litigation frequently do not emerge until the settlement or remedial deliberation phase because a loosely defined consensus that rights have been infringed or needs ignored unites a group during the liability phase).

⁸⁶ ANTHONY M. BERTELLI & SVEN E. FELDMANN, CTR. FOR ECON. & BUS. RESEARCH, DISCUSSION PAPER: STRUCTURAL REFORM LITIGATION REMEDIAL BARGAINING AND BUREAUCRATIC DRIFT 2 & n.2 (Feb. 2004), available at <http://www.cebr.dk/upload/dp200403.pdf> (quoting KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 369 (1986)).

some extent, conceived of as a community-wide venture.⁸⁷ Because a 23(b)(2) class action final judgment binds *all* class members,⁸⁸ even when unnamed class members would have prioritized different remedies—or preferred not to bring the lawsuit at all—it is essential that lawyers pursuing structural reform lawsuits, and the courts hearing these claims, consider the tensions outlined above in determining their respective courses of action.⁸⁹ Although it may not be possible to resolve the numerous potential conflicts attendant to class actions that arise in public interest lawyering, awareness of the role of lawyers' ideological commitments in determining the course of litigation, the implications of attenuated relationships between lawyers and their clients, and the role of client autonomy in class actions may lead to improved practices. The suggestions outlined below aim to mitigate the effects of these tensions.⁹⁰

A. *The Role of the Court*

Guided by ethical responsibilities and the Federal Rules of Civil Procedure, particularly Rule 23, the court plays an important role in class action litigation, but it is handicapped to some extent by the limited information it receives.⁹¹ Measures that increase and improve the amount and quality of information that a judge is able to consider would allow the judge to take account of the existence of conflicts between lawyers and clients or among clients, and take action to protect unrepresented or inadequately represented interests.⁹² Furthermore, given the volume of judicial resources consumed by class actions, closer

⁸⁷ See SCHLOZMAN & TIERNEY, *supra* note 86, at 368 (stating that judicial decisions in class actions apply not just to the plaintiff but to a whole class of persons).

⁸⁸ See FED. R. CIV. P. 23(b).

⁸⁹ See Bell, *supra* note 27, at 505–06; Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 502–03 (1982) (“Rule 23(b)(2) class members generally are unable to opt out of the lawsuit and may be bound even if they receive no notice of the action. [The Rule thus permits a class action] to proceed without the active support of class members.”).

⁹⁰ These solutions address the roles and responsibilities of courts and lawyers; operating separately or in concert, they may provide guidance for those seeking to improve structural reform litigation. See Kane, *supra* note 3, at 408 (discussing the importance of collaboration between lawyers and judges in this context).

⁹¹ See, e.g., MODEL CODE OF JUD. CONDUCT Canon 3(B)(7) (amended 1991), available at http://www.abanet.org/cpr/mcjc/canon_3.html (directing judges to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard”); FED. R. CIV. P. 23 (outlining the procedure and requirements for bringing class action lawsuits); see also Rhode, *supra* note 49, at 1218 (emphasizing that courts often lack information regarding the need to invoke Rule 23’s procedural devices).

⁹² See Kane, *supra* note 3, at 405.

judicial oversight from the beginning might avert retrospective formal reviews and proceedings that consume time and resources and that may occur too late to protect those most vulnerable.⁹³

In determining whether to allow a class action to proceed and whether to certify a particular class, courts apply the multiple requirements of Rule 23 of the *Federal Rules of Civil Procedure*.⁹⁴ A central requirement of the Rule for the purposes of this analysis is courts' responsibility to ensure adequate representation.⁹⁵ In the more than fifty years that the *Federal Rules of Civil Procedure* have been in existence, several commentators have proposed that Rule 23 be revised to focus more on this issue.⁹⁶ Others recommend that rather than modify the Rule itself, courts should scrutinize carefully whether all of its requirements have been met.⁹⁷ Recognizing that conflicts among classes are not revealed and addressed until the settlement stage in

⁹³ See *id.* at 406.

⁹⁴ FED. R. CIV. P. 23(a) (denoting prerequisites for class actions); *id.* 23(b) (outlining additional requirements for maintenance of class actions); *id.* 23(c) (setting forth processes, procedures, and requirements for determining by order whether to certify a class action, appointing class counsel, establishing membership in a class, reaching judgments, and representing multiple classes and subclasses); *id.* 23(e) (indicating the procedures for settlement, voluntary dismissal, and compromise); *id.* 23(f) (establishing rules for appeals); *id.* 23(g) (noting procedure for appointment of class counsel); *id.* 23(h) (stating procedure for obtaining an attorney fees award).

⁹⁵ *Id.* 23(a) (4); Rhode, *supra* note 49, at 1218.

⁹⁶ See Shapiro, *supra* note 54, at 958-59 (suggesting that Rule 23 "be revised to facilitate return to the fundamental point developed by the Supreme Court over half a century ago—that the constitutional propriety of class action treatment, and the binding effect of judgment on the members of the class, turns on the issue of adequate representation" (referring to *Hansberry v. Lee*, 311 U.S. 32 (1940))). For Shapiro, adequacy of representation includes consideration of the potential existence of conflicts; he recommends that counsel remain responsible to the class as a whole by communicating regularly with a sufficiently representative group of class members and ensuring that they be heard at critical stages of the process to guard against manipulation of the class by their counsel or their adversary. *Id.* at 959-60; see also Rubenstein, *supra* note 32, at 1660 n.174 (proposing that courts "reconceptualize the notion of adequacy of representation to ensure that the legal representatives utilize[] democratic decisionmaking processes in adopting their strategies and tactics").

⁹⁷ See Kane, *supra* note 3, at 402-03 (recommending increased judicial scrutiny of class counsel's competence and judicial approval of settlements under Rule 23(e), and suggesting that the judge should participate actively in early stages of class actions, before settlement talks begin, to increase her awareness of potential problems); Shapiro, *supra* note 54, at 960 (noting the court's important role in overseeing class counsel); see also Bell, *supra* note 27, at 507 (asserting that principles of equity require courts to scrutinize closely whether representation provided by plaintiffs fairly and adequately protects class interests); *id.* at 507-08 (noting that courts must apply carefully the requirements of Rule 23 to determine the validity of class action allegations in order to protect the interests involved).

many cases,⁹⁸ some scholars have proposed adjusting incentive structures to disclose and develop strategies to attend to class schisms earlier in the litigation.⁹⁹

Currently, Rule 23 directs the court to determine "at an early practicable time" by order whether to certify a lawsuit as a class action.¹⁰⁰ Though the Rule does not specify a time limit, where the certification decision is postponed, the rights of absent class members may not be adequately protected.¹⁰¹ To inform the certification decision, the judge may conduct preliminary evidentiary hearings on the merits or the class issue, appoint special masters, request amicus briefs, or permit intervention in order to gather information.¹⁰² She may also grant or deny certification conditionally.¹⁰³ The rules direct a judge to either deny class status or attempt reconciliation of disparate interests where antagonisms among class members or between named representatives and the class have been discovered.¹⁰⁴ In these cases, she has at her disposal several procedural mechanisms, including sub-classing, intervention, bifurcation, and exclusion, to accommodate conflicts among class members and to protect the interests of those who are absent.¹⁰⁵

Several commentators have suggested that existing procedural protections are not sufficient for courts to meet their ethical and Rule 23 obligations, particularly as to adequacy of representation.¹⁰⁶ Incorporating additional protections into the rules may assist judges in gathering the information necessary to make informed decisions re-

⁹⁸ See, e.g., *Piambino v. Bailey*, 757 F.2d 1112, 1145-46 (11th Cir. 1985); *Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981); *Soskel v. Texaco, Inc.*, 94 F.R.D. 201, 203 (S.D.N.Y. 1982); see also Kane, *supra* note 3, at 397 (noting that, under Rule 23(e), the traditional resolutions of class conflicts that emerge later in the litigation include the withholding of judicial approval of settlement and the disqualification of class attorneys from continuing to represent the entire class).

⁹⁹ See Rhode, *supra* note 49, at 1247-51 (proposing specific measures, such as requiring courts to create a factual record concerning notice and adequacy of representation, that would "require plaintiffs' counsel or a court-appointed expert to submit statements detailing contact with class members and any non-privileged indications of substantial dissension").

¹⁰⁰ FED. R. CIV. P. 23(c)(1)(A).

¹⁰¹ See *id.*; see also Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 596-97 (1982) (discussing the rights of absent class members to receive notice of action, proposed settlement, or dismissal; request exclusion; participate in the litigation; or object to adequacy of representation).

¹⁰² See Rhode, *supra* note 49, at 1221, 1253, 1256; Note, *supra* note 101, at 598-99.

¹⁰³ See Note, *supra* note 101, at 598-99.

¹⁰⁴ *Id.* at 591; see *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 39 (E.D. Cal. 1977), *aff'd in part, rev'd in part* 649 F.2d 679 (9th Cir. 1980).

¹⁰⁵ See *Harriss*, 74 F.R.D. at 37-38; Note, *supra* note 101, at 591-92.

¹⁰⁶ See, e.g., Rhode, *supra* note 49, at 1191-94.

garding, for example, class certification and whether to approve a settlement.¹⁰⁷ Furthermore, additional protections may assist courts in dealing with class conflicts once they have been disclosed.¹⁰⁸ Professor Deborah Rhode describes a pluralistic approach, whereby distinct factions of a class would each have separate representatives, as one way to ensure that dissenting opinions are heard.¹⁰⁹ Noting the problems of timing, manageability, and expense that this approach entails, she also explores a majoritarian alternative, which features polls and hearings as increased opportunities for class members' direct expressions of their preferences.¹¹⁰ Rhode endorses the latter for a variety of reasons: compared to the pluralist model, the majoritarian approach is less expensive, offers the court more direct access to class members' views rather than their attorneys' or named representatives' interpretive gloss, and may empower a larger number of individuals by increasing their participation in the process.¹¹¹ The disadvantage of the majoritarian model is that without considerable expenditure, the views elicited through procedures such as notice and hearings may be "unrepresentative, uninformed, and unresponsive to a range of concerns particularly significant in institutional reform litigation."¹¹² To counteract the tendency of such presentations to be biased, especially when there is a disjuncture between class preferences or when named plaintiffs do not appear to be sufficiently informed or disinterested to speak for an entire class, Rhode recommends that the court be inten-

¹⁰⁷ See, e.g., Garth, *supra* note 89, at 515-16 (discussing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) and Owen M. Fiss, *Foreword—The Forms of Justice*, 93 HARV. L. REV. 1 (1979)); see also Note, *supra* note 101, at 604-05 (recommending relaxation of ethical rules restricting attorney solicitation to increase the amount of class information before the court at an earlier stage).

¹⁰⁸ See Rhode, *supra* note 49, at 1252. Rhode suggests that courts should refrain from denying intervention as untimely and from assuming that defendants have adequately presented the views of plaintiff class members who disagree with the position advanced by the plaintiffs' lawyers. *Id.* She also proposes the use of advisory committees, recommends "clearer standards . . . for appointing and compensating separate counsel" and suggests increased use of "expert witnesses, special masters and magistrates for surrogate representation functions." *Id.* at 1253, 1254, 1256. Rhode acknowledges that expense may prevent the use of these measures. *Id.* at 1256.

¹⁰⁹ See *id.* at 1221 (indicating that this approach could involve subclasses, mandatory or permissive intervention, or amici participation).

¹¹⁰ See *id.* at 1221, 1224-25, 1228.

¹¹¹ See *id.* at 1232-33, 1243-44 (suggesting that majoritarian strategies may help the court to understand class members' priorities and may increase the significance accorded their opinions).

¹¹² *Id.* at 1233.

tional and conscientious in seeking out and bringing in a diverse cross-section of individuals to express their opinions.¹¹³

In addition to developing new rules to guide the court's own behavior, commentators have proposed mechanisms through which courts may regulate what happens outside of court to ensure participation in public interest litigation affecting groups.¹¹⁴ One scholar proposes that courts limit self-appointed community representatives' potential for overreaching by instituting procedural rules that enhance community dialogue.¹¹⁵ Such measures constitute one method, short of requiring elections to make decisions about litigation, to counter the alienation and disempowerment caused by over-reliance on lawyers.¹¹⁶ Court rules could require that prior to filing an action on behalf of a group, lawyers present evidence of group or community participation in the filing.¹¹⁷ To reduce the vulnerability of a group to manipulation by a lawyer, courts could allocate to specialists decisions that implicate group rights, such as initiation, pursuit, and settlement of litigation.¹¹⁸ Although this model may effectively cure some of the defects inherent in decentralized decision-making by group members or top-down decision-making by lawyers, it also infringes on individual liberty and rests on the elitist assumption that specialists can better determine a community's goals than can community members themselves.¹¹⁹

Ensuring participation by community members through formal court rules or court-ordered procedural mechanisms for lawyers and

¹¹³ See Rhode, *supra* note 49, at 1236, 1244.

¹¹⁴ See Garth, *supra* note 89, at 521 ("[C]ourts should encourage lawyers and others interested in rights enforcement to seek out, inform, and mobilize those who stand to be affected by class actions.").

¹¹⁵ See Rubenstein, *supra* note 32, at 1659-60.

¹¹⁶ *Id.* Rubenstein further elaborates on this proposal, suggesting that a court may be authorized by rule to dismiss an action in the event that an individual or expert plaintiff seeking to represent a group is unable to demonstrate that she can fairly represent the group's interests and that the action flows from a democratically produced group decision. *Id.* at 1670-71. Although this approach values individualism and expertise in addition to democratic process, it is imperfect because it is difficult to ascertain who comprises the "community" being represented. *Id.* at 1672.

¹¹⁷ *Id.* at 1659-60; see Garth, *supra* note 89, at 516 (suggesting that judges in the structural context should construct a broader representational framework); *id.* at 525 (courts should inquire into whether a class action brought by an organization is the result of a decision-making process responsive to its membership).

¹¹⁸ Rubenstein, *supra* note 32, at 1662-63. The specialists, who need not be attorneys, must be skilled in determining community goals. *Id.*

¹¹⁹ *Id.* at 1663-64. Rubenstein suggests that this model may be most appropriate for technical lawyering decisions. *Id.* at 1666.

class representatives would not necessarily provide the court with all of the information it needs to make informed decisions regarding adequate representation and other elements of class certification. Because their obligations are not limited to named plaintiffs but run to the class as a whole, it is especially important that class counsel expose conflicts to the court.¹²⁰ A policy of mandatory disclosure of potential conflicts between class and attorney, or among class members themselves, is one way for lawyers and courts in class actions to meet their fiduciary obligations to both named representatives and absent class members.¹²¹ Mandatory disclosure may impose financial costs and unfamiliar roles and responsibilities on lawyers, and it may also impede the settlements that named plaintiffs and their counsel desire as it invariably flushes out dissension.¹²² However, mandatory disclosure would serve important due process values such as respect for individual dignity, autonomy, and self-expression.¹²³ These values are especially important in institutional reform class actions, which involve "complex indeterminate remedies, fundamental personal values, nonapparent preferences, and politically vulnerable forms of intervention."¹²⁴ Furthermore, in institutional reform cases, the defendant has often proven itself unable to control its own behavior, presenting increased opportunities for courts to guide plaintiffs' active participation in the design of remedies.¹²⁵ For this reason, courts must be apprised of the full range of class members' interests and preferences.¹²⁶

B. *The Role of the Lawyer*

Although courts have ethical and legal responsibilities in structural reform class actions, it is lawyers who meet with clients, determine which claims to file, and make tactical decisions throughout the course of the litigation.¹²⁷ Furthermore, the relief sought in structural reform cases, like those concerning the enforceability of NCLB, frequently ex-

¹²⁰ See Garth, *supra* note 89, at 521; Kane, *supra* note 3, at 405; Rhode, *supra* note 49, at 1203.

¹²¹ See Rhode, *supra* note 49, at 1204-05 (quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973)).

¹²² See Kane, *supra* note 3, at 406, 408; Rhode, *supra* note 49, at 1206-07.

¹²³ Rhode, *supra* note 49, at 1198.

¹²⁴ *Id.*

¹²⁵ See *id.* at 1199.

¹²⁶ *Id.*

¹²⁷ See Ellman, *supra* note 55, at 1120-21 (recognizing that the ability to wield a profound influence on the characterization of their clients imbues lawyers with significant responsibility).

tends years into the future, requiring that public interest lawyers develop "long-term staying power to insure meaningful implementation" of their courtroom victories.¹²⁸ Because ethical rules do not provide sufficient guidance and procedural protections may fall short as well, class action lawyers must be especially attentive to their roles and the balance between their interests and those of their clients.¹²⁹ Commentators addressing this balance have focused on various aspects of, and have reached different conclusions about, the lawyer's role.

One alternative emphasizes clients' individual autonomy as a driving force in class actions.¹³⁰ Professor Derrick Bell, for example, reminds lawyers that their job is to lawyer, not to attempt to lead their clients and the class in making decisions that should be determined by clients and shaped by communities.¹³¹ For lawyers involved in school reform, litigation as a strategy presents the seductive opportunity to focus on abstract legal principles rather than protection and advancement of client interests.¹³² By remaining receptive to those interests, lawyers may increase clients' involvement and nurture their autonomy.

Rather than focus on individual clients' needs, Professor William Rubenstein emphasizes the role of professional public interest litigators' expertise in class actions. In light of the American legal system's emphasis on individuals, he asserts, it is important to value the expertise of professional public interest litigators in litigation campaigns, even at the expense of attorney individualism or group decision-making.¹³³ This paradigm of client-centered lawyering in class actions requires broad conceptions of "client" and "competence."¹³⁴ Proposed changes to the rules governing class actions would, for example, require plaintiffs filing an action on behalf of a group to provide pre-filing notice to anyone whose interests are at stake, which would allow dissenting class members the opportunity to be heard.¹³⁵ By placing the burden to come forward on community members without

¹²⁸ Rabin, *supra* note 31, at 252.

¹²⁹ See, e.g., Ellman, *supra* note 55, at 1104.

¹³⁰ See Bell, *supra* note 27, at 512 (calling on lawyers involved in class action litigation to recognize their duties to the client and community); Ellman, *supra* note 55, at 1169 (cautioning lawyers to refrain from overreaching).

¹³¹ Bell, *supra* note 27, at 512; see Ellman, *supra* note 55, at 1169.

¹³² Bell, *supra* note 27, at 504. Although Bell's criticism, directed at the NAACP's role in school desegregation litigation, may not describe the lawyers involved in the cases discussed in this article, it does sound an important cautionary note. See *id.*

¹³³ Rubenstein, *supra* note 32, at 1633.

¹³⁴ *Id.* at 1674-75.

¹³⁵ *Id.* at 1673.

granting them a veto power, this model both preserves the initiative of self-appointed representatives and experts and mandates that they enter into dialogue with other interested group members.¹³⁶ Lawyers representing groups are expected to consider both their clients' interests and the consequences of their actions for others.¹³⁷ In Rubenstein's view, ethical, client-centered lawyering requires that a class action attorney have experience that helps her to understand and be sensitive to the history, structure, and divisions of the community on whom her case will be binding.¹³⁸

Other commentators, however, might characterize Rubenstein's emphasis on expertise and strict boundaries between the roles of lawyer and client as "regnant lawyering" because it maintains the disassociated power over clients that dominates the traditional lawyer-client model.¹³⁹ According to Professor Gerald López, lawyers should embrace a "rebellious lawyering" model, one which demands that lawyers and those with whom they work "nurture sensibilities and skills compatible with a collective fight for social change."¹⁴⁰ Rebellious lawyers practice collaborative advocacy, connecting with the community they serve and working *with* their client community, not just on its behalf.¹⁴¹ They must adopt a problem-solving orientation appropriate for working with others.¹⁴² This model involves brainstorming, designing, and executing strategies that respond immediately to particular problems, while at the same time fighting social and political subor-

¹³⁶ *Id.*

¹³⁷ *Id.* at 1674 & n.226; see also Rhode, *supra* note 49, at 1214-15 (noting that class sentiment about appropriate remedies may evolve over the course of a protracted lawsuit, and therefore a lawyer's duty of adequate representation "must run to all class members, present and future").

¹³⁸ Rubenstein, *supra* note 32, at 1675.

¹³⁹ See Calmore, *supra* note 33, at 1933-34. Regnant lawyering focuses on the special skills of lawyers and the preservation of a formal relationship. See *id.* at 1934. It views service (addressing an individual problem) as separate from impact (advancing systemic change). *Id.* According to Calmore, regnant lawyering is cultivated under the circumstances of practice, with features such as social and cultural distance and distrust between lawyers and clients, different world views, and high demands on lawyers' time. *Id.* at 1935. Regnant lawyering is likely to persist because of psychological factors, such as the felt need to address immediate concerns before longer-term ones, and institutional factors, such as the delegation of allocative decision-making to street-level lawyers. Tremblay, *supra* note 4, at 970.

¹⁴⁰ GERALD R. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 38 (1992); see Calmore, *supra* note 33, at 1933-34.

¹⁴¹ LÓPEZ, *supra* note 140, at 37-38; Calmore, *supra* note 33, at 1936.

¹⁴² LÓPEZ, *supra* note 140, at 38; Calmore, *supra* note 33, at 1936.

dination.¹⁴³ This multi-layered approach is consistent with Professor Stephen Ellman's observation that lawyers working on behalf of those who would otherwise lack adequate representation to achieve social reform must find strategies that "target broad situations rather than individual circumstance[s]."¹⁴⁴ These strategies are necessary because problems are often related to social conditions and because the needs faced by the poor will always exceed their lawyers' capacity to meet them.¹⁴⁵

Like López, Professor Michael Diamond recognizes that the law on its own cannot provide the kind of long-term relief that poor and subordinated clients need.¹⁴⁶ Accordingly, he proposes that lawyers should engage in a "cross-disciplinary and pro-active political assault on oppression" that involves interacting with clients on a non-hierarchical basis, participating with them in planning and implementing strategies designed to build client power, and viewing each client's world beyond its legal implications.¹⁴⁷ These "activist lawyers" assist their clients in developing and realizing enduring legal and non-legal solutions for addressing problems that they face in the present and may face in the future.¹⁴⁸ Diamond's approach is consistent with Bell's admonition that lawyers seeking social change "make clear that the major social and economic obstacles are not easily amenable to

¹⁴³ LÓPEZ, *supra* note 140, at 38; see Ellman, *supra* note 55, at 1111 (asserting that progressive lawyers for groups should foster collective mobilization without sacrificing individual autonomy).

¹⁴⁴ Ellman, *supra* note 55, at 1105-06.

¹⁴⁵ See *id.*; see also Cahn & Cahn, *supra* note 5, at 1012 (asserting in 1970 that attorneys for the poor should focus on building self-sufficiency among consumers of legal services and "developing new ways to complement a judicial system increasingly incapable of responding to" broad classes of justice and inequity). Professor Stephen Wexler argues that in light of these realities, lawyers for the poor should concern themselves less with the attorney-client relationship and the solving of legal problems, and more with helping poor people to organize themselves to orchestrate change. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

¹⁴⁶ Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 67 (2000).

¹⁴⁷ *Id.* at 110.

¹⁴⁸ See generally *id.* Diamond characterizes this model as drawing from several existing models, including the collaborative model, which he describes as seeking to break down barriers between the professional and clients from subordinated groups by having attorneys become, as much as possible, members of the community who help clients learn to advocate for themselves, and the client-centered model, which he describes as working to achieve collective action while protecting group members' autonomy. *Id.* at 82, 97.

the legal process and that vigilance and continued activity by the disadvantaged are the crucial elements in social change."¹⁴⁹

CONCLUSION: THE ROLE OF LAWYERS IN EDUCATION REFORM

We believe minority children in Connecticut deserve a voice at the table in this litigation

—John C. Brittain, chief counsel for the Lawyers' Committee for Civil Rights Under Law¹⁵⁰

Looking forward, lawyers are likely to continue to participate in securing and enforcing the educational rights of children and their parents, and their practice should be informed by the models of lawyering discussed above. What these various models have in common is increased attention to relationships between lawyers and their clients, and awareness of the power that lawyers have the potential to wield over their clients and their communities, particularly in the context of complex litigation. To be effective, lawyers for groups must be involved with, and engaged in, the communities they represent. Education reform presents numerous opportunities for attorneys to collaborate with clients and communities. A lawyer who respects her clients' knowledge and autonomy will refrain from imposing her own ideological preferences on their decision-making processes. She will spend considerable time in the community meeting with students and their parents, listening to their concerns, explaining their existing rights, and exploring legal and non-legal approaches to the problems community members have identified.

In the event that her clients have expressed interest in NCLB as a tool to improve education, an attorney must assist them in investigating a wide range of options and address openly any tensions that arise, including implications of each option for future enforcement of

¹⁴⁹ Bell, *supra* note 27, at 514 (quoting Leroy Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 U. KAN. L. REV. 459, 470 (1971)); see also Rabin, *supra* note 31, at 218–19 (suggesting that diversification of attack, including lobbying, educational reform efforts, and protest, may engage community members, and out of this sense of engagement may grow a more abstract identification with organizational objectives such as litigation); Wexler, *supra* note 145, at 1056 (suggesting that a lawyer can help her clients use her knowledge by: 1) informing individuals and groups of their rights; 2) writing manuals and other materials; 3) training lay advocates; and 4) educating groups for confrontation).

¹⁵⁰ Frahm, *supra* note 8.

related educational rights.¹⁵¹ If, for example, she discovers either that some students and parents wish to pursue their rights under NCLB through informal advocacy within schools and school districts, while others want to file a lawsuit to accomplish the same goals, or that the students whose education is at stake disagree with their parents (who hold many of the students' legal rights), the lawyer should help all group members to explore and evaluate multiple approaches and attempt to seek consensus by presenting a strategy that incorporates various tactics. Furthermore, if it becomes apparent early in the discussions that the group cannot overcome its differences because, for example, some members believe poor and minority children are injured by NCLB while others seek to enforce their rights under the Act, or because some class members seek enforcement of the transfer provisions of NCLB whereas others are more concerned about securing SES or school-based assistance for struggling students given a lack of viable transfer options within their district,¹⁵² their lawyer should explore the implications of these decisions with the group and recommend that dissenters seek alternate counsel. If disagreement emerges among group members or between the group and its counsel after the commencement of litigation, the lawyer should communicate honestly with class members and, unless the class decides on an alternative course of action, disclose the disagreement to the court.

The skills required to be effective in this work may not be the same as those learned in law school.¹⁵³ Training lawyers who are concerned about their relationships with clients, aware of the potential tensions between their own ideologies and clients' and communities' autonomy, and effective in working for structural reform, requires a fundamental shift in legal education.¹⁵⁴ It is difficult work, but only

¹⁵¹ It is unclear to what extent the NLC plaintiffs' lawyers explained the impact of their legal strategy on enforcement of their clients' other rights under NCLB.

¹⁵² Compare 20 U.S.C.A. § 6316(b)(1)(E) (West 2003) (providing that after a child's school has failed to make adequate yearly progress for two consecutive years, her parents have the unqualified right to transfer her to another district school that is not in need of improvement), with *id.* § 6316(b)(11) (providing that if the district does not have an acceptable school, parents have the qualified right to transfer their child to schools run by other area LEAs). To the extent that a child attends a school that is not making adequate yearly progress, there are no vacancies in the district schools that are making adequate progress, and the district is unable to establish a cooperative agreement with other LEAs, the child's right to transfer is meaningless.

¹⁵³ See Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 10-11 (1989) (noting that in many ways, lawyers fighting for social change have largely had to overcome rather than take advantage of the law school experience).

¹⁵⁴ See *id.*

through careful attention to relationships with and among clients and communities will lawyers participate effectively in achieving meaningful education reform.