

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 50 No. 14 August 16, 2017

NAVIGATING CONFLICTS OF INTEREST IN SECURITIES CLASS ACTIONS

Dealing with conflicts of interest in the class action context requires class counsel to find a proper balance between the class's interest in recovery and the lawyer's interest in getting paid. Conflicts among class members also arise, particularly when class representatives are paid "incentive awards" for their service in bringing the lawsuit. The author explores these conflicts and the courts' responses to them at various points in the litigation. She finds that judges do not strictly apply normal conflict rules to disqualify counsel in class actions, since in their view that would substantially weaken the class action device.

By Anne P. Ray *

The rules of professional conduct serve as a valuable tool in a lawyer's arsenal to avoid and resolve potential conflicts of interest. But the rules of professional conduct are not the end of the story when it comes to conflicts, particularly in the context of class actions. Indeed, the rules are largely silent about class action litigation, and provide next to no guidance regarding conflicts of interest unique to the class action framework.¹

By definition, a class action permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class," most of whom will have no contact with the lead plaintiff or lead counsel. This can lead to abuses and may create conflicts between the class and class counsel. Class counsel has a fiduciary duty to the class as a whole, complicating matters and potentially leading to additional conflicts between the class and class counsel, particularly where the conflict must be reported to the court. The sheer number of individuals involved also intensifies the opportunity for conflicts to arise among the class members.

¹ A rare exception is MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 25 (AM. BAR ASS'N 2016) (unnamed members of class are not clients for the purpose of obtaining consent in conflict situations).

* ANNE P. RAY is a partner in Jenner & Block LLP's Professional Responsibility practice group in Chicago. She defends lawyers and law firms in pending or threatened legal malpractice matters and related claims; counsels lawyers on ethics and the rules of professional conduct; and regularly speaks and writes on issues related to conflicts of interest. Her e-mail address is aray@jenner.com.