

Reform from Within: Changing the Paradigm of Class Action Litigation

Steven N. Berk

Why does the public's, and sometimes the Court's, regard for class action lawyers seem to be slipping? How is it that our opponents' message – that we are greedy and opportunistic – continues to gain traction? And, how do we change the course of public perception to one where we are seen for who we are, resourceful consumer advocates providing a critical private attorney general function?

I take on these questions with a perspective informed by over twenty years of litigation experience in government and private practice, the majority outside the class action bar. I see a striking disconnect between what I believe I am doing to protect and promote the public interest and how my work is perceived. In this article, I suggest reforms to how we do business, and challenge well-worn orthodoxies that I believe have contributed to a negative perception. Sparking a conversation for reflection and possible change is my modest goal.

Background

My professional journey through the past two decades in

law has taken me from Illinois, where I was an associate at the law firm formed by Abraham Lincoln's son to the United States Attorney's Office for the District of Columbia where I was a federal prosecutor to a stint at the Securities and Exchange Commission's General Counsel's Office, then to a Top 100 Firm, where I was elected to the partnership and finally to my own practice where I represent thousands, indeed millions, of individuals in class action litigation.

Being a federal prosecutor were my headiest of days, proudly standing before juries, announcing myself "Steven Berk, on behalf of the United States", before proceeding with openings, direct examinations, cross examinations and those wonderful closing arguments: some law, mostly theater. A class action practice is largely about investigations, motions, briefing and discovery. Ever more rare are those court appearances when a Court decides to actually hold a hearing. More rare still is a full trial on the merits.

Despite the dearth of trial work, I relish the practice. It requires creativity, a competitive spirit, hard work and intellectual rigor. And it takes guts. In

Author Spotlight



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every case you have "skin in the game." A few weeks back I had an epiphany of sorts. There I was, writing briefs in two federal court actions I had nurtured from a client presenting a problem to a factual investigation to the application of a legal theory to a procedural device that allowed for the representation of

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the client and the protection of thousands of people who had suffered meaningful losses. Hundreds of millions of dollars were at stake; important legal issues to be resolved. I thought, "I am in a good place, a very good place."

In the past seven years, I've had the good fortune to represent an array of consumers seeking redress for a range of corporate misconduct: owners of outboard marine engines; purchasers of inkjet printers; millions of owners of camcorders who for too many after using their camera a half a dozen times had a only dark screen – at just the moment of their child's first step or an important family reunion; frustrated purchasers of a time share interest who seem to only to be able to use their "points" for a motel room in February in International Falls, South Dakota (average temperature: negative 20 degrees).

I've represented hundreds of drivers who were told they

had anti-lock brakes when they didn't; aspiring stockbrokers who were told they failed the Series 7 test, the only ticket to their chosen career, when in fact they passed; and 750,000 car owners who bought a new vehicle equipped with a new and "improved" brake system only to learn their brakes wore out well before they should have. Most recently, I've been representing

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investors who have lost their life savings in a Ponzi scheme that operated under the noses of the nation's largest, and for a long time, most respected banks.

I've won some and lost some of these cases. I've found lifelong friends as we together fight a formidable foe, with superior resources. I like to think that more often than not I've earned the respect of my colleagues, adversaries, the court, and most importantly, my clients.

This past spring – by circumstance and opportunity – I opened my own firm: "Hanging out a shingle," as they say. Nowadays, we don't have shingles. It's all about your digital presence. Instead of that "shingle," it's securing a URL and networking your PC, laptop and smart phone. I launched into this digital age practice with confidence surely mixed in with a dollop of utter fear, a sense of adventure and a bit of pride.

The Disconnect

But there is a disconnect between how I view my work and how most people view my work – and even how most lawyers – fellow

members of the Bar – view my practice. For some at least, Plaintiffs' Class Action Lawyer is simply a bad word. Why all the disdain and distaste for a group that typically represents the poor against the rich, the little guy paying out hard earned dollars for the latest corporate scheme to increase quarterly earnings and guarantee bonuses?

Two reasons immediately come to mind. First, greed. The words Plaintiffs Class Action Lawyer and greed seem to be

joined at the hip. I've been to too many social gatherings, soccer games and family events (yes, my own family) where in response to, "oh, what kind of law do you practice?" my response is met by an almost visible imaginary cloud rising from my interrogator's head – This guy is greedy and cares only about making money. And it's not just what they are thinking that gives me pause. It's what they say. "Oh, I get those notices all the time in the mail. I just throw them out. Getting \$5 when the lawyers make millions? No thanks." That says it all: they want you to know, straight up, that your work has no value to them. Not the best place to mount a defense of your practice, even for the most skilled amongst us.

Second, dishonesty (a first cousin to greed). No matter how you explain it, people are convinced the lawyers get all the money. The clients and class, regardless of its size (and actual benefit) gets nothing. How did we get to this place? Most of us work incredibly hard and take enormous financial risk to advocate on behalf of our clients' interests and, in doing so, seek to maximize our clients' recoveries. Yet, good people, all over the country, seem to view us with disdain and suspicion? Conventional

wisdom among our bar has it that this is all a result of a great PR job by the National Chamber of Commerce, and the Federalist Society, among others. It is true that large companies, business groups and conservative thinkers have done a masterful job at framing our work as pure greed and hammering it home. They have their mission and constituencies to promote. But too often we seem to add fuel to the fire.

Changing Popular Misperceptions

We need to make it harder for our detractors, each of whom has its own agenda that doesn't square with our clients' needs. We can collectively clean our own houses; set standards, and agree on where the line is. Without self-regulation, though we only have ourselves to blame. To be sure the answers are not easy and more often than not the correct decision is a shade of gray. Consider the following situation many of us may have faced in some degree.

You are approaching year five of a case that started with great promise and fanfare. You are dealing with an adverse ruling by the Court limiting discovery, narrowing the size of your class, and precluding you from seeking damages. Class certification and a victory on the

merits become unlikely to downright impossible. In other words, the value of the class members' claims, and your case as a whole, has been reduced to a fraction of what you and your clients once thought it was. What do you do? Gulp. Five years of costs: travel, experts, and deposition transcripts (wow those transcripts can be expensive). So, you try to get out of the case with something for the class and our dignity. Would you like it to be different? Of course. For the class, treble damages, eight figure cy pres awards, injunctive relief with teeth – no big sharp fangs. And, what the heck, a written apology and handshake from the CEO. And for the lawyers, a nice multiplier on our hourly rate to compensate us for all that time and money we sank into the matter.

Alas, "Only in the movies," as they say. Instead, we are discussing with opposing counsel the "e-credit" (a new term for the much maligned coupon) the company is offering. The negotiation centers on the transferability of that e-credit. Counsel for defendants feigning a seriousness of purpose earnestly explains the concern over the potential creation of a "secondary market" in these credits. We sit patiently -- knowing the war has been lost

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and we're merely discussing the terms of surrender -- wanting to scream: "You know and I know that a small percentage of the class will take advantage of these e-credits. A secondary market? What planet are you on?"

So we soldier on and settle, knowing we will be challenged and knowing that the settlement may not look great. But we did the best we could, certain that without

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our efforts, there would be no benefits whatsoever. We live to fight another day. But it's these settlements that give us all a collective "bad name." Inevitably the fee-based on five years of work -- will be compared to the relief: a \$5 e-credit and some mysterious, amorphous thing called "injunctive relief," which really never makes it above the fold. The headline is "Greedy Class Action Lawyers Receive Millions And Clients A Worthless Electronic Credit."

Lost in translation is that, given what actually happened in the case, the class members'

recovery reflected the limited value of their claims, and the lawyers lost a great deal of money prosecuting the case. We can say in reply. "Don't look at us -- it was approved by the Court." But we have to realize that such settlements must become the exception. Not the

rule. Because, if they are the rule, our credibility will continue to erode, and the courts, legislatures and eventually the public, will put us out of business.

They say in baseball that if a hitter goes 2 for 10 over the course of his career, he'll be destined to long bus rides over the dusty roads of the minor leagues -- improving to 3 for 10 translates into a long stay in the majors: team jets, five star hotels, big free agent contracts, and possible enshrinement in the Hall of Fame.

We're never going to go 10 for 10 on our cases. There are too many unknowns. The facts unfold differently than we expected and hoped. The law is interpreted differently than we had predicted, and yes -- the elephant in the room -- it seems some courts will never grant class certification, no matter the facts or law. But if we can improve the value of our collective portfolios just 10% (that translates to 100 points for an aspiring major leaguer), our reputation and standing among the public and the courts will be enhanced dramatically. And we will be afforded a fair shake in our effort to establish and prove the merits of our cases.

Five Suggestions for Change

How can we attain a 10% increase in the value of our portfolio? Here are 5 suggestions. They may not be new, but they occur to me as helpful guideposts toward an effort to generate discussion among our bar.

Case Selection: Real Harm and Sharp Practices

Consider only taking on cases where there is real harm resulting from a sharp practice. First, as to harm: It generally should be something you can

explain to a parent. Or if you're talking to a college friend, they should understand in three sentences what you are seeking to accomplish. Harm, of course, doesn't always translate exactly to dollars. The value of money

is relative. An alleged defective windshield wiper blade on a Mercedes might be \$250, but not as harmful as a \$25 surcharge by banks on any checks cashed by folks without a permanent address. In other words, harm or injury must be evaluated in context. Although beauty is in the eye of the beholder, if you need an expert to determine that the conduct was "wrong" or your mom says: "Huh?" or your college friend says: "Geez, that doesn't seem like a big deal," you may want to reconsider what you're doing.

As to sharp practices. Bring cases where you can establish a wrongful, conscious conduct: the bad practice should be purposeful and the company aware of the defect. The days of the "gotcha cases" may be over. Gotcha cases are those "technical" violations of law that really have no consequence. No one is harmed and your efforts do nothing for society or the class. So yes, there is a violation on its face. But a case? Hardly. And judges figure out a way – they always can – to get rid of your "meritorious" claim. Instead

of jury nullification, it is judicial nullification, which can have far reaching consequences in a published order or opinion.

In selecting your cases, look

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beyond class certification. Although certification is an important threshold, too often I see cases that meet the standards of Rule 23, but hardly meet the more exacting standard of: Can this case win at trial? Is this the type of case that puts an end to truly objectionable conduct? Is this a wrong, an injustice – you want to pursue for the next half decade?

Also, consider putting existing cases through this same scrutiny. They may not pass muster after two or three years. If they don't, consider with your client a graceful exit strategy. Remember those 10 at bats. Each time you're at bat you want to maximize the opportunity for a good at bat, and a hit.

Put an End to Copycat Suits and Feeding Frenzy Litigation

Too often there is a feeding frenzy sparked by media coverage. The next big thing. "Let's get retained and put something on file quickly." Well, how do you file quickly? You copy someone else's complaint. This practice needs to stop. Pure and simple. If your name is on a pleading that

is identical or substantially similar to an earlier filed complaint, there should be a presumption it is a copycat suit. State bar rules should include stiff sanctions on anyone who has copied the work of another firm and presented it as their own. Copycat suits run contrary to everything we strive to be as attorneys and citizens. Remember your 10 year old at home, asking: "Mom, what did you do at work today?" "Oh, I copied someone else's work and turned it into the Judge as my own." And, if there are 23 cases already on file, do you really need to file the 24th? Unless you have something particular to bring to bear, the answer is no.

The issues go beyond mere copycatting, however. Most of us would never consider filing a copycat suit, but what about the following scenario: You were retained 4 months earlier and have a well-researched and well documented complaint, and lo and behold, the Friday before the Monday you expect to file, someone across the country or in your state files a bare bones complaint on the same issue. Are you done? Must you cede the field?

No. You are not a copycat and you should not be penalized for having been deliberate and careful (See number #1 above). However, the value proposition changes. Since

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you've assessed the value of the case before filing, you should reassess, assuming ten or twenty law firms will be involved it still make sense? With large classes, it is virtually inevitable that members of the class will find other lawyers to file the same or similar claims. Expect it and be prepared to fight for your position or step aside – yes, step aside.

Too often cases become over-staffed and unmanageable. Consider: if just three groups (each with 3 or 4 firms) come together to litigate the case. That's 12 law firms. Do we really want to spend hours and hours on conference calls to carve up and mull over every inch of litigation turf? Beware, because in the end, that's where the real problems begin: a lodestar that defendant chokes on that can become an impediment to settlement and appear contrived to the Court.

Instead, through your superior skills as negotiators, work something out early. The firms with the best clients, most resources and knowledge in this matter should take the lead. Everyone else should focus on providing meaningful support (if requested) and another wrong to be challenged and defeated. Most of the time, walking away may be the best option.

Treat Your Class Representatives Like Clients

You have a client. Don't ever forget it. You should be required to communicate with your client once per month, even if it's just by email. Why? Consider the following: the night before your class certification hearing, the Judge contacts your class reps to discuss the issue of adequacy. What would you want your client to say? You've never spoken since the day she was sent the retainer? She couldn't pick you out of a line up? Some attorney who she never met flew in for her deposition and she can't recall his name? We should all strive for the day when our clients routinely say: "Your Honor, my lawyer contacts me every month. What would you like to know about the case?"

This type of care and feeding is not only ethically required, but good business. And good for the standing of our bar.

Commit to Pro Bono Work

Class Actions, as we know, can be positive forces for social change. We should all commit to cases where the beneficiaries are some disenfranchised group: the poor, those with special needs, the exploited, the disabled, or children. Let's use our expertise and skills on their behalf. For bigger firms, it's a way to train associates. For the rest of us, it's good exposure. But for all of us, it's an opportunity to do the right thing

and take a small chip out of the moniker "greedy" that we need to shake.

For big pro bono projects, why not co-counsel with a defense firm? Make it a bi-partisan effort. Cross the aisle in support of the public good. We must be bold and creative to change the paradigm we find ourselves in.

Object to Bad Settlements

The conventional wisdom is: "Don't object to even the worst settlement because you will put yourself at risk of objection and scrutiny on your good cases. It's not worth the risk." That kind of thinking must change. We are all risk takers. Objecting to bad settlements is a risk we must have the courage to accept. Sure, there are many marginal settlements that may be improved – but no need to second-guess those. Save your powder for the clear, egregious cases – those that give us all heartburn and a bad name. Although objecting doesn't have to be a regular part of your practice to be an effective deterrent, it should be done when necessary.

Of course, if you are not on the case, it's hard to know the back-story. What looks like an awful settlement may in fact be brilliant (or just good) lawyering. Find out the facts before you object. I suspect all among us would discuss their settlement with a member of our bar – and explain how the result was achieved and what hurdles an outsider may not be

aware of. But agree to be part of the process; agree to scrutinize settlements that affect us all. If we don't they will just be thrown in our face by a Judge, adversary, or potential class representative.

Conclusion

I want to thank AAJ and the CALG for the opportunity to have my say. I hope this essay on the state of our practice generates some discussion and eventual action within our

bar toward self-regulatory reform. I look forward to the day when I'm at a party or watching a high school hockey game and the standard response is: "Oh, you do class action work, don't you? I'm a member of a class and the lawyers did a phenomenal job." ■

CALG Supports AAJ

In a show of support and confidence in the AAJ organization as a whole, the Co-Chairs of the Class Action Litigation Group recently voted unanimously to donate \$5,000 of group funds to AAJ in the organization's recent fundraising effort. CALG members have been very diligent in supporting the litigation group with dues, and the Co-Chairs couldn't think of a more worthy cause to support than the vitality of AAJ. CALG received praise and many thanks from AAJ officers for the donation. It is times like these that we should all be proud to stand up for the mission of AAJ through continued financial support.

AAJ and CALG membership has its benefits!

If you have colleagues who represent plaintiffs in class action matters and are not members of the CALG, please encourage them to join. Membership provides access to the Document Depository, Objector Database, Listserv, Newsletter, and the Summer and Winter business meetings, among other things. AAJ members can join the CALG by visiting www.justice.org or by contacting Lauren Khair (Lauren.khair@justice.org). Anyone with questions about the CALG should feel free to contact one of the CALG co-chairs: Jay Aughtman (jay.aughtman@fglawgroup.com), Elizabeth Cabraser (Ecabraser@lchb.com), Ingrid Evans (ievans@waterskraus.com), or Frank Pitre (fpitre@cpmlegal.com).