

## **Order Regarding Expectations of Counsel**

By setting out this list of expectations for all counsel, and particularly class counsel, the court does not imply that counsel in this matter have caused any problems or that the court anticipates any problems. However, the court believes that if counsel initially understand the court's high expectations of them—and what counsel can expect from the court—we can all avoid problems and this complex litigation can proceed smoothly. The demands of complex litigation place a premium on professionalism. With these demands in mind, the court sets forth these expectations for class counsel, all counsel, and also commits itself to foster professionalism by the conduct of the undersigned judge. This court, in the broadest sense, strongly encourages all counsel to not only abide by professional ethics codes, but also to maintain the spirit of professionalism and to conduct themselves with civility throughout dealings with the court, co-counsel, and opposing counsel.

### **I. Class Counsel**

Although Fed. R. Civ. P. Rule 23 invests the court with power to control potential abuses in class actions and this court has full power to take remedial action to avoid or minimize any prejudice to the class, the court believes that if counsel initially understand the court's expectations and requirements, the necessity for remedial action can be avoided. The following list, while not exhaustive, represents this court's expectations of **class counsel**:

1. The court expects counsel to place the best interests of the class far above the financial or other interests of the attorneys; to always act as a true fiduciary; and to never place his or her own selfish interest or greed above the interests of the

client.

2. The court expects counsel to work cooperatively and congenially with co-counsel, members of the consolidated steering committee, and opposing counsel. Counsel need to perform their obligations as advocates in a manner that will foster and sustain good working relations among themselves, opposing counsel, and with the court. The court will not tolerate uncivil or unprofessional conduct by counsel whom this court has appointed or over whom this court has control.
3. The court expects counsel to remember that this court has fiduciary obligations to the class and inherent in those obligations is the right to remove or rearrange counsel structure.
4. The court expects full disclosure to the clients and to the court of any fee arrangements among counsel at the time of making them—not when counsel seeks approval of a fee allocation.<sup>1</sup>

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<sup>1</sup> Although the Eleventh Circuit has not addressed disclosure of fee-sharing arrangements in class action cases, other courts that have examined the issue have found disclosure mandated. *See, e.g., In re “Agent Orange” Product Liability Lit.*, 818 F.2d 216, 226 (2d Cir. 1987) (invalidating undisclosed fee sharing agreement and holding that “... in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class.”); *In re Futurionics Corp.* 655 F.2d 463, 468 (2d Cir. 1981) (awarding no compensation to counsel because counsel entered into a fee sharing agreement that was prohibited by the bankruptcy rules and because counsel “intentionally kept the court in the dark about this arrangement for four years despite the numerous opportunities to disclose this agreement.”); *Warnell v. Ford Mtr. Co.*, 205 F. Supp. 2d 956, 960 (N.D. Ill. 2002) (stating that the failure to disclose the intent to enforce contingent fee agreement with named plaintiffs in class action rendered the agreement unenforceable because the failure to disclose circumvented the court’s role as fiduciary for the class.); *Wanninger v. SPNV Holdings, Inc.*, 1994 WL 285071 at \*2 (N.D. Ill. June 24, 1994) (noting that the court “stands as the only real check on class counsel” in its role as “surrogate client” in evaluating fee petitions in class action cases and finding that the court “cannot adequately evaluate fee sharing agreements unless counsel are required to disclose

5. The court expects that any counsel seeking an award of or allocation of a fee must present to the court, when requested, contemporaneously made time and expense records that accurately and reasonably reflect time spent and services performed that benefit the class or specific subclass. These time and expense records should be provided to lead counsel at intervals as designated by lead counsel. The court will not tolerate padding of hours or charges that reflect numerous attorneys providing the same service.
6. The court expects that any conflicts of interest that might arise among counsel or between counsel and clients will be properly disclosed and resolved in favor of the best interests of the clients.

## II. All Counsel

Many of the expectations on the list above apply equally to **defense** counsel. Although the court does not have as much control over defense counsel as it does over counsel appointed under Fed. R. Civ. P. 23, the court also will hold defense counsel to the highest standards of ethical, professional, and civil conduct. The expectations listed below apply to **all counsel**:

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them to the Court at the first opportunity, rather than after a settlement is approved,” and quoting Alexander v. Chicago Park Dist., 927 F.2d 1014 (7th Cir. 1991) *cert. denied*, 112 S. Ct. 1262 (1992) (“The district court [is] required under Fed. R. Civ. P. 23(e) to scrutinized any fee agreements that [will] be enforced as part of the settlement, because those agreements necessarily put counsel and clients in an adversary relation.”) and citing In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (commenting that, in fee petitions, the judge assumes the role of “surrogate client” for the class.); Lewis v. Teleprompter Corp., 88 F.R.D. 11, 18, 24 (S.D.N.Y. 1980) (holding that failure to disclose fee allocation agreement between lead counsel and other plaintiffs’ attorneys overlooked the duty of counsel “as officers of the court to be sure that the court, in passing on its fee application, has all the facts; and its fiduciary duty to the shareholder class not to overreach,” and stating “[p]roper or improper, those [fee] arrangements should have been disclosed on a threshold basis to the court, and its consent or guidance sought.”).

1. The court expects counsel to uphold the highest standards of ethical and professional conduct at all times. Counsel shall practice their profession with a continuing awareness that their role is to advance the legitimate interests of their clients. In their dealings with others, counsel will not reflect the ill feelings of their clients and will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.
2. The court expects counsel not to abuse or indulge in offensive conduct, even if called upon by a client to do so, that is directed to other counsel, parties, or witnesses. Counsel shall abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses, and shall treat adverse witnesses and parties with fair consideration.
3. The court expects counsel not to attribute, absent good cause, bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.
4. The court expects counsel to never seek to mislead the court regarding the facts, the law, billable time, or anything else.
5. The court expects counsel to not use any form of discovery or discovery scheduling as a means of harassment. Counsel shall also consult with other counsel regarding scheduling matters in a good faith attempt to avoid scheduling conflicts.
6. The court expects counsel to make good faith efforts to resolve by agreement their

objections to matters contained in pleadings and discovery requests and objections.

7. The court expects counsel to take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. Counsel shall not take depositions for purposes of harassment or to increase litigation expenses. Also, counsel shall not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
8. The court expects all counsel to be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, counsel shall notify the court and other counsel, if possible.
9. The court expects counsel not to engage in any conduct that brings disorder or disruption to the courtroom. Counsel shall advise their clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of their ability, prevent their clients and witnesses from creating disorder or disruption.
10. The court expects counsel to act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

### **III. The Court**

Counsel for all parties in this litigation have the right to expect certain conduct from the court. The undersigned judge commits herself to uphold the highest standards of professional and judicial ethics, and to conduct all proceedings in this matter with civility and

professionalism. The court and her staff will be courteous, respectful, and civil to lawyers, parties, and witnesses. The court expects the best of lawyers and will give her best as well. The undersigned judge commits to work with the lawyers to move this matter forward in a manner reflective of the serious issues at stake and with the goal of obtaining a just result. While endeavoring to resolve disputes efficiently, the undersigned judge will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. Lastly, the court will give the issues in controversy deliberate, impartial, and studied analysis and consideration, and will make all reasonable efforts to decide promptly all matters presented for decision.

DONE and ORDERED this \_\_\_\_\_ day of July, 2003.

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KARON O. BOWDRE  
UNITED STATES DISTRICT JUDGE