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## Choosing a class action rep

By Correy E. Stephenson Staff writer

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Paul Kiesel learned a lot from his first experience filing a class action.

It was 1994, and he was primarily doing personal injury plaintiffs' work when a friend referred a case about a consumer who had been injured using a hair-straightening product. The product, advertised nationally on infomercials, was geared toward the African-American community and promised "straight, wonderful, flowing hair," Kiesel, a partner at Kiesel, Boucher & Larson in Beverly Hills, said.

"And it did that - for about five minutes," he added. "Then the consumer's hair began to fall out of her head."

Realizing that the product had affected individuals across the country, Kiesel knew he was looking at a class action. But who would be his class rep?

Kiesel held a press conference designed to get the story out - with great fanfare he displayed bald customers and baggies full of hair. Within 90 minutes, all 12 office phone lines were ringing off the hook, and he eventually sent out more than 600 retainer agreements. The result was overwhelming.

"I was thinking more like a PI lawyer than a class lawyer," Kiesel explained. "I thought I needed all these class members and a ton of reps, when all I really needed were one or two really good class representatives, and I would have been in great shape."

The right representative can make or break a case, agreed Timothy E. Eble, a sole practitioner in Mount Pleasant, S.C.

"I've turned down cases where people contacted me and they were unsuitable ... to take on the responsibilities of being a class rep," he said.

### Meeting the requirements

Of course, class representatives must meet the requirements of Rule 23(a) of the federal Rules of Civil Procedure (and/or any analogous state rule), which states: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Oftentimes, the hardest part can be finding someone willing to take on what can be a thankless job.

Eble said it's important for the class rep to understand that class counsel may at some point take a position contrary to the class representative and that reps can't take preferential settlements or agree to any side deals with the defense that are not disclosed to the court. He has reps sign a document stating their understanding of these issues as part of the attorney-client agreement, which he also has notarized.

"You must make it very clear that what they are doing is really a selfless act, and that they are working on behalf of the entire class, not representing their own personal interest," Kiesel said.

And that work can be time-consuming (depositions, preparation time with lawyers and trial time if necessary) and costly, especially if the litigation isn't near the plaintiff's home. At best, a class rep may get a small stipend for expenses.

"But the rep must be comfortable with the fact that he or she are involved in a process for the benefit of others," Kiesel stressed.

Eble cautioned that defense counsel can seek to undermine a rep's resolve.

"I've seen the defense in depositions ask a class rep if he would take \$500,000 to dismiss the suit and walk away," he recalled. "A rep needs to be prepared for a question like that and be able to explain that would be unethical and he wouldn't accept that deal anyway."

### Other considerations

Beyond the legal requirements, there are also practical considerations for attorneys choosing a rep:

- **The more the merrier?**

Not necessarily. "For every class rep you name, that is another request for disclosure, more interrogatories, another deposition and more people testifying," explained Eble, who authors a class action blawg at [www.classactionlitigation.com](http://www.classactionlitigation.com)

In addition, with more people testifying, there is a greater likelihood that the plaintiffs could contradict each other.

On the other hand, sometimes having understudies waiting in the wings can be a good idea.

Kiesel had to switch class reps in a consumer class action against a computer manufacturer where the rep's computer, although it had problems functioning, was exhibiting different problems than the rest of the class machines.

"It was fairly easy to ask the court to substitute an appropriate rep," Kiesel said. "But that's why it's always a good idea to have a few other potentials in mind should you need to call upon them."

- **Jury appeal.**

"I'm looking for someone who is not a hothead," Eble said. "I don't want someone who is going to act emotionally during a deposition and in such a manner that it would be a negative factor in the case."

The strongest defense challenge to the adequacy of a class rep occurs when a plaintiff has a history of bad conduct, class action defense attorney Donald Frederico explained.

"An extreme example would be a criminal record, specifically with a history of fraud or dishonesty," he said. But more frequently, representatives will be disqualified for smaller adequacy issues such as mental or physical infirmity.

And personality is definitely a factor. "I want somebody who will have jury appeal," especially if there is a good chance the case might make it to trial, Eble added.

- **Experience not required.**

"I always ask about a client's prior litigation experience to find out if he has ever been a class member, or more importantly, ever served as a class representative before," Kiesel said, because prior experience may make an individual look like a "professional class rep."

Kiesel also performs a thorough background check to make sure that a rep doesn't have anything lurking in his or her past that could prove detrimental to the case, such as a judgment against the person he or she may not even be aware of.

- **Bankruptcy problems.**

Eble steers clear of class reps in bankruptcy.

"After a petition has been filed, there is an issue about who controls the claim, because the trustee and the bankruptcy court can call the shots," he explained.

And Frederico, a shareholder at Greenberg Traurig in Boston, noted that plaintiffs have occasionally been disqualified from the class where they filed for bankruptcy in the past but didn't list the claim on their schedules, leaving them without standing to pursue the case.

- **Let's keep in touch.**

Litigation - especially class actions - can be a long process. Kiesel recommends that attorneys remain in regular contact with their reps and make it clear that the representatives have an obligation to keep the attorney informed of their whereabouts. Eble requires his reps to inform class counsel of any employment or address changes, as well as extended vacations.

- **Articulate and participate.**

The rep needs to be able to articulate the cause of action and what the defendant did wrong, albeit not in legal terms.

In a hypothetical consumer credit card case, "a rep doesn't need to be able to say the defendant violated the automatic stay and cite the statute, but he does need to be able to say it was wrong for the company to continue to charge him interest after he filed for bankruptcy," Eble explained.

He typically requires his reps to read the statute and the pleadings, as well as consult with him throughout the decision-making process and be able to participate meaningfully in settlement discussions.

In one case, every time the defense counsel asked Eble's class rep a question, he was unable to answer or said, "You'll have to ask my lawyer." The defense moved to deny certification of the class based on the rep's testimony.

But the judge still certified the class, recognizing that the case - which was centered on bankruptcy issues - was complicated, Eble said.

"The judge said the plaintiff's knowledge was typical given the facts of the case," he noted.

Questions or comments can be directed to the writer at:  
correy.stephenson@lawyersusaonline.com



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