RESOLVING THE CLASS ACTION PARADOX

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A paradox exists at the core of class actions. They were designed to perform a valuable function, protecting and compensating individuals who would not otherwise have legal recourse, yet in practice they have effectively silenced and disenfranchised class members, leaving them unaware and uninformed of litigation commenced on their behalf, the nature of their potential claims, and the damages they may seek. In this Article, we take three significant steps toward resolving the class action paradox. First, we unpack recent scholarship that led to the introduction of "representational notice," a mechanism that leverages advances in technology and the social sciences to gather and parse class members' preferences regarding class counsel and litigation outcomes at the outset of the litigation. Second, the Article provides inside details on how, a few months after representational notice was introduced to the legal academy, it was effectively implemented in the 23andMe data breach litigation. For a class of an estimated seven million persons, class action attorneys teamed up with legal scholars to afford prospective class members a voice. While the 23andMe litigation represents unprecedented progress—for the first time in large-scale commercial litigation, class members could share their preferences—the journey toward fully actualizing class member participation is far from complete. This brings us to the final step taken in this Article. We analyze representational notice's debut in practice and identify challenges: how can a class speak fairly (without disregarding subsets of class members), efficiently (without hindering the efficiency gains of current class action procedures), and accurately (yielding information that truly represents what it purports to represent, as well as being digestible and actionable)? We then provide an essential blueprint for representational notice surveys across four key areas: administration, design, dissemination, and analysis, including the specific substance that representational

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notice should contain. By adhering to this blueprint, the class action paradox can be resolved, the momentum toward robust class member representation sustained, and a more inclusive, responsive, and just class action system fostered.

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INTRODUCTION

A "class action" lawsuit, by definition, should represent the class, yet this one, and most others, do NOT, serving simply to enrich law firms at the expense of the people they falsely claim to represent . . . .[1]

—Elon Musk, X

While the underlying claim in this quote is a truism among legal scholars, what makes it salient is that a prominent layperson, Tesla CEO Elon Musk, uttered it. Musk was bemoaning that, although Tesla stockholders had twice voted in favor of his executive compensation package,[2] a class action claiming to represent all Tesla shareholders,[3] including, ostensibly, the 72% of shareholders who had just voted in favor of the compensation package, had been filed.[4] Setting aside the merits of Musk's claim, a more interesting and fundamental inquiry emerges: How is this even possible? How can shareholders vote overwhelmingly in favor of something and simultaneously sue to strike the very same thing down? The answer to this paradox lies in a curious schism between those who bring class action lawsuits and those who are represented by those suits. Indeed, the answer is best sought through another question: Can class members have a meaningful voice in their own litigation?

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1 Elon Musk (@elonmusk), X (June 22, 2024, 10:59 AM), https://x.com/elonmusk/status/1804529658005803227 [https://perma.cc/7FNV-K79B].

2 Lily Boyce & Jason Karaian, *How Tesla Shareholders Upheld Elon Musk's Sky-High Pay*, N.Y. TIMES (June 14, 2024), https://www.nytimes.com/interactive/2024/06/14/business/tesla-shareholder-vote-results.html [https://web.archive.org/web/20250331140956/https://www.nytimes.com/interactive/2024/06/14/business/tesla-shareholder-vote-results.html].

3 *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024); Warren Redlich (@WR4NYGov), X (June 22, 2024, 3:53 AM), https://x.com/WR4NYGov/status/1804422325854708084 [https://perma.cc/MB7J-ZJ6N].

4 Boyce & Karaian, *supra* note 2; *see Tornetta*, 310 A.3d 430 (rescinding Musk's ten-year compensation package); Jeff Montgomery, *Chancery Voids Elon Musk's $55B Telsa Pay Package*, LAW360 (Jan. 30, 2024, 5:39 PM), https://www.law360.com/articles/1792014 [https://web.archive.org/web/20240131142613/https://www.law360.com/articles/1792014].

This question has haunted legal scholars and litigators for well over a century, as the answer has been a consistent but tremulous "no."[5] Despite exhortations in Rule 23(d) of the Federal Rules of Civil Procedure to provide class members with a say,[6] most courts have concluded that putative class members are not *echt* legal clients,[7] and thus can be deprioritized and positioned off-field.[8] Indeed, they are referred to as "absent" class members for a reason[9]—they are notably absent in all aspects of the litigation, from filing to pretrial efforts to settlement and trial processes.[10]

Recent developments, however, have dramatically altered this landscape. Now, for the first time ever, class members' voices are beginning to be heard. In the ongoing 23andMe data breach class action litigation, class action attorneys and legal scholars (i.e., the authors of the present Article) worked together to gather class members' preferences regarding class counsel, legal strategy, and litigation outcomes—and provided this information to the court to consider prior to its appointment of class counsel.[11] This was a groundbreaking development, something that had never been accomplished before in commercial

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5 *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 87 (2022) (identifying a consensus that "plaintiff participation in class-action and impact litigation is not achievable").

6 FED. R. CIV. P. 23(d)(1)(B)(i), (iii).

7 *E.g.*, Depina v. FedEx Ground Package Sys., Inc., 730 F. Supp. 3d 954, 956–57 (N.D. Cal. 2024); Morris v. Gen. Motors Corp., No. 07-md-1867, 2010 WL 931883, at *5–6 (E.D. Mich. Mar. 11, 2010); *see also* Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1636 (2022) (treating unnamed class members as nonclients for purposes of standing and venue and noting that most courts focus solely on the named representative's standing).

8 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV 669, 681 (1986) (describing the attorney-client relationship in class actions as "so weak" as to render class counsel "virtually an independent entrepreneur"); Alissa del Riego & Joseph J. Avery, *The Class Action Megaphone: Empowering Class Members with an Empirical Voice*, 76 STAN. L. REV. ONLINE 1, 3–4 (2023) ("Class members are sidelined at all points in the litigation process."); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 21 (1991) (noting that class counsel initiate litigation "and do not rely on clients to come to them with cases"); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132 (2001) (arguing that class counsel has no truly identifiable client); *cf.* Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781, 1789 (2014) ("Class litigation affords class members little voice and even less control.").

9 Wilf-Townsend, *supra* note 7, at 1635.

10 *See infra* Part I.

11 *See* Expert Report of Joseph J. Avery, Ph.D., J.D., and Alissa del Riego, J.D., at 1–2, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-3098 (N.D. Cal. Apr. 22, 2024), ECF No. 36-1 [hereinafter Expert Report].

litigation of this scale, and it heralds a revolution in class actions, a new era for class members.[12]

In all, the potential gains for class members and legal justice are great enough to warrant optimism, if not the unbridled variety. However, potential pitfalls are numerous, necessitating thoughtful, detailed, and clear guidance—which this Article provides—for practitioners, experts, and courts to fully realize the promise of class member participation in class litigation.

To understand the significance of this current moment, it is essential to consider its historical context. Nearly two hundred years ago, Rule 48 of the Federal Equity Rules of 1842, which allowed for lawsuits to be brought by or against representatives of a larger group, was created out of a desire to provide plaintiffs who would otherwise be silent with a voice.[13] Almost one hundred years later, in 1938, with the introduction of the Federal Rules of Civil Procedure and its Rule 23, the modern framework for class actions in the United States began to take shape, and the same precipitating desire was at work: through the class action mechanism, injured and isolated individuals who otherwise would not have a voice would be handed a megaphone.[14] But the irony is that, since their nascence, class actions have largely wrought the opposite.[15]

Class actions have effectively silenced and disenfranchised class members, leaving them unaware and uninformed of litigation commenced on their behalf, the nature of their potential claims, and even the damages they may seek or those being sought on their behalf.[16] Efforts to provide representation attuned to class members' actual preferences and demands failed to gain any traction for a century, and reform efforts largely focused instead on giving more power to courts and class counsel to act as fiduciaries for class members.[17] But that has recently changed.

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12 Rule 48, Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) lvi (1842) (superseded 1912); *see* Alison Frankel, *Law Firm Edelson Pitches Radical Idea for Picking Lead In 23andMe Case. Ask Class Members*, REUTERS (Apr. 18, 2024, 6:45 PM), https://www.reuters.com/legal/legalindustry/column-law-firm-edelson-pitches-radical-idea-picking-lead-23andme-case-ask-class-2024-04-18 [https://web.archive.org/web/20240420102806/https://www.reuters.com/legal/legalindustry/column-law-firm-edelson-pitches-radical-idea-picking-lead-23andme-case-ask-class-2024-04-18].

13 *See* Smith v. Swormstedt, 57 U.S. 288, 303 (1854).

14 John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1421 (2003).

15 *See infra* Part I.

16 *See infra* Part I.

17 *See, e.g.*, Austin v. Pa. Dep't of Corr., 876 F. Supp. 1437, 1456 (E.D. Pa. 1995) (noting that Rule 23(e) "was designed to protect class members from the potential abuse by class representatives and plaintiffs' counsel" by requiring courts to evaluate settlements); Aditi Shah, *Constitutional and Procedural Pathways to Freedom from Immigration Detention: Increasing Access to Legal*

Over the past few years, a glimmer of possibility for class member participation has begun to materialize.

This forward progress can be broken into two overlapping developments, one scholarly and one applied. First, a few scholars highlighted the potential for technological advances to facilitate mass communication among class members and identified centralized structures in multidistrict litigation ("MDL") that could enable plaintiffs to be active and engaged participants.[18] Further work introduced the concept of "participatory litigation," suggesting that class action litigation could permit "collaborative, collective, and consensus-building interactions" between counsel and class members.[19] This dynamic relationship would allow for continuous communication, teaching, and learning between attorneys and class members.[20]

These ideas crystallized in our proposal for "representational notice," a mechanism designed to inform class members at the outset of class action litigation of their claims, the existence of a class lawsuit, and the attorneys seeking to represent them.[21] In addition to providing this information, representational notice would enable class members to evaluate prospective counsel, express litigation objectives, and detail the injuries they believe resulted from the defendant's alleged conduct.[22] The responses from class members would be considered by the court when appointing counsel and guide the directives of the litigation.[23]

Building on representational notice's foundation, we conducted pilot studies demonstrating how it could feasibly be implemented.[24] In these studies, we provided participants with notice of ongoing litigation and requested their input on prospective class counsel, i.e., the attorneys

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Representation, 35 GEO. IMMIGR. L.J. 181, 229 (2020) (noting that Rule 23(g), and Rule 23(a)(4) prior to that, was aimed at providing courts with the authority to ensure class counsel was adequate to represent class members); Alex A. Parkinson, *Behavioral Class Action Law*, 65 UCLA L. REV. 1090, 1141–42 (2018) (arguing that judges should take a larger role in reviewing class settlements for architecture and nudges); Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1323–29 (arguing that the court should take a larger role in regulating lead plaintiffs and class counsel in securities class litigation); *cf.* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168 (2003) (discussing the "monopoly power" of class counsel).

18 Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849–51 (2017); del Riego & Avery, *supra* note 8, at 5.

19 Lobel, *supra* note 5, at 87–88.

20 *See id.* at 92–93.

21 Alissa del Riego & Joseph Avery, *Inadequate Adequacy?: Empirical Studies on Class Member Preferences of Class Counsel*, 2024 UTAH L. REV. 499, 504 (2024).

22 *Id.* at 544.

23 *Id.*

24 *Id.* at 521–43.

that sought to represent them.[25] The implications of our pilot studies were significant.[26] For the first time, it was evident that class members could contribute to meaningful class action decision-making. No longer silenced, they could have a voice—and they demonstrated that they were thoughtful contributors who often held different preferences from those which courts and class counsel might anticipate.[27]

This brings us to the second development. With the academic soil tilled, crops sprouted in actual practice. In his detailed account of a successful class action suit challenging California's use of prolonged solitary confinement in its prisons in 2022, Professor Jules Lobel demonstrated that class member participation is possible, at least when dealing with a relatively small, defined, and concentrated class.[28] In this case, Center for Constitutional Rights attorneys involved prisoner class members in many aspects of the litigation, including choosing class representatives, deciding which claims to present, negotiating and ratifying a settlement agreement, and monitoring the settlement decree.[29] This technique facilitated "collaborative, collective, and consensus-building interactions" between class lawyers and class members.[30]

Even more recently, in 2024, in the consolidated 23andMe class action data breach involving millions of class members, a law firm seeking to represent the class, filed a brief proposing a "radical idea"[31]:

> The old way of litigating privacy class actions hasn't been working. Far too often, it's resulted in anemic settlements that primarily benefit the lawyers—settlements focused on credit monitoring, *cy pres*, or that were just hastily reached. . . . How, then, can a Court take an objective approach to deciding what's in the best interests of its temporary, millions-strong client? A burgeoning area of scholarship suggests a surprising but commonsense solution: perhaps we should just ask them.[32]

And that is precisely what the law firm did. It engaged legal scholars pioneering this area of research to provide representational notice to a

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25 *Id.*

26 *See id.* at 541–43.

27 *Id.* at 524.

28 Lobel, *supra* note 5, at 87–88 (describing class litigation where class members were involved throughout various steps in the litigation, choosing class representatives, defining claims, choosing relief, considering settlement terms, etc.).

29 *Id.* at 123–48.

30 *Id.* at 88.

31 Frankel, *supra* note 12.

32 *Melvin* Plaintiffs' Notice of Filing of Motion to Appoint Interim Leadership of Class Action at 1–2, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-3098 (N.D. Cal. Apr. 22, 2024), ECF No. 9.

well-powered sample of prospective 23andMe data breach class members.[33] The result was unprecedented insight into class members' beliefs and preferences vis-à-vis the pending litigation.

What we are witnessing is nothing short of a sea change in class action litigation. There was a fundamental disconnect between class members and their legal representatives, and there was frustration of class actions' *raison d'être*. Now a path toward class member participation has been cleared, but a road to the same remains to be paved. We are only at the beginning, and the most important work—both in terms of developing further legal theory and increasing its application to legal practice—is yet to be done.

In this Article, we analyze in detail the results of the 23andMe data breach class member survey, highlighting the steps taken, discussing the outcomes of those steps, and identifying what might be improved upon in the future. Additionally, we identify and unpack the major questions that remain: Given what the two recent instances of class member engagement have shown us, how can a class speak fairly (ensuring no subsets of class members are disregarded), efficiently (maintaining the efficiency gains of current class action procedures), and accurately (providing information that truly represents the class members' views, while being both digestible and actionable)? Drawing from our experiences with representational notice's debut in the 23andMe data breach class litigation, we outline what needs to happen for the current momentum to yield the theorized and desired results in future class litigation. To this end, we propose a blueprint that provides the principles and procedures for perfecting representational notice across four key areas: (1) administration, (2) design, (3) dissemination, and (4) analysis. The Appendix to this Article provides the precise content that representational notice should contain.

This Article progresses as follows. In Part I, we discuss the current state of class member disenfranchisement in class action litigation. This Part divides the litigation into three Sections: prelitigation, pretrial, and trial and settlement. We explore how, at each stage of litigation, class members have been effectively absent, silenced, and uninformed. We contrast this with the traditional attorney-client relationship, where clients are actively involved in decision-making processes, highlighting the significant gap between the ideals of Rule 23(d) and the realities faced by putative class members. This analysis sets the stage for understanding the revolutionary potential of recent developments aimed at amplifying class members' voices.

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[33] *See* Expert Report, *supra* note 11.

In Part II, we outline the foundational developments that enabled this breakthrough in class member participation. We start by discussing the theoretical groundwork laid by scholars who have advocated for participatory litigation and representational notice. These scholars leveraged advances in technology and communication science to propose innovative solutions for involving class members in the litigation process.[34] Next, we detail pilot studies testing these theories that demonstrated their feasibility and provided valuable insights into the practicalities of implementation. Finally, we examine the real-world application of these ideas in a litigation involving California prisoners that showcased how class member involvement could be both possible and crucial in achieving just outcomes in smaller, localized impact litigation.[35]

Part III delves into the first practical implementation of representational notice in the 23andMe data breach class litigation. This Part provides a detailed account of the class member survey conducted in the litigation to understand class members' preferences. We provide background on the litigation, explain how the survey was designed and disseminated, and discuss its results. This analysis not only highlights the unprecedented insight gained from the survey but also underscores the potential for representational notice to transform class action litigation more broadly.

Finally, Part IV offers a comprehensive blueprint for replicating and perfecting representational notice in future class cases. We provide detailed recommendations for representational notice's administration, design, dissemination, and analysis, addressing potential challenges and offering solutions to ensure that class members' voices are meaningfully integrated into the litigation process. By outlining best practices and practical steps, we aim to sustain the momentum for class member participation, avoiding potential pitfalls and ensuring responsible representation in this transformative new era of class actions. This Part serves as a call to action for scholars, practitioners, and courts to embrace and further develop representational notice, ensuring class actions fulfill their original intent of amplifying the voices of the injured and isolated.

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34 *See infra* Part II.

35 *See supra* notes 5, 22.

I. VOICELESS DISTANT SPECTATORS: COUNSEL-CLASS MEMBER ESTRANGEMENT

Imagine the following hypothetical scenario: Adam purchases a brand new 2020 BMW X5. A year later, a lawsuit against BMW is initiated on Adam's behalf that alleges his car is defective—without Adam's knowledge—by attorneys Adam has never met, nor authorized to represent him. The litigation continues for three years. During discovery, documents are produced that suggest BMW knowingly sold Adam a defective and unsafe vehicle, arguably entitling Adam to significant damages. However, the attorneys choose to avoid the costs and uncertainties associated with a jury trial and potential appeals and instead accept a settlement offer from BMW that entitles Adam to $300. Adam receives correspondence in the mail informing him of the settlement, but he believes it to be junk mail and discards it. A year later, Adam loses control of his BMW while driving. Fortunately, no one is injured, and his car is not damaged. When he takes the vehicle to a mechanic, he learns about the defect. Adam consults an attorney and is informed that he cannot file a lawsuit against BMW because his claims have already been settled in a prior lawsuit. Adam attempts to at least claim the $300 settlement, but the deadline for submitting a claim has passed. Consequently, Adam is left without any remedy.

While this hypothetical might lead some to believe Adam has a malpractice claim and grounds for a professional bar complaint against the attorneys that settled his claim, they did nothing wrong. It was a class action lawsuit, and "courts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members."[36] Rules that apply to traditional attorney-client relationships have been deemed impractical and inapplicable in the class context.[37] Indeed, several courts have held that an attorney-client relationship does not exist between class members and class counsel until a class is

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36 *In re* Cmty. Bank N. Va., 418 F.3d 277, 313 (3d Cir. 2005).

37 *See, e.g.*, *id.*; *In re* McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1245–46 (N.D. Cal. 2000) (rejecting an argument that putative class members are "represented" and cannot be contacted directly by opposing counsel); Edward R. Becker, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 694–95 (2001) ("In class actions, the ordinary assumptions about the attorney-client relationship do not apply."); Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 967–69 (2004) (noting arguments that ethical obligations under the Modern Rules of Professional Conduct are impractical in the class action context); *cf.* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 65–67 (2003) (proposing a new governance framework for class actions that better recognizes the "basic insight" that the traditional attorney-client relationship does not apply).

certified,[38] which often does not occur until the case has been practically completely litigated pretrial.[39]

The claim that plaintiff class action attorneys operate without clients rings true.[40] These attorneys wield almost unfettered control over class action litigation, with scant obligations or incentives to communicate with or inform class members about anything throughout the process.[41] For all practical purposes, the traditional attorney-client relationship is nonexistent in class litigation.[42] Historically, there have been practical reasons for this reality—it is unwieldy for hundreds, thousands, or even millions of individuals or entities to effectively communicate and manage litigation cohesively.[43] Consequently, Rule 23 contains no explicit

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38 *See, e.g.*, Depina v. FedEx Ground Package Sys., Inc., 730 F. Supp. 3d 954, at 956–57 (N.D. Cal. 2024) (finding that communications and survey responses by putative class members were not protected by the attorney-client privilege because they occurred prior to class certification); Morris v. Gen. Motors Corp., No. 07-md-1867, 2010 WL 931883, at *5–6 (E.D. Mich. Mar. 11, 2010) (same); Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 353–54 (2002) (noting the "majority view" that no attorney-client relationship exists in the class action context until after certification); *cf.* MANUAL FOR COMPLEX LITIGATION § 21.33 (4th ed. 2004) ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."). *But see* Glover v. EQT Corp., No. 19-cv-223, 2023 WL 5321810, at *6–7 (N.D. W. Va. Aug. 14, 2023) (finding that attorney-client privilege applied to attorneys' communications with putative class members that communicated as prospective clients).

39 Del Riego & Avery, *supra* note 21, at 507 (noting that class certification presently occurs after extensive litigation and sometimes two to three years into the case); *see also* Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to a Class Action Paradox*, 47 U. S.F. L. REV. 55, 58 (2012) (discussing later class certification in securities class actions).

40 *See* Coffee, *supra* note 8, at 677–78, 681; del Riego & Avery, *supra* note 8, at 3–4 (noting that scholars have argued class counsel lack identifiable clients because they make all litigation decisions); Koniak & Cohen, *supra* note 8, at 132 (arguing that class counsel has no truly identifiable client); Macey & Miller, *supra* note 8, at 21 (noting that class counsel initiate litigation "and do not rely on clients to come with them with cases"); *cf.* Bassett, *supra* note 8, at 1789 ("Class litigation affords class members with little voice and even less control.").

41 *See* Bassett, *supra* note 37, at 959 ("Class counsel play a . . . very powerful role in class litigation with little accompanying oversight . . . from the court."); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1986–87 (2011) ("No class member can tell class counsel what to do . . . ."); del Riego & Avery, *supra* note 21, at 500 (noting that class counsel "speaks solely for and on behalf of the class"); Macey & Miller, *supra* note 8, at 3 (noting that class counsel "exercise nearly plenary control over all important decisions in the lawsuit"); Mohsen Manesh, Note, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923, 934 (2005) (noting "class counsel's incentive to keep class members uninvolved in the litigation").

42 Del Riego & Avery, *supra* note 8, at 3–4; Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083, 1097–98 (2020).

43 Del Riego & Avery, *supra* note 8, at 2 ("[C]lasses can contain hundreds, thousands, and often millions of class members, rendering meaningful consultation and traditional representation impossible."); David Rosenberg, *Class Actions for Mass Tort: Doing Individual Justice by Collective*

requirement to communicate with class members and putative class members outside the official notice process.[44]

Courts may, however, under Rule 23(d)(1)(B), order counsel to communicate with class members to inform them of significant steps in the litigation or the proposed scope of a judgment and provide them an opportunity to express their views on the representation they are receiving.[45] But, in practice, Rule 23(d)(1)(B) is rarely invoked.[46] When invoked, requests by class counsel to communicate with class members via Rule 23(d)(1)(B) are often denied as unnecessary and wasteful.[47] This is perhaps because the Rules' Advisory Committee has stated that Rule 23(d) "does not require notice at any stage" and that when "there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum."[48]

Interestingly, class action legal expert Professor Herbert Newberg interpreted courts' authority under Rule 23(d) a bit more broadly, suggesting that such notice could be used, inter alia, to "encourage interventions to improve the representation of the class," "poll members on a proposed modification of a consent decree," and, importantly, "identify or make available the identity of counsel for the class plaintiffs to whom inquiries about the action may be made by class members."[49] Rule 23(d)(1)(B), however, has not in practice become a path to communicate with class members or invite a more traditional attorney-client relationship between class counsel and putative class members.

Means, 62 IND. L.J. 561, 567 (1987) ("[B]ureaucratic justice implemented through class actions provides better opportunities for achieving individual justice than does the tort system's private law, disaggregative processes."); *cf.* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 636–38, 659 (2023) (noting the "democratic deficit" in class actions).

44 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 9:2 (6th ed. 2024).

45 *See* Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 962–63 (3d Cir. 1983).

46 Less than 130 cases available on Westlaw mention the Rule. *Cf.* DW Volbleu, LLC v. Honda Aircraft Co., No. 21-CV-637-SDJ, 2021 WL 5826536, at *1–2 (E.D. Tex. Dec. 8, 2021) (noting "courts' skepticism concerning the propriety of issuing notices to putative class members under Rule 23(d)" and explaining "such notices have typically, and rarely, been employed only as a curative measure restricting or modifying the manner in which communications are conducted between one or more of the litigants already before the court and the 'potential' class members").

47 *See, e.g.*, Gardner v. GMAC, Inc., 796 F.3d 390, 398–99 (4th Cir. 2015); *In re* Chrysler Pacifica Fire Recall Prods. Liab. Litig., No. 22-3040, 2024 WL 3103434, at *3–4 (E.D. Mich. June 20, 2024); Clark v. Hyatt Hotels Corp., No. 20-cv-01236, 2020 WL 6870599, at *2–3 (D. Colo. Oct. 30, 2020).

48 Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 106–07 (1966); *see* Herbert B. Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. INDUS. & COM. L. REV. 577, 594 (1969).

49 Newberg, *supra* note 48, at 595.

Class members thus remain largely unaware that litigation has been commenced on their behalf.[50]

In this Part, we describe the decades-old paradox of the client disenfranchisement problem that has plagued class litigation at each step of the process. Specifically, we contrast the class counsel-class member relationship with the traditional attorney-client relationship, showing how the former diverges from the foundational principles of legal representation. Unsurprisingly, the communication void and lack of client accountability that characterizes class litigation have engendered criticism focusing on class action attorneys' motivations to reap personal profit at the expense of the class.[51]

A. *Prelitigation*

When individuals or entities encounter a legal problem, they typically seek an attorney through research and recommendations from colleagues, friends, or acquaintances.[52] Prospective clients may interview one or more attorneys, asking pointed questions about experience, costs, litigation strategy, resources, recommendations, and availability. Based on these, and perhaps other factors, an attorney is engaged. Once an attorney is engaged, clients customarily sign a retainer agreement that outlines the scope of representation, billing rates or contingency fees,

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50 Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 90–91 (2007); Bassett, *supra* note 38, at 389–90 (2002); Bassett, *supra* note 8, at 1790.

51 *See, e.g.*, Bassett, *supra* note 37, at 927–31 (discussing inter alia others' criticisms of class actions as "embodying many of the horrors associated with a legal system purportedly out of control"); Leslie, *supra* note 50, at 72 ("Class action litigation often seems to be a mechanism for greedy class counsel and shrewd defendants to negotiate settlements that undermine the interests of the class."); Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 861–63 (2016) ("The irony is that the seeds of disempowerment are sown by the very mechanism that makes aggregation empowering for plaintiffs."); Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 55, 71–73 (2004); Koniak & Cohen, *supra* note 8, at 145–55; Martin H. Redish, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1139–42 (2020).

52 Daniel M. Filler, *Lawyers in the Yellow Pages*, 14 LAW & LITERATURE 169, 171 (2002).

costs, and other relevant details.[53] While these are often standard and drafted by the law firm,[54] clients have some ability to negotiate terms.[55]

Class litigation operates almost inversely to traditional litigation: instead of clients seeking an attorney, attorneys seek out clients.[56] Attorneys learn of several individuals affected by a company's defective product, business practice, privacy violations, anticompetitive behavior, fraud, etc., and seek out a few of those impacted to serve as class representatives.[57] They often use their social networks, or those of colleagues and acquaintances, to identify prospective class members.[58] Some class action attorneys even publicly advertise to find clients.[59] After identifying potential clients, attorneys screen them and cherry-pick those who will serve as class representatives in the litigation.[60] Because class

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53 *See, e.g.*, Flannery v. Singer Asset Fin. Co., 94 A.3d 553, 558 (Conn. 2014) (describing an engagement letter that outlined, inter alia, the scope of engagement); Gonzalez v. Thomas, Alexander, Forrester & Sorensen, LLP, No. 21-cv-3903, 2022 WL 17345913, at *1 (C.D. Cal. July 22, 2022) (discussing terms of an engagement letter between an attorney and client that included contingency fee provisions).

54 *See, e.g.*, Managed Care Sols., Inc. v. Baptist Health Sys., Inc., No. 07-61263, 2009 WL 10696303, at *1 (S.D. Fla. Apr. 27, 2009) (noting that the engagement letter between a client and a law firm was drafted by that law firm); Wolff Ardis, P.C. v. Kimball Prods., Inc., 289 F. Supp. 2d 937, 939 (W.D. Tenn. 2003) (same).

55 *See, e.g.*, Powers v. Dickinson, 54 Cal. App. 4th 1102, 1110 (Cal. Ct. App. 1997) (noting that the retainer agreement between the attorney and client was negotiated and that the client "possessed the freedom to . . . bargain for the terms of their choice"); *see also* Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2186 (1998) (discussing a legal client's ability to negotiate fees).

56 *See* del Riego & Avery, *supra* note 21, at 515 (noting that class members and class representatives rarely hire or choose their attorneys); Macey & Miller, *supra* note 8, at 21 ("[C]lients do not pick their attorneys in class . . . suits[.]").

57 *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370–72 (2000) (noting that class counsel has "elected to represent" class representatives); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064–65 (1995) (noting that class representatives were "recruited" by class counsel); Macey & Miller, *supra* note 8, at 21 (noting that class attorneys, as opposed to class members, initiate the litigation).

58 *See* Macey & Miller, *supra* note 8, at 21; Kathryn Honecker, Julia Campins & Laura Van Buren, *Class Actions 101: A Primer on Finding Plaintiffs for Your Class Action . . . Ethically*, AM. BAR ASS'N (Sept. 19, 2013), https://www.americanbar.org/groups/litigation/resources/newsletters/class-actions-derivative-suits/class-actions-101-primer-finding-plaintiffs-your-class-action-ethically [https://web.archive.org/web/20241015183822/https://www.americanbar.org/groups/litigation/resources/newsletters/class-actions-derivative-suits/class-actions-101-primer-finding-plaintiffs-your-class-action-ethically].

59 *See* Honecker et al., *supra* note 58 ("[A]ttorneys can provide information about class actions they are investigating on their firm's website, on another website, or in a banner ad.").

60 *See id.*; Sonya Winner, *Practice Pointers: Know Your Plaintiff*, COVINGTON & BURLING LLP (May 23, 2022), https://www.insideclassactions.com/2022/05/23/practice-pointers-know-your-plaintiff [https://perma.cc/S25Z-W69H]; Abbas Kazerounian, *Material Considerations When*

representatives do not pay upfront for legal fees or costs incurred and have a smaller financial investment in the litigation, they typically agree to the terms presented to them in an engagement letter with the hopes of receiving an incentive award at the end of the litigation.[61]

Class action attorneys have full discretion in selecting their clients, often choosing those who will be less troublesome for them or the case.[62] For instance, if a background check reveals a class member was convicted of petty larceny four years prior, the attorney would likely not select them as a class representative, anticipating that such a fact would emerge during deposition and be used to undermine the class member's credibility.[63] However, not all criteria attorneys consider when choosing class representatives are based on substantive litigation challenges. Many class action attorneys, for example, might prefer to choose a busy country club friend who will not pester them with questions during the litigation over a putative class member who is furious about a defendant's misconduct and overly invested in the case, constantly requesting updates and expressing strong opinions.[64]

Once a class action attorney has clients, they can file a lawsuit on their behalf and on behalf of all others similarly situated. But filing a class action does not guarantee that the attorney will represent the class. Rule 23(g) requires that courts certifying a class appoint adequate or qualified class counsel.[65] Because class certification can occur years into the litigation, courts frequently appoint interim class counsel at the outset of the litigation, particularly when multiple attorneys seek to represent the same class.[66] When several attorneys apply, courts must appoint the attorney(s) "best able to [fairly and adequately] represent the interests of

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Screening for a Class Representative, PLAINTIFF MAG. (June 2020), https://plaintiffmagazine.com/recent-issues/item/material-considerations-when-screening-for-a-class-representative [https://perma.cc/PMW5-M3C3].

61 *See* Radcliffe v. Experian Info. Sols., Inc., 715 F.3d 1157, 1163–64 (9th Cir. 2013) (describing similar terms across class representative retainer agreements that (unethically) obligated class counsel to seek incentive awards); Weiss & Beckerman, *supra* note 57, at 2064–65 (noting that a class representative "has only a nominal financial interest in a class action").

62 *See* Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 181–83 (1990); *see also* Lobel, *supra* note 5, at 114.

63 *See, e.g.*, Larson v. Trans Union, LLC, No. 12-cv-05726, 2015 WL 3945052, at *12 (N.D. Cal. June 26, 2015).

64 *See* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1703–04 (2004) (discussing the "potted-plant theory" of the class representative, likening representatives to potted plants, where their "appropriate role is to remain mute, provide background foliage, and do nothing more").

65 FED. R. CIV. P. 23(g)(2).

66 FED. R. CIV. P. 23(g)(3); *see* Deangelis v. Corzine, 286 F.R.D. 220, 223 (S.D.N.Y. 2012); *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11-md-2262, 2011 WL 5980198, at *2 (S.D.N.Y. Nov. 29, 2011); del Riego & Avery, *supra* note 21.

the class."[67] Under the Rule, courts must evaluate the fitness or "adequacy" of attorneys based on their experience, knowledge of the law, work done investigating the conduct and claims in the litigation, and the resources they are able and willing to dedicate to the litigation.[68] Courts are also permitted to consider any "matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[69]

A court's determination that a particular attorney or group of attorneys is the best to represent the class's interest, however, is a rather subjective decision and does not consider the class members' preferences.[70] Even if a class member were to consult an attorney and that attorney agreed to bring class claims on their behalf, the court may ultimately appoint the class a different attorney and that client would be cast aside from the litigation unless appointed counsel chose to have them serve as a class representative. Practically, however, class members are largely unaware that multiple attorneys are vying to represent them or that litigation has been initiated on their behalf.[71]

B. *Pretrial Litigation*

In a traditional case, attorneys have a professional and ethical duty to communicate with their clients and keep them reasonably informed.[72] Attorneys who bill hourly typically send monthly bills that detail the work they have performed on the case.[73] Even in contingency fee cases, attorneys must keep their clients reasonably informed about the litigation.[74] Moreover, attorneys communicate with their clients when drafting the complaint, as factual allegations and injuries typically come

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67 FED. R. CIV. P. 23(g)(2).

68 FED. R. CIV. P. 23(g)(1)(A).

69 FED. R. CIV. P. 23(g)(1)(B).

70 Alissa del Riego, *Luck of the Transfer?: Curtailing Court's Impact on Class Members' Legal Representation*, 62 HARV. J. ON LEG. (forthcoming 2025).

71 *See* Bassett, *supra* note 8, at 1790–91 (noting the "reality that absent class members are unaware of the class action's pendency").

72 MODEL RULES OF PRO. CONDUCT r. 1.4(a) (AM. BAR ASS'N 2024) ("A lawyer shall: . . . keep the client reasonably informed about the status of the matter [and] . . . promptly comply with reasonable requests for information . . . .").

73 *See, e.g.*, Mitchell Enters., Ltd. v. Bennie Consulting Eng'rs, LLC, No. 5:12-CV-110, 2013 WL 12142377, at *6 (E.D. Tex. Jan. 22, 2013) (noting that an attorney and a law firm "typically bill . . . clients on an hourly basis and transmit detailed invoices on a monthly basis"); *see also* Schottenstein, Zox & Dunn Co., L.P.A. v. Reineke, No. 10CA0138-M, 2011 WL 6016521, at *6 (Ohio Ct. App. Dec. 5, 2011) (describing a law firm's monthly billing to a client).

74 MODEL RULES OF PRO. CONDUCT r. 1.4; *cf. In re* Disciplinary Action Against Britton, 484 N.W.2d 110, 111 (N.D. 1992) (suspending an attorney for two years from practice for, inter alia, failing to keep contingency fee client informed about the litigation).

directly from the client.[75] Similarly, during the discovery phase, when the opposing side seeks relevant information, attorneys gather information and documents from their client and prepare them for a deposition. While attorneys have greater knowledge of the law and are often better equipped to make strategic litigation decisions, clients are integral to the litigation process and retain ultimate decision-making authority.[76]

In class litigation, however, attorneys do not communicate with the vast majority of putative class members during the pretrial litigation period.[77] Class counsel does not provide the class with monthly updates or detailed accounts of their ongoing efforts in the case.[78] During the pretrial process, communication, if any, is generally concentrated on a select few class representatives.[79] These sporadic communications have been considered sufficient to establish the representative's adequacy.[80] Most class members remain unaware that a legal action has been filed on their behalf or that there are attorneys purportedly representing their interests throughout the litigation.[81] They do not receive notice when a complaint is filed or information about their attorneys unless and until the class is certified for trial or settlement.[82] Class members do not have the opportunity to review pleadings, motions, or other relevant case

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75 *See, e.g.*, Williams v. Ill. Dep't of Corr., No. 05-cv-4227, 2007 WL 2316476, at *3 (S.D. Ill. Aug. 13, 2007) ("Filing even a short complaint usually requires . . . verifying details with the client . . . ."); Kaluzynski v. Armstrong, No. Civ. 00-267-B-C, 2001 WL 812238, at *3 (D. Me. July 17, 2001) (explaining an attorney's "obligation to use due care and diligence in investigating the facts of his client's case for the purposes of preparing an accurate and truthful complaint," which includes incorporating information known to the attorney and the client).

76 MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2024) (explaining that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters," but, in the event of a dispute, noting clients' ultimate authority to terminate attorneys for failing to come to an agreement).

77 Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. MICH. J.L. REFORM 67, 92 (2022).

78 *See* Amanda M. Rose, *Classaction.gov*, 88 U. CHI. L. REV. 487, 509–10 (2021) (proposing that a government website be created to inform class members in a certified class of litigation updates); del Riego & Avery, *supra* note 8, at 3, 7 (noting that class members "should be afforded the opportunity to subscribe to periodic litigation updates" but are not presently).

79 *See* Rose, *supra* note 78, at 509–10; del Riego & Avery, *supra* note 8, at 3, 7.

80 *See* Ormond v. Anthem, Inc., No. 05-cv-1908, 2009 WL 3163117, at *5 (S.D. Ind. Sept. 29, 2009).

81 Del Riego & Avery, *supra* note 21, at 500, 515; del Riego & Avery, *supra* note 8, at 3; Macey & Miller, *supra* note 8, at 20 (noting class members "are often entirely unaware that the litigation is pending until after a settlement has been reached").

82 *See* FED. R. CIV. P. 23(e); Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 HARV. L. REV. 828, 829 (noting that class members do not receive notification of the pending suit until certification); del Riego & Avery, *supra* note 8, at 2 (noting that prior to class certification class members are not required to be informed or consulted on litigation).

documents before class counsel publicly files them. Class counsel makes virtually all litigation decisions, including the decision to voluntarily dismiss the case, without any obligation or incentive to discuss these with class members.[83]

Moreover, class members have limited means to hold counsel accountable. If counsel does not respond to their emails, phone calls, or other inquiries, class members cannot unilaterally terminate them.[84] Indeed, before a class is certified, the law suggests that class counsel has no obligation to communicate with class members at all, as several courts have held that "prior to class certification, no attorney-client relationship exists between class counsel and the putative class member."[85] This further discourages counsel from communicating with class members before certification because communications would not be privileged and thus are discoverable by defense counsel.[86]

To make matters worse, communications between class counsel and putative class members have been attacked by defense counsel.[87] They can be subject to court restriction and sanction if deemed "misleading or improper,"[88] further disincentivizing class counsel from communicating with class members. Although courts generally refrain from limiting communications between putative class members and class counsel,

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83 Coffee, *supra* note 8, at 685 (observing "a serious principal-agent problem that gives the plaintiff's attorney, not the client, the real discretion as to whether to commence suit"); del Riego & Avery, *supra* note 21, at 499; Macey & Miller, *supra* note 8, at 21; *see also* Weiss & Beckerman, *supra* note 57, at 2064–65 (observing that class attorneys control most litigation decisions, including settlement terms).

84 Del Riego & Avery, *supra* note 21, at 499–500 (quoting WILLIAM B. RUBENSTEIN, NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 3:72 (6th ed. 2022)); *see also* Leslie, *supra* note 50, at 108 ("Courts similarly reject efforts by class members who object to the settlement to have the class counsel disqualified.").

85 *See, e.g.*, Hammond v. City of Junction City, 167 F. Supp. 2d 1271, 1286 (D. Kan. 2001) (citing Garrett v. Metro. Life Ins. Co., No. 95-cv-2406, 1996 WL 325725, at *6 (S.D.N.Y. June 12, 1996)).

86 *See* sources cited in *supra* note 38; Morisky v. Pub. Serv. Elec. & Gas Co., 191 F.R.D. 419, 427 (D.N.J. 2000); Aldapa v. Fowler Packing Co., No. 15-cv-420, 2016 WL 8738176, at *7 (E.D. Cal. Mar. 18, 2016); Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 MO. L. REV. 813, 815–16 (2003) (discussing uncertainty surrounding communications with putative class members given the attorney-client relationship or lack thereof between putative class members and class counsel).

87 *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 (1981) (recognizing that "the possibility of abuses in class-action litigation" potentially implicates communication between class counsel and "potential class members").

88 Finder v. Leprino Foods Co., No. 13-cv-2059, 2017 WL 1272350, at *1, *4 (E.D. Cal. Jan. 20, 2017) (quoting Parks v. Eastwood Ins. Servs., Inc., 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002)) (where defendant challenged the plaintiff's counsel's communications with putative class members in a Facebook group and asked the court to restrict such precertification communications as "misleading or improper").

heeding the Supreme Court's directive in *Gulf Oil Co. v. Bernard*,[89] they are asked with some frequency to do so.[90] Class counsel saves themselves considerable headaches and discovery battles by simply abstaining from communicating with absent class members prior to certification. And so, they do.

C. *Trial and Settlement*

Attorneys are obligated to communicate settlement offers to their clients,[91] and it is the client's ultimate decision, with the attorney's advice, whether to accept or reject such offers.[92] Clients can also choose whether to dismiss their claims or proceed to trial, and the attorney must act according to the client's wishes.[93]

In class litigation, however, attorneys for the class are not obligated to inform unnamed putative class members or even class representatives of settlement offers.[94] The class, even if certified, will never learn of settlement offers that were rejected by class counsel.[95] Class counsel alone determines whether to accept or reject any settlement on behalf of the

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89 452 U.S. at 101 ("[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.").

90 *See, e.g.*, Gordon v. Kaleida Health, 737 F. Supp. 2d 91 (W.D.N.Y. 2010); Garcia v. Pilgrim's Pride Corp., No. 06-710, 2006 WL 1983174 (E.D. Pa. July 13, 2006).

91 MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 2 (AM. BAR ASS'N 2024) ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer.").

92 MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2024) ("A lawyer shall abide by a client's decision whether to settle a matter."); Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 8 (2018) (noting that the law is clear that clients and not their attorneys have the right to decide whether to settle or go to trial); *see also In re* Whitnall, 673 N.W.2d 674 (Wis. 2003) (revoking attorney's license for, inter alia, "failing to inform a client of an offer settlement and to abide by his client's decision whether to accept an offer of settlement").

93 *See* Carle, *supra* note 92, at 8; Addison v. Asplundh Tree Expert Co., No. 04-cv-521, 2005 WL 1684397, at *1 (N.D. Fla. June 30, 2005) ("An attorney may not voluntarily dismiss a client's case without permission.").

94 *See* del Riego & Avery, *supra* note 8, at 4; Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 660 (1994) (noting that, although they presently do not, "courts should require class counsel to inform and consult with the named representatives on . . . settlement offers").

95 *See* del Riego & Avery, *supra* note 21, at 516 (explaining that class members "are not aware of settlement offers that were previously rejected"); *see also In re* ConAgra Foods, Inc., No. 11-cv-5379, 2022 WL 1197445, at *1–2 (C.D. Cal. Feb. 22, 2022) (observing courts' and class members' lack of knowledge of a prior rejected settlement when court originally granted settlement approval).

class.[96] Class members are only informed after class counsel accepts a settlement offer.[97] The settlement is presented to the court for preliminary approval and then notice of the settlement is sent to class members.[98] This notice contains the basic terms of the settlement agreement and informs class members that they are entitled to object to or opt out of the settlement agreement.[99]

However, class members are ill-equipped to object to settlement agreements because they are not privy to the information revealed during discovery, which is almost always kept confidential per agreements between defense and class counsel.[100] Complaints about class counsel not properly communicating with class members, even class representatives, before a settlement, moreover, have not largely impacted the adequacy of the settlement or representation by class counsel.[101] And while class members can opt out of a settlement they do not like, they face significant challenges in finding another attorney to represent them in expensive, time-consuming, individual litigation.[102]

In sum, class members are sidelined at every stage of the litigation process. They have no say in hiring counsel, no input when a complaint is filed that purports to reflect their injuries and desired remedies, no

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96 *See* del Riego & Avery, *supra* note 8, at 3; Roger C. Crampton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 822 (1995) (noting that class counsel makes settlement decisions); Weiss & Beckerman, *supra* note 57, at 2064–65 (observing that class attorneys control most litigation decisions, including settlement terms).

97 *See* FED. R. CIV. P. 23(e).

98 *See id.*; WILLIAM B. RUBENSTEIN, NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 7:33 (6th ed. 2022).

99 *See* FED. R. CIV. P. 23(e)(1).

100 *See* Bassett, *supra* note 8, at 1798 (noting that class members have "insufficient information to evaluate the proposed settlement"); del Riego & Avery, *supra* note 8, at 4 ("[C]lass members . . . lack the requisite knowledge to formulate arguments concerning whether an accepted settlement . . . is in their best interests."); Leslie, *supra* note 51, at 103 ("[W]ithout additional discovery the class objector seems unlikely to affect the terms of settlement . . . .").

101 *See, e.g.*, Keim v. ADF MidAtlantic, LLC, 328 F.R.D. 668, 691 (S.D. Fla. 2018) ("[B]ecause the adequacy of attorney-client settlement discussions in the class context is largely an ambiguous matter that escapes easy measurement, Plaintiff's counsel's shortfall cannot be considered grounds for rendering them inadequate counsel . . . ."); Maywalt v. Parker & Parsley Petroleum Co., 155 F.R.D. 494, 497 (S.D.N.Y. 1994) (finding that the "perceived inadequacy of communication between Class Counsel and the Moving Representative Plaintiffs, an event which is perhaps unbecoming . . . does not constitute a level of impropriety necessitating the drastic remedy of a Court ordered discharge of Class Counsel").

102 *See* Albin v. Resort Sales Mo., Inc., No. 20-cv-3304, 2021 WL 5107730, at *4 (W.D. Mo. May 21, 2021) ("[W]hen a class member opts out of a class action, she is free to pursue her own *individual* claims against the defendant, but cannot initiate a competing class action."); del Riego & Avery, *supra* note 8, at 3; Michael A. Perino, *Class Action Chaos? The Theory of the Core and Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 87 (1997) (noting that class members have the choice between proceeding as a class or opting out "and pursuing their claim through individual adjudication").

opportunity to participate in litigation decisions, including whether to reject or accept settlement offers, and no involvement in a potential trial. Class members indisputably lack a meaningful voice and role in class litigation.

II. AN IDEA, A PILOT, AND A PRISONER CLASS APPLICATION

The previous Part detailed how, in contrast with the typical attorney-client relationship, class members have been marginalized, silenced, and sidelined in their own cases. However, recent developments are radically shifting the class litigation landscape. In this Part, we outline the groundwork that enabled the 23andMe data breach litigation class survey discussed in Part III to emerge.[103] This groundwork involved three key stages: the conception of an idea, a pilot that brought that idea to life, and a modified small-scale real-world application of the idea. Together, these stages facilitated representational notice's debut in the 23andMe data breach litigation, which gave class members a meaningful voice for the first time and provided the momentum that this Article sustains and furthers.

A. *An Idea for Providing Class Members with a Voice*

Given the general consensus that broad class member participation in class litigation cannot be achieved,[104] what can even be said for giving class members a voice? What would it mean for them to have a voice, and what would it look like given real-world constraints? In a few academic articles, answers to these questions were provided, and the idea of meaningfully empowered class members began to seem less fringe.[105] The first notable piece of scholarship that we will discuss comes from 2017, when prominent class action practitioner and Professor Elizabeth Cabraser and Professor Samuel Issacharoff described the "participatory class action."[106] Highlighting that technological advances have enabled

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103 *See* Expert Report, *supra* note 11; Class Preferences Survey at 49–62, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 3:24-md-3098 (N.D. Cal. May 1, 2024), ECF No. 36-1 Exhibit 1–C [hereinafter referenced as "Class Preferences Survey"]; Data Sheet, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 3:24-md-3098 (N.D. Cal. Apr. 22, 2024), ECF No. 9-2 [hereinafter "Class Member Survey Results"]. For clarity, the Class Preferences Survey is Exhibit 1–C to the Expert Report and can be found in the same document as the Expert Report on the docket.

104 Lobel, *supra* note 5, at 87.

105 *See* Cabraser & Issacharoff, *supra* note 18; Lobel, *supra* note 5; del Riego & Avery, *supra* note 8; del Riego & Avery, *supra* note 21.

106 Cabraser & Issacharoff, *supra* note 18.

mass communication with and among class members, they argued that centralization inherent to the MDL process created a structure where plaintiffs could be active and engaged participants.[107] Even more, class members' "voice[s] emerge[] as a critical element," such that they have something meaningful to say that should be heard.[108] Building on the work of Professors Cabraser and Issacharoff, Professor Lobel outlined a new framework for participatory litigation in 2022.[109] Professor Lobel borrowed language from political representation and grassroots movements and argued that class action litigation could permit "collaborative, collective, and consensus-building interactions" between counsel and class members.[110] In other words, the representatives (the attorneys) and the represented (class members) could stand in dynamic relationship, communicating with, teaching, and learning from one another.[111]

This emerging theme was highlighted in two even more recent articles. In 2023, Professors Alissa del Riego and Joseph Avery demonstrated how artificial intelligence and large language models further eroded barriers to class member participation.[112] Rather than staying silent, class members could finally have the megaphone that class actions had so long promised and failed to deliver.[113]

These ideas were crystallized and systematized in a 2024 article by Professors del Riego and Avery.[114] A new form of notice—"representational notice"—could be provided to class members to enable them to communicate their preferences to counsel and the court at the outset of the litigation.[115] This mechanism would inform prospective class members of their claims, the pendency of a lawsuit, and the attorneys that seek to represent them in the lawsuit.[116] More importantly, representational notice would give class members the opportunity to evaluate prospective counsel, express their litigation objectives, and detail the injuries they believe resulted from the defendant's alleged conduct.[117] Prospective class members' responses should be acknowledged and

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107 *Id.* at 852–60.

108 *Id.* at 852.

109 Lobel, *supra* note 5.

110 *Id.* at 88.

111 *Id.* at 88, 159.

112 Del Riego & Avery, *supra* note 8.

113 *Id.*

114 Del Riego & Avery, *supra* note 21.

115 *Id.* at 545.

116 *Id.* at 544.

117 *Id.* at 547.

considered by the court appointing counsel.[118] The court could also use class members' responses to later evaluate settlements at the preliminary and final approval stages.[119] Representational notice would grant class members a vote and a voice, emphasizing that the true principals of class actions are class members themselves.[120] This mechanism may also provide class counsel with new categories of injuries and remedies to pursue, potentially increasing the value of the litigation and adding legitimacy to any outcomes that consider these factors, thereby reducing potential settlement objections.[121] For courts, it offers an additional data point to consider, potentially legitimizing the appointment of class counsel.[122]

B. *A Pilot for Implementing the Idea*

From this foundation, the idea of granting class members a voice began to seem feasible. Professors del Riego and Avery documented pilot studies that were instrumental in solidifying this sense of potential and feasibility.[123] Rather than limiting themselves to theoretical discussions, they actively tested their ideas. In 2023, they conducted a series of surveys based on three existing class action cases—the Takata defective airbag litigation, the Marriott data breach litigation, and the TikTok consumer privacy litigation.[124] The surveys were meticulously designed to gather comprehensive data from class members regarding their preferences and priorities on class counsel.[125] By asking direct questions about which attorneys class members wanted to represent them, the surveys aimed to understand the criteria that mattered most to those directly affected by the litigation.[126]

Survey participants revealed that they valued the Rule 23(g) criteria that courts are required to consider when appointing counsel, such as the experience of the attorneys and the resources attorneys could commit to the litigation.[127] Most intriguingly, despite valuing and claiming to apply

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118 *Id.* at 550.

119 *Id.* at 551.

120 *Id.* at 558.

121 *Id.* at 548, 551.

122 *Id.* at 551.

123 Del Riego & Avery, *supra* note 21.

124 *Id.* at 522. *See generally In re* Takata Airbag Prods. Liab. Litig., 1:15-md-02599 (S.D. Fla.); *In re* Marriott Int'l, Inc. Customer Data Sec. Breach Litig., 8:19-md-2879 (D. Md.); *In re* TikTok, Inc., Consumer Priv. Litig., 20-md-02948 (N.D. Ill.).

125 Del Riego & Avery, *supra* note 21, at 521–24.

126 *Id.*

127 *Id.* at 526–33.

the same Rule 23(g) criteria that courts use to evaluate counsel, class members often chose different attorneys than those ultimately appointed by the courts.[128] This discrepancy was not attributable to inattention or confusion, as survey participants often logically justified their choice of counsel based on those criteria.[129] Instead, it highlighted the potential gap between the courts' selections and the preferences of the class members class counsel aims to serve.[130]

The implications of these findings were profound, but the successful exercise of surveying prospective class members was even more significant. For the first time, it became evident that class members could play a meaningful role in class action decision-making. No longer silenced, they could have an intelligible voice in matters such as the selection of counsel, and they genuinely appreciated this opportunity.[131] Survey participants provided thoughtful answers, as evidenced by their detailed responses.[132]

Moreover, the study demonstrated the practical benefits of enfranchising class members. Providing them with a platform to express their preferences and priorities could lead to the identification of injuries and remedies that class counsel might not have considered.[133] This expanded understanding could enhance the overall value of litigation, ensuring that the compensation and remedies pursued align more closely with the harms suffered by class members.

In terms of practical implementation, the study indicated that while there were some costs associated with identifying and notifying prospective class members and reviewing their responses, these costs were low and justified by the benefits gained.[134] The investment of time and resources could lead to more robust and representative class actions, ultimately benefiting all parties involved.[135] Furthermore, the potential challenges, such as unrealistic outcome preferences leading to higher opt-out and objection rates, could be managed through careful design and implementation of the survey process.[136]

Professors del Riego and Avery's work provided a compelling case for the feasibility and value of granting class members a voice in class litigation. Their empirical approach not only validated the idea of

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128 *Id.* at 535–41.

129 *Id.* at 535–42.

130 *See id.* at 542–43.

131 *Id.* at 541–44.

132 *Id.* at 542.

133 *Id.* at 548–49.

134 *Id.* at 551–53.

135 *See id.* at 551.

136 *Id.* at 556.

involving class members in class litigation via representational notice but also offered a practical pathway to achieving more representative and legitimate outcomes. By enfranchising class members, the legal process can become more inclusive and responsive, ensuring that the true principals of class actions—the class members—are heard and considered in the decisions that affect them.

C. *A Narrow but Real-World Application of the Idea and Pilot in Prisoner Class Litigation*

While the pilot just discussed provided a compelling case for class member participation feasibility, a successful class action suit challenging California's use of prolonged solitary confinement in its prisons demonstrated that class member participation was possible in actual litigation.[137] In this case, over 500 prisoners had been incarcerated in California prisons that kept them in solitary confinement for years without meaningful review of their placement.[138] Those prisoners filed suit in 2009 in the U.S. District Court for the Northern District of California.[139] The legal team representing the class of prisoners involved class members at several key stages of the litigation, including selecting class representatives and determining which legal claims to pursue.[140] The goal of the legal representation was multifaceted, but, at its core, it was aimed to give class members a voice in expressing their needs.[141]

The prisoners did not get to collectively choose or weigh in on the attorneys who would be directly representing them.[142] Instead, one wrote the Center for Constitutional Rights ("CCR") and asked it to file a class action on the prisoners' behalf, and it did.[143] The CCR recognized, to its credit, that many prisoners may not trust their attorneys, as the overwhelming majority of prisoners were Hispanic or Black, and the CCR legal team was not.[144] Racial tension existed among the prisoners, and one Black plaintiff urged several times that a Black lawyer be added to the legal team to represent him and other inmates.[145] Recognizing these concerns,

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137 Lobel, *supra* note 5, at 90–91; *see* Ruiz v. Brown, No. 09-cv-05796 (N.D. Cal.).

138 Plaintiffs' Supplemental Complaint Class Action at 2, Ashker v. Brown, No. 09-cv-05796 (N.D. Cal. Mar. 11, 2015), ECF No. 388.

139 42 U.S.C. Section 1983 Civil Rights Complaint and Demand for Jury Trial, No. 09-cv-05796 (N.D. Cal. Dec. 9, 2009), ECF No. 1.

140 Lobel, *supra* note 5, at 92.

141 *See id.* at 93–94.

142 *See id.* at 113.

143 *Id.* at 91.

144 *Id.* at 113.

145 *Id.*

the CCR assembled a team of attorneys that had prisoners' trust, met with them regularly, and responded to their communications.[146]

Class members worked closely with the attorneys to choose class representatives.[147] Class representatives were not mere figureheads chosen by the attorneys based on characteristics the attorneys valued (i.e., passivity, well-spokenness, etc.).[148] Instead, class representatives were selected based on their commitment to the cause (i.e., leaders of the prisoner hunger strike) and whether the facts of their confinement told a powerful story, and to ensure each ethnic and racial group that formed part of the class was represented.[149]

The prisoner class also worked closely with attorneys when drafting their complaint and deciding which claims to raise and how.[150] Despite the possible drawbacks for the legal team and the time-consuming process, the participatory lawyering approach the CCR adopted focused on enabling prisoners to articulate their claims in their own voices.[151] This required close collaboration between lawyers and plaintiffs to accurately reflect the prisoners' perspectives and desires.[152] For example, prior precedent held that solitary confinement was not cruel or unusual punishment under the Eighth Amendment unless prisoners had a mental illness, but the prisoners did not want to claim they had a serious mental illness, so the CCR abandoned that path.[153] Compromises, however, had to be made as the law was clear that solitary confinement was not per se unconstitutional.[154] The participating prisoners and the CCR thus agreed to limit the class to prisoners held in solitary confinement for over ten years.[155] This narrowed the class to just over 500 prisoners, but provided an avenue for success.[156]

Prisoners also worked with the CCR to formulate the remedy sought by the class.[157] Although the prisoners' original pro se complaint asked for monetary damages and injunctive relief, the CCR did not have the resources to litigate a claim seeking both remedies and determining how a monetary award for each prisoner would be assessed coupled with

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146 *Id.* at 113–14.

147 *Id.* at 114.

148 *Id.*

149 *Id.*

150 *See id.* at 92.

151 *Id.* at 117.

152 *Id.* at 92.

153 *Id.* at 115 (citing Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)).

154 *See id.*; *Madrid*, 889 F. Supp. at 1267.

155 Lobel, *supra* note 5, at 117.

156 *Id.* at 117–18.

157 *See id.* at 113, 122.

potential immunity defenses made seeking monetary damages prohibitively difficult.[158] Despite the prisoners' preferences for monetary damages, they ultimately listened to their counsel and agreed to abandon their request for monetary damages.[159]

While the legal team sought to keep prisoners informed, the realities of the prison system impeded frequent communications.[160] Instead, attorneys could only communicate with five class representatives for one hour on the phone every two weeks.[161] The prisoners did not have the opportunity to attend courtroom hearings or conferences, but they were able to decide the objectives of the representation and participate in tactical litigation and settlement discussions.[162]

Although attorneys disagreed amongst themselves, clients disagreed with attorneys, and clients disagreed amongst themselves, respect was maintained and decisions were legitimized.[163] For example, one prisoner wanted to present a novel legal argument he had formulated, and another wanted to engage in early mediation against counsel's recommendations.[164] Counsel obliged, and to their surprise, these insights and preferences ranged from neutral to genuinely fruitful in the litigation.[165] Some voices were stronger than others, but the goal of the attorneys' participatory litigation approach was "to empower the prisoners in their *collective* capacity."[166] Once a settlement was reached with opposing counsel and a few prisoner representatives, it was taken to the remaining prisoners, who ultimately agreed to ratify the agreement despite their concerns.[167] The settlement included monitoring by class members,[168] which perhaps further added to its acceptance and legitimacy.

This example of participatory class litigation was encouraging, but whether it could be translated to a larger-scale commercial class action, where class members were scattered and their interests in the litigation less pronounced, remained to be seen. Its application in impact litigation, as Professor Lobel describes, was truly remarkable and, for many reasons, a worthy birthplace of the model, but most class litigation is not impact-

158 *Id.* at 122.
159 *Id.*
160 *Id.*
161 *Id.*
162 *See id.* at 125 & n.219, 129, 137.
163 *Id.* at 129–30.
164 *Id.* at 131–32.
165 *Id.*
166 *Id.* at 135.
167 *Id.* at 138–41.
168 *Id.* at 138.

oriented.[169] Putative class members are not often concentrated in one facility or geographic region[170] and identifying all members of a class prior to, and even post-certification can be challenging,[171] much less involving them in the litigation. Gathering and assessing a collective voice with millions, as opposed to hundreds, of class members, moreover, could prove difficult. This brings us to Part III and the 23andMe data breach litigation, where the principles, ideas, and techniques previously outlined were applied in a larger commercial MDL and class action with diverse class members scattered around the country.

III. A CLASS SPEAKS: INSIGHTS FROM THE 23ANDME CLASS ACTION

In the spring of 2024, representational notice transitioned from a scholarly idea implemented in pilot studies to a reality in the 23andMe data breach class action litigation. This Part outlines this groundbreaking transition. We begin by providing an overview of the origins of the litigation and our involvement in it. Next, we explain the mechanics of developing and launching representational notice. We then delve into the substance of 23andMe class members' input, including their distinct preferences for counsel, litigation strategy, and litigation outcomes.

A. *Background to the 23andMe Data Breach Class Action Litigation*

Founded in 2006, 23andMe is a company that produces at-home genetic testing kits.[172] Its real product, however, is not these kits, but rather the information the kits enable 23andMe to provide its customers.[173] Once customers submit their DNA samples, 23andMe processes and analyzes them to generate information regarding ancestry and health.[174] For example, 23andMe's Ancestry Service provides customers with detailed reports on their geographical ancestry composition, such as whether their ancestors were European, East Asian,

169 *Id.* at 156–58.

170 *See, e.g.*, Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 211 (E.D. Pa. 2000) (noting class members resided in and purchased the subject engines in forty-one states); Cullen v. Nissan N. Am., Inc., No. 09-0180, 2010 WL 11579748, at *6 (M.D. Tenn. Mar. 26, 2010) (noting proposed class members represented a class from forty-three different states).

171 Mullins v. Direct Digit., LLC, 795 F.3d 654, 672 (7th Cir. 2015); *In re* Google LLC Street View Elec. Commc'n Litig., 611 F. Supp. 3d 872, 891 (N.D. Cal. Mar. 18, 2020).

172 23ANDME, https://www.23andme.com/about [https://perma.cc/4CEX-SQPX].

173 *Id.*

174 *How It Works*, 23ANDME, https://www.23andme.com/howitworks [https://perma.cc/BQD4-WU8N].

Middle Eastern, or Sub-Saharan African, and further breaks these down by regions like Northwestern European, which includes British, Irish, French, and German ancestries.[175] The Health + Ancestry Service offers insights into customers' health predispositions, carrier status, and traits[176] that may indicate, for example, an elevated risk for type 1 diabetes compared to the general population or reveal a carrier status for conditions like sickle cell anemia.[177]

In late 2023, 23andMe disclosed that a data breach had compromised the information of nearly seven million customers.[178] While data breaches are becoming more frequent, this one was particularly alarming because the compromised data included not only names and dates of birth but also information regarding customers' geographic locations, relationship labels, DNA ancestries, birth year, and more.[179] Within weeks, the hackers posted an initial sample of the compromised data online, claiming to have one million data points on Ashkenazi Jews and offering to sell those profiles for $1 to $10 per account.[180] Shortly thereafter, the hackers released data from the profiles of another four million users, alleging that some belonged to some of the wealthiest Americans.[181] 23andMe attributed the breach to users who "negligently recycled and failed to update their passwords," insisting that it was "not a result of 23andMe's alleged failure to maintain reasonable security measures."[182]

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175 *See DNA Testing Companies & Ethnicity Estimates Part I: The Ancestry Composition Tools of 23andMe*, LEGACY TREE GENEALOGISTS, https://www.legacytree.com/blog/ancestry-composition-tools-23andme [https://perma.cc/WRS3-4MZ3]; *Ancestry Service*, 23ANDME, https://www.23andme.com/dna-ancestry [https://perma.cc/7HGB-RFJF].

176 LEGACY TREE GENEALOGISTS, *supra* note 175; *Which Service Will You Start with Today*, 23ANDME, https://www.23andme.com/compare-dna-tests [https://perma.cc/4774-PG53].

177 LEGACY TREE GENEALOGISTS, *supra* note 175; 23ANDME, *supra* note 176.

178 Edward Helmore, *Genetic Testing Firm 23andMe Admits Hackers Accessed DNA Data of 7m Users*, GUARDIAN (Dec. 5, 2023, 9:18 AM), https://www.theguardian.com/technology/2023/dec/05/23andme-hack-data-breach [https://perma.cc/Q5Q8-CGJQ].

179 *Id.*

180 Lily Hay Newman, *23andMe User Data Stolen in Targeted Attack on Ashkenazi Jews*, WIRED (Oct. 6, 2023, 5:53 PM), https://www.wired.com/story/23andme-credential-stuffing-data-stolen [https://perma.cc/FK9Q-T4QN].

181 Helmore, *supra* note 178.

182 Letter from Ian C. Ballon, Greenberg Traurig LLP, to Hassan A. Zavareei, Tycko & Zavareei LLP (Dec. 11, 2023), https://www.documentcloud.org/documents/24252535-response-letter-to-tycko-zavareei-llp [https://perma.cc/FBD5-RR69] (denying, in a letter to a group of users, that the breach was a result of negligence related to 23andMe's security measures).

Almost immediately after the breach was announced, several class action lawsuits were filed against 23andMe.[183] By early 2024, approximately forty data breach class action cases had been filed by different attorneys across three different U.S. district courts.[184] Claims against the genetic testing company focused on its failure to properly safeguard its customers' personal data and respond in an appropriate and timely manner to the breach.[185] Some complaints focused on the breach's particularly egregious impact on 23andMe customers with Ashkenazi Jewish ancestry and Chinese ancestry.[186] The complaints contained various claims, including negligence,[187] violations of specific state unfair competition laws,[188] unjust enrichment,[189] privacy tort violations,[190] violations of state privacy and genetic privacy statutes,[191] and breach of implied contracts or covenants.[192]

Most of these lawsuits were concentrated in the Northern District of California, but others were filed in the Northern District of Illinois and the Central District of California.[193] 23andMe filed a petition before the Judicial Panel for Multidistrict Litigation (JPML) in December 2023 to

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183 *See, e.g.*, Class Action Complaint, Eden v. 23andMe, Inc., No. 23-cv-5200 (N.D. Cal. Oct. 11, 2023); Class Action Complaint, Velez v. 23andMe, Inc., No. 23-cv-5464 (N.D. Cal. Oct. 24, 2023) [hereinafter Complaint, *Velez*]; Class Action Complaint, Lamons v. 23andMe, Inc., No. 23-cv-5178 (N.D. Cal. Oct. 10, 2023) [hereinafter Complaint, *Lamons*].

184 Jonathan Bilyk, *Privacy Class Action Firms Jockey for Control of 23andMe Data Breach Claims; Edelson Calls for New Approach*, N. CAL. REC. (Apr. 19, 2024), https://norcalrecord.com/stories/657865535-privacy-class-action-firms-jockey-for-control-of-23andme-data-breach-claims-edelson-calls-for-new-approach [https://perma.cc/VLD4-JQH9]; *see* Corrected Schedule of Actions, ECF No. 45-1, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., MDL No. 3098 (J.P.M.L. Jan. 17, 2024).

185 *See* sources cited *supra* note 184.

186 *See* Lauren Berg, *23andMe Users Say Hackers Targeted Jewish, Chinese Data*, LAW360 (Jan. 26, 2024, 10:49 PM), https://www.law360.com/articles/1790853/23andme-users-say-hackers-targeted-jewish-chinese-data [https://web.archive.org/web/20240127040328/https://www.law360.com/articles/1790853/23andme-users-say-hackers-targeted-jewish-chinese-data]; Cara Salvatore, *On Deck in JPML: Baby Food, 23andMe Privacy, NCAA*, LAW360 (Mar. 27, 2024, 7:15 PM), https://www.law360.com/articles/1818480/on-deck-in-jpml-baby-food-23andme-privacy-ncaa [https://perma.cc/8X57-93LC].

187 *See, e.g.*, Class Action Complaint at 16, Rivers v. 23andMe, Inc., No. 23-cv-6481 (N.D. Cal. Dec. 15, 2023), ECF No.1; Complaint, *Velez*, *supra* note 183, at 33; Complaint, *Lamons*, *supra* note 183, at 12.

188 *See, e.g.*, Class Action Complaint at 34, Melvin v. 23andMe, Inc., No. 24-cv-487 (N.D. Cal. Jan 26, 2024), ECF No. 1 [hereinafter Complaint, *Melvin*].

189 *See, e.g.*, Complaint, *Velez*, *supra* note 183, at 42; Complaint, *Lamons*, *supra* note 183, at 17.

190 Complaint, *Velez*, *supra* note 183, at 40.

191 *See, e.g.*, Complaint, *Melvin*, *supra* note 188, at 38.

192 *See, e.g.*, Complaint, *Velez*, *supra* note 183, at 38; Complaint, *Lamons*, *supra* note 183, at 15, 17.

193 Motion for Transfer, Schedule of Actions, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 24-md-3098 (N.D. Cal. Dec. 21, 2023), ECF Nos. 1–2.

create an MDL consolidating and transferring to one district court all class cases pending against the company stemming from the data breach.[194] In April 2024, the JPML granted 23andMe's motion and transferred all actions to the Northern District of California before Judge Edward M. Chen.[195] As often occurs when multiple class action cases are consolidated and transferred by the JPML, the battle of which attorney or attorneys will represent the class and assume control of the litigation took center stage.[196] Adding a further wrinkle, 23andMe had already met with some of these attorneys privately in an attempt to settle the matter quickly and without court intervention.[197] The company was also in dire financial straits and facing a stock market delisting.[198]

Amid these proceedings, we—Professors del Riego and Avery—were contacted by Edelson PC ("Edelson"), a plaintiffs-side class action firm.[199] Edelson had filed its class complaint against 23andMe in January 2024.[200] The firm was concerned that a swift global settlement might occur before a court could appoint interim class counsel that would thoroughly investigate the events leading up to the data breach and thus requested Judge Chen appoint its attorneys to represent the class before the JPML consolidated the cases.[201] This request was denied, but Edelson was committed to understanding class members' actual preferences and determining whether they genuinely desired a quick settlement with 23andMe.[202] The law firm sought authorities, research, and any information that could persuade the court to heed class members' actual preferences and interests, as it believed the court was supposed to

194 *Id.*

195 Transfer Order at 3, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 24-md-3098 (N.D. Cal. Apr. 11, 2024), ECF No. 89.

196 *See, e.g.*, Motion to Appoint Counsel, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 24-md-3098 (N.D. Cal. Apr. 23, 2024), ECF No. 14; Melvin Plaintiffs' Notice of Filing of Motion to Appoint Interim Leadership of Class Action, *supra* note 32; Motion to Appoint Counsel, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 24-md-3098 (N.D. Cal. Apr. 19, 2024), ECF No. 5.

197 *See* Alison Frankel, *As 23andMe Goes to Mediation in Hacked DNA Case, Plaintiffs' Firm Warns of Collusion*, REUTERS (Jan. 30, 2024, 4:22 PM), https://www.reuters.com/legal/legalindustry/column-23andme-goes-mediation-hacked-dna-case-plaintiffs-firm-warns-collusion-2024-01-30/.

198 Rolfe Winkler, *23andMe CEO Anne Wojcicki Plans to Take Company Private*, WALL. ST. J. (Apr. 18, 2024, 10:01 AM), https://www.wsj.com/tech/biotech/23andme-ceo-anne-wojcicki-plans-to-take-company-private-1a9265eb [https://web.archive.org/web/20241006214820/https://www.wsj.com/tech/biotech/23andme-ceo-anne-wojcicki-plans-to-take-company-private-1a9265eb].

199 *See Inside the Firm*, EDELSON, https://edelson.com/inside-the-firm [https://perma.cc/59UJ-QL7B].

200 Complaint, *Melvin*, *supra* note 188.

201 Frankel, *supra* note 197.

202 Order Denying Plaintiff's Motion to Appoint Interim Leadership Without Prejudice, Melvin v. 23andMe, Inc., 24-cv-487 (N.D. Cal. Feb. 2, 2024), ECF No. 15.

consider these when appointing counsel and approving settlements.[203] To its surprise, relevant case law was nonexistent. However, their search led them to our academic research. Edelson connected with us, and we became involved in the litigation. Our aim was to amplify class members' voices so the court could genuinely consider their preferences and interests, fulfilling the requirements of Rule 23(g).[204]

B. *The 23andMe Data Breach Class Member Survey*

The research question was, in a sense, simple—what do class members want? There are, of course, many questions nested within this general one: What litigation strategies do class members want their attorneys to pursue? What litigation outcomes do they want? And what types of qualifications, experiences, or qualities do class members want of the attorneys or law firms that will be representing them? We were tasked with designing a survey that would yield meaningful empirical answers to these questions. We focused on three aspects of class member preferences: (1) litigation strategy, (2) desired litigation outcome, and (3) class counsel.[205] In the remainder of this Section, we describe the survey design and distribution.[206]

1. Population Included

First, participants were asked a series of screening questions that enabled the inclusion of only those individuals who qualified as class members in the litigation.[207] In other words, we sought only those individuals in the United States whose personal genetic information was accessed by third parties without their consent in the data breach disclosed by 23andMe on October 6, 2023.[208] 23andMe sent email notifications to those affected by the breach, making these putative class members easily identifiable for us, and we required that each of our

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203 *See* Motion to Appoint Interim Leadership of Class Action 7–8, Melvin v. 23andMe, Inc., 24-cv-487 (N.D. Cal. Apr. 18, 2024), ECF No. 41.

204 FED. R. CIV. P. 23(g).

205 *See* Expert Report, *supra* note 11, at 1–2. Although in the report we divide the third category into two categories—"Law Firm Experience and Capabilities" and "Law Firm Communication and Resource Allocation"—the questions in these two categories essentially seek feedback on class members' preferences of prospective class counsel. *Id.*

206 *See infra* Section III.B; Expert Report, *supra* note 11; Class Preferences Survey, *supra* note 103.

207 *See* Expert Report, *supra* note 11, at 12.

208 *Id.* at 9.

participants had received such an email to begin our screening questions.[209]

To further prevent non-class members from influencing the survey, participants were not told the purpose of the survey, and each screening question contained at least seven other potential responses, obfuscating our inclusion criteria.[210] These questions screened out participants who did not understand or agree to follow given instructions, were completing the survey on a device other than a desktop computer, laptop, tablet, or mobile/cellphone, could not verify via reCAPTCHA that they were human, resided outside the United States, did not provide an age, had not used an at-home genetic or ancestry test, had not used a 23andMe at-home genetic or ancestry test, and had not received an email notification about a breach involving their personal data from 23andMe.[211] Moreover, participants who failed an attention check question, were younger than eighteen, did not reside in a zip code that fell within their state of residence, or whose stated gender did not match panel data were also screened out.[212]

After the screeners, the final population included 395 individuals.[213] A power analysis indicated this was a sufficient sample size, given the potential size of the total class (seven million individuals).[214] The panel gender makeup was 51% male and 48% female,[215] with the remaining class members selecting "Gender Variant/Non-Conforming."[216] Roughly 33% of participants fell into the following age groups: eighteen to thirty-four years old, thirty-five to fifty-four years old, and over fifty-five years

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209 *See* Zeba Siddiqui, *23andMe Notifies Customers of Data Breach into Its 'DNA Relatives' Feature*, REUTERS (Oct. 25, 2023, 5:21 PM), https://www.reuters.com/world/us/23andme-notifies-customers-data-breach-into-its-dna-relatives-feature-2023-10-24 [https://web.archive.org/web/20241005190909/https://www.reuters.com/world/us/23andme-notifies-customers-data-breach-into-its-dna-relatives-feature-2023-10-24].

210 Expert Report, *supra* note 11, at 12.

211 *Id.* at 17–18.

212 *Id.* at 12.

213 *Id.* at 9, 17.

214 Statistically "well-powered" means that a study has a sufficient sample size or statistical capacity to detect a true effect or difference if one exists. That is, a well-powered study reduces the risk of concluding that there is no significant effect when, in fact, there is one. *See id.* at 9. Most of the survey questions used a 7-point Likert scale, for which common practice is to aim for a 95% confidence level and a margin of error around 5%. This setup strikes a good balance between accuracy and feasibility of collecting responses. So, using a 95% confidence level ($Z = 1.96$) and a margin of error of 5%, and applying a finite population correction, which slightly reduces the sample size needed compared to an infinite population assumption, the required sample size was approximately 350 to 400 respondents. *Id.* at 9.

215 Expert Report, *supra* note 11, at 17.

216 *Id.*

old.[217] Finally, the population was geographically well-distributed, with 22%, 16%, 35%, and 27% of respondents residing in the Northeast, Midwest, South, and West, respectively.[218]

2. Foregrounding Information and Substantive Questions

Participants who successfully progressed through the screening procedures were admitted into the study and provided with background information regarding the litigation.[219] They were told what a class action is, and the 23andMe data breach litigation was explained to them.[220] Specifically, the survey stated:

> What is this case about?: In 2023, the private genetic information of approximately 7 million 23andMe customers was breached by hackers. The breached information included customers' genetic heritage, ancestral origin, full names, home addresses, profile pictures, and birth dates. Hackers have already posted some of this information on hidden internet marketplaces, specifically targeting members of certain vulnerable groups.
>
> 23andMe is facing several lawsuits for:
>
> 1. Negligence in not protecting customer data adequately,
>
> 2. Not informing customers promptly about the breach,
>
> 3. Violating consumer protection laws, and/or
>
> 4. Violating state genetic privacy laws.[221]

Participants were told that the court would ultimately decide which law firm or group of law firms would represent the class in the litigation and that the legal team chosen by the court would make "crucial decisions about how to litigate the case."[222] Participants were also told they would be asked questions regarding their preferences for the litigation.[223]

The survey followed generally accepted procedures for the design of questionnaires used in research for litigation. These included rotating and randomizing survey questions to reduce order effects and ensure that questions were not biased or leading.[224] There were three types of

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217 *Id.*

218 *Id.* at 21.

219 *Id.* at 12.

220 *See* Class Preferences Survey, *supra* note 103, at 54.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

question formats. One type was binary questions with mirrored response wording so each answer option would be fairly considered.[225] That is, participants could choose from two options, and they also could indicate "No Preference," "Not enough information to determine," or "Something else." A second type employed 7-point Likert scales to measure opinions, feelings, and attitudes, with the scale ranging from "Not Important at All," "Unimportant," "Somewhat Important," "Neither Unimportant Nor Important," "Somewhat Important," "Important," and "Very Important."[226] A third type was an open-ended free-response question in which participants were asked whether there was "anything else you would like the court to consider as it chooses the law firm(s) who will lead this case to ensure you have the best representation possible."[227]

Designing the survey required some balancing. We needed to ask enough questions to gain valuable information regarding class members' preferences, but we did not want to ask so many questions as to fatigue or overwhelm participants.[228] In the end, we settled on eighteen substantive questions, with three employing the binary design, fourteen employing the Likert scale, and one providing space for an open-ended response.[229]

As mentioned above, the substance of the questions could be parsed into three categories: (1) litigation outcomes, (2) litigation strategy, and (3) class counsel characteristics. For litigation outcomes, class members were asked whether it was important that counsel prioritize preventing bad actors from misusing data compromised in the breach to harass, intimidate, harm, or discriminate against class members, prioritize obtaining large cash payments for class members, or seek special protection for certain ethnic groups that have been specifically targeted in the aftermath of the breach.[230]

Regarding litigation strategy, class members were asked whether they favored a private litigation strategy, which would likely result in a quicker and more certain resolution through direct negotiations with 23andMe using the company's provided facts and documents, or pursuing a resolution through the public court system, which would

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225 Expert Report, *supra* note 11, at 13.

226 *Id.* at 13–14. A Likert scale is a commonly used psychometric response format that asks respondents to rate their agreement with a statement on a graded scale, typically 5 or 7 points ranging from "strongly disagree" to "strongly agree." It is widely used in empirical legal and social science research to capture attitudes and subjective judgments in a structured and comparable way. Susan Jamieson, *Likert Scales: How to (Ab)Use Them*, 38 MED. EDUC. 1217 (2004) (providing a brief overview of Likert scales).

227 Expert Report, *supra* note 11, at 15; *see* Class Preferences Survey, *supra* note 103, at 61.

228 Expert Report, *supra* note 11, at 13.

229 *Id.* at 13–15.

230 *Id.* at 14.

involve court-supervised discovery.[231] The public court system approach would likely take longer and involve more uncertainty, but had the potential for a larger settlement value.[232] Class members were also asked whether they preferred a quick filing of the case against 23andMe, or a later filing following a more thorough investigation of the facts and potential claims, whether they preferred a legal team composed of many law firms collaborating on the case or one or two law firms, and how much they valued pursuing claims under state genetic privacy statutes.[233]

For class counsel characteristics, class members were asked about their preferences regarding potential counsel's efforts to communicate with class members, experience litigating privacy class actions, experience litigating claims under state genetic privacy statutes, track record of obtaining large settlements in privacy class actions, track record of high claims rates (percentage of class served), use of in-house forensic investigation team, ability to attract the best attorneys, diversity, demonstrated long-term financial viability, and willingness to limit attorneys' fees.[234]

3. Survey Dissemination

National Economic Research Associates (NERA), an economic consulting firm,[235] managed the tasks of finding likely class members, screening them as outlined above and distributing the survey to those who passed the screening measures and met the inclusion criteria.[236] In late March 2024, NERA ran the substantive survey.[237] The firm subsequently provided us with the raw data and summarization tables.[238]

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231 *See* Class Preferences Survey, *supra* note 103, at 55.

232 *Id.*

233 *See id.* at 57.

234 Expert Report, *supra* note 11, at 5, 14, 15; *see* Class Preferences Survey, *supra* note 103, at 56, 58–61.

235 *About NERA*, NERA, https://www.nera.com/about.html [https://perma.cc/AJF6-8BMX].

236 Expert Report, *supra* note 11, at 11–12.

237 *Id.* at 19.

238 Motion to Appoint Interim Leadership of Class Action, Melvin v. 23andMe, Inc., 24-cv-487 (N.D. Cal. Apr. 18, 2024), ECF No. 41-2.

C. *The Results*

In this Section, we unpack salient results from each of the three categories of preferences solicited, providing an overview of how effective this survey was in providing class members with a voice.[239]

1. Litigation Outcomes

In class actions and litigation more generally, it is often assumed that plaintiffs primarily seek to maximize financial compensation.[240] After all, the tort system is a somewhat crude mechanism, limited by the hurdles inherent to enforcement, and it tends to transmogrify all harm into dollar amounts. Yet receiving monetary damages is only one manner in which plaintiffs may be compensated. This is especially true in data breach cases, where sensitive information has been released, and impacted individuals are suddenly vulnerable to exploitation. So, in the 23andMe data breach litigation, what did plaintiffs want? We asked them. Specifically, we asked the following:

> The 23andMe data breach involved incredibly sensitive information, including customers' genetic heritage, ancestral origin, full names, home addresses, profile pictures, and birth dates. Hackers have already posted some of this information on the Dark Web identifying lists of certain vulnerable groups.
>
> How important is it to you that the law firm representing the class focuses on getting measures that would prevent others from using your data to harass, intimidate, harm, or discriminate against you online or in real life?[241]

On the 7-point Likert scale, which ranged from "Not Important at All" (converted score of 1.0) to the scale midpoint of "Neither Unimportant Nor Important" (score of 4.0) to "Very Important" (score of 7.0), participants were clear in their affirmation. The mean score was 6.50, with a standard deviation of 0.89.[242] To evaluate significance, we used a conservative approach that compared the mean to the ambivalent midpoint of the scale, as opposed to the floor of the scale;[243] this created a

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239 For an exhaustive discussion of the results, see Expert Report, *supra* note 11.

240 *See, e.g.*, James F. Bleeke, *Mediation Strategies: What Plaintiffs Really Want*, BLEEKE DILLON CRANDALL (July 8, 2017), https://www.bleekedilloncrandall.com/articles/2017/07/08/mediation-strategies-plaintiffs-really-want [https://perma.cc/4E7K-YWBU].

241 Class Preferences Survey, *supra* note 103, at 56.

242 Expert Report, *supra* note 11, at 13–14, 22.

243 *Id.* at 16.

higher bar for significance. Moreover, because there were several questions of this type, we adjusted the significance test to allow for multiple comparisons.[244] Participants affirmed that it was very important to them that the litigation would result in measures to prevent others from using their data to harass, intimidate, harm, or discriminate against them online or in real life.[245]

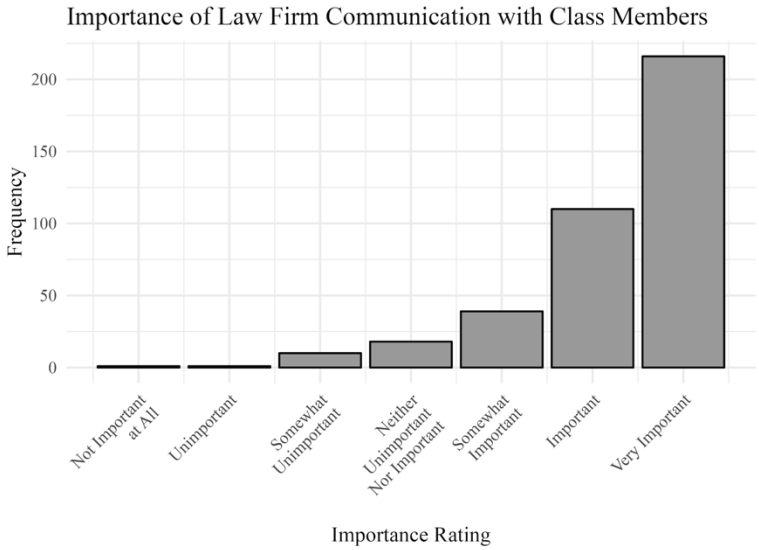

Figure 1. The importance class members placed on receiving specific nonpecuniary outcomes in the 23andMe data breach litigation, specifically measures that would prevent others from using their data to harass, intimidate, harm, or discriminate against them online or in real life. Bar heights represent the frequency of responses for each response option.

We also inquired about other litigation outcomes, although none scored as highly on the importance scale as financial damages.[246] Nevertheless, class members expressed interest in both monetary and nonmonetary remedies.[247] This raises the issue of trade-offs in resolving cases, as outcomes cannot be unlimited. Addressing this is crucial, and it is revisited later in this Section and in Part IV, which provides a practical blueprint for future uses of representational notice.

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244 *Id.* We chose the Bonferroni Correction to reduce the risk of Type I errors that find effects where none exist, though it did increase the risk of Type II errors that fail to detect true effects (again, erring on the side of being conservative, circumspect in reaching conclusions). The one-sample t-test comparing the mean to the midpoint was highly significant ($p < .001$), as well as the adjusted p-value ($p < .001$). *Id.* at 16 n.5, 17, 18.

245 Class Member Survey Results, *supra* note 103.

246 *See id.* at 8.

247 *See id.* at 7.

2. Litigation Strategy

One point of contention in litigation strategy, and one that reflects ideological differences across firms, is the question of a private versus a public resolution. On the one hand, proactive private negotiation can lead to quick and satisfactory results. A third-party mediator may be involved, the defense may voluntarily disclose information, and the case can be resolved quickly without court involvement or the variability of a jury verdict. On the other hand, forgoing private negotiation in favor of the public court system provides the possibility of a larger settlement and more complete relief. The latter is owing to the more robust discovery that takes place in the formal litigation process. There are clear benefits and negatives to each approach—evaluating the best way to proceed is a question of strategy and a matter of personal preferences, such as one's tolerance for risk.

We put the matter to class members, letting them choose between the two strategies. In addition to those options, we again allowed participants to indicate "No Preference" between the two options, and they also could state if they preferred some other strategy be pursued ("Something Else") or if they felt that they did not have enough information to make an informed decision ("Not Enough Information to Determine").[248] One hundred eighty-five participants (46.8%) chose the public strategy, 134 chose the private strategy (33.9%), and 54 (13.7%) professed no preference.[249] Twenty-two (5.6%) felt that they did not have enough information to decide, and none indicated that they preferred some strategy other than those that the two presented.[250]

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248 Expert Report, *supra* note 11, at 16; *see* Class Preferences Survey, *supra* note 103, at 9.

249 Class Member Survey Results, *supra* note 103, at 5.

250 *Id.* This was, at its core, a binary question that provided participants with two primary response choices, and so assessing the significance of these results called for a chi-square-goodness-of-fit test, which allowed us to determine whether the distribution observed significantly differed from a uniform or expected distribution. We assumed an equal split (50% each) for the two binary options presented and adjusted for multiple comparisons across the three questions. We used the Bonferroni Correction—a method used in statistical analysis to reduce the likelihood of obtaining false-positive results when multiple hypothesis tests are conducted simultaneously—to be more conservative. We also ran two additional statistical tests to analyze further the dyadic comparisons: (i) the chi-square test of independence to see if there was a significant preference for one option over the other, considering all options available; and (ii) the Z-test to compare options 1 and 2, while treating the other responses as separate categories of non-preference. In brief, what we found was that the observed distribution was significantly different ($p < .001$) from the expected distribution, even after adjusting for multiple comparisons with the Bonferroni correction ($p < .001$). Moreover, the two primary response options were significantly different from each other. Expert Report, *supra* note 11, at 16–17, 19–20, 22.

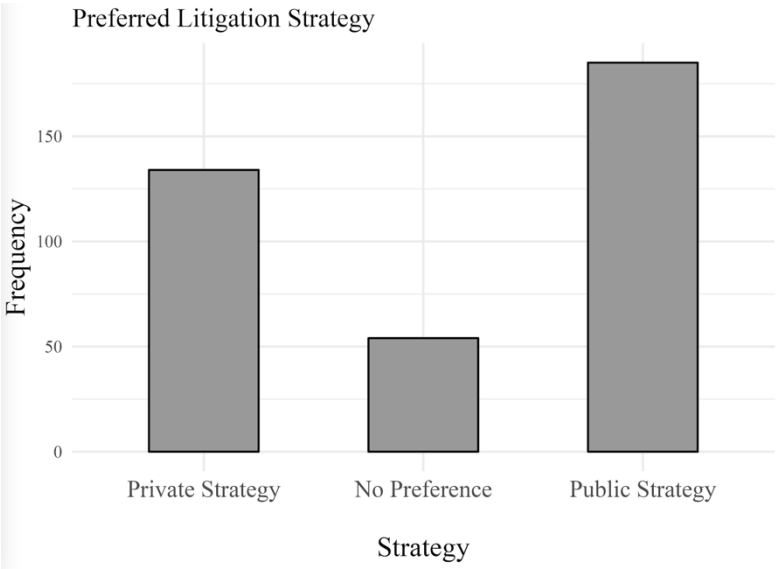

Figure 2. Class members' preferred litigation strategy. Bar heights represent the frequency of responses for each response option. Not included in the visualization are two additional response options: "Not Enough Information to Determine," which was chosen by just twenty-two participants, representing 5.6% of the total, and "Something Else," which was not chosen by any participants.

Participants were not unanimous about whether to pursue a private versus public litigation strategy.[251] This is to be expected, as there are trade-offs in the decision. That said, class members overall preferred a public strategy, even with its longer timeframe to resolution and greater potential risk in outcomes.[252]

The analysis presented herein reveals that the outcomes we have examined occupy a liminal space between litigation results and strategic decisions. The duration of the dispute resolution process undeniably constitutes an outcome, as does the nature of the proceedings to which a defendant is subjected. This is particularly relevant when class members seek to convey a punitive message through public litigation, thereby exposing the defendant to potential reputational harm—a consideration traditionally within the purview of individual litigants when deciding whether to initiate legal action. However, the dichotomy between private and public resolution, once litigation has commenced, may also be construed as a strategic decision. This raises a fundamental question: To what extent should class members have agency in shaping litigation

251 Class Member Survey Results, *supra* note 103, at 5.

252 *Id.*

strategy? We explore this complex issue in greater depth in the subsequent Section.

3. Class Counsel Preferences

We might think that class members do not really care about communication. After all, people are busy and perhaps want little to do with class actions except for when it comes to receiving the benefits of outcomes. From a more jurisprudential lens, we might say that perhaps class members do not care so much about meaningful representation, about having a voice, about process; perhaps they care only about end results. So, we asked the potential 23andMe data breach litigation class members: "How important is it to you that the law firm representing the class makes an effort to communicate with the class in order to consider class members' preferences?"[253]

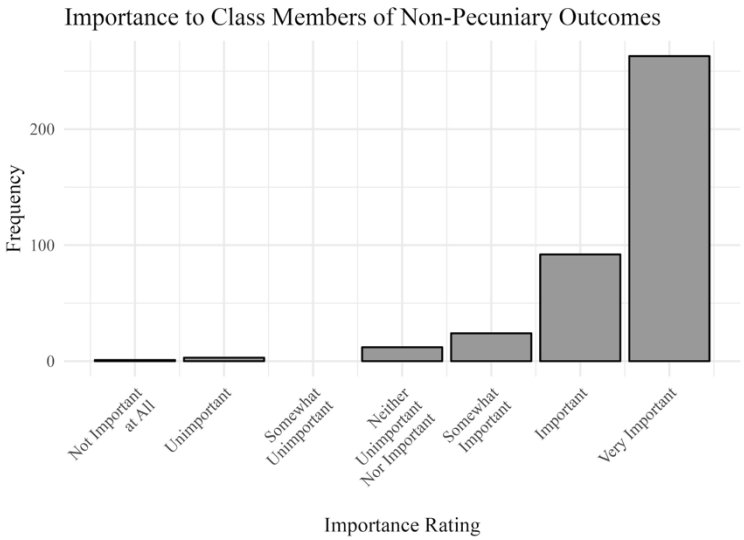

Figure 3. The importance class members placed on law firms' efforts to communicate with class members. Bar heights represent the frequency of responses for each response option.

The result was overwhelming: Class members want a voice, they appreciate when they receive it, and they are careful to be thoughtful, open communicators. Beginning with the first of these three claims, we can clearly see, in Figure 3, that class members want to be represented by a firm that makes an effort to communicate with them in order to

253 Class Preferences Survey, *supra* note 103, at 11.

consider their preferences. A full 82.5% of participants rated this as "Important" or "Very Important," the ceiling on the scale.[254]

When asked whether there was anything else they would want the court to consider in choosing a law firm to represent them,[255] many class members' responses focused on communication. For example, one class member wanted the court to "take everyone's opinion into consideration."[256] Another stated that they "really just want the people to be heard," emphasizing that "[w]e have a strong voice and our lives are out online."[257] Yet another wanted the law firm to "[c]onsider the people [who] have been—or will be—harmed, not the voices of the attorneys."[258]

In addition, participants appeared to be thoughtful communicators who desired to have relevant information. One class member stated that it was important that the law firm choose to "[c]ommunicate with me."[259] Another said it was important to "keep litigants informed at each and every step of the court case."[260] Yet another wanted the "firms involved [to] keep providing constant and current information to the class."[261] One class member wanted to know whether deceased individuals would be part of the class, as they had purchased a 23andMe kit for both themselves and their deceased parent.[262] At least two class members wanted to know how having their data compromised would affect their children and relatives.[263]

D. *The Aftermath*

Anticipating the JPML's ruling assigning him the multidistrict litigation, Judge Chen ordered all class counsel to file motions for the

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254 Class Member Survey Results, *supra* note 103, at 8. The mean score (on the 1–7 scale) was 6.26 with a standard deviation of 1.05. A one-sample t-test comparing this mean to the midpoint of the scale was highly significant ($p < .001$), as was the adjusted p-value ($p < .001$). Expert Report, *supra* note 11, at 20.

255 Expert Report, *supra* note 11, at 16.

256 *See generally* Free Response Answers to Question 18, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig. (on file with authors) (discussing various expectations and desires regarding communication and information to be provided by the law firm chosen to represent them in the action).

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*

263 *Id.*

appointment of interim counsel one week after the JPML's ruling.[264] The court encouraged that "a team of diverse attorneys (e.g., years of experience, backgrounds)" be proposed[265] and asked that the motions address the work counsel had already done in the case and the work they had done in other data breach or comparable cases.[266] After the JPML consolidated all 23andMe data breach class action cases and transferred them to Judge Chen for pretrial purposes,[267] several attorneys and law firms moved for their appointment as interim lead counsel in the case, including Edelson.[268] The survey results were filed with the court on April 18, 2024, alongside Edelson's motion to be appointed interim lead counsel in the litigation.[269] Edelson's motion was premised, among other things, on class members' preference for the types of litigation strategies it intended to employ, litigation outcomes it had previously achieved, and qualities it possessed.[270] In June of 2024, the MDL court held an initial case management conference during which all motions for appointment of class counsel were argued.[271] At the hearing, Edelson noted its unique approach of seeking out class member preferences, and Judge Chen inquired into the substance and results of the survey, particularly whether any of the class members' responses surprised counsel.[272]

Ultimately, the court did not appoint Edelson to serve as class counsel in the 23andMe data breach litigation.[273] It appointed other attorneys "based on various factors, including but not limited to experience (e.g., with multidistrict or class litigation, complex litigation, and data breach/privacy litigation); resources; the scope of the class; and the support of other attorneys."[274] Judge Chen did not reference class

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264 Civil Minutes, Santana v. 23andMe, Inc., No. 23-cv-5147 (N.D. Cal. Feb. 22, 2024), ECF No. 78.

265 *Id.*

266 *Id.*

267 *In re* 23andMe, Inc. Customer Data Sec. Breach Litig., 730 F. Supp. 3d 1352, 1354 (J.P.M.L. 2024).

268 Motion to Appoint Counsel, *supra* note 196; Melvin Plaintiffs' Notice of Filing of Motion to Appoint Interim Leadership of Class Action, *supra* note 32.

269 Motion to Appoint Interim Leadership of Class Action, *supra* note 238.

270 *See id.* at 6–11.

271 Civil Minutes, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-0398 (N.D. Cal. June 3, 2024), ECF No. 65.

272 Transcript of Proceedings (Corrected) at 35, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-0398 (N.D. Cal. June 25, 2024), ECF No. 77.

273 Pretrial Order No. 2: Order Appointing Counsel and Setting Initial Deadlines, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., No. 24-md-3098 (N.D. Cal. June 5, 2024), ECF No. 62.

274 *Id.* at 1.

members' preferences or the representational notice survey in his order appointing counsel and outlining counsel's directives.[275]

E. *A Retrospective Analysis of the 23andMe Class Member Survey*

We would be remiss not to acknowledge the challenges and potential shortcomings of the 23andMe class member survey. We encountered a few difficulties, but the main ones were related to time, data interpretation, question selection, and the court's ultimate response to the survey results. We discuss each of these in turn.

First, we had limited time between when counsel engaged us to survey class members and when the survey was deployed. Despite this, we dedicated significant and sufficient effort to complete the survey, analyze the results, and draft our report. However, as is often the case in pioneering efforts, we would have appreciated more time, especially given that this survey was the first of its kind. Participants also have limited time to spend on surveys. A careful balance must be struck between asking enough questions to provide the court with all the necessary information and not asking so many questions that participants become overburdened and fatigued. We did not receive complaints about the question load (eighteen substantive), nor did we suffer from mid-survey attrition, but this was a forefront concern.

A second challenge and issue we faced was how to interpret and use the survey results. The 7-point Likert scale we used confirmed the importance and relevance of various factors but not necessarily (or, rather, not fully) their comparative importance and relevance. For example, class members expressed interest in both monetary and nonmonetary remedies,[276] but we were not able to conclude with any precision whether they preferred monetary remedies to nonmonetary ones. We only knew they were both important to class members. But outcomes are limited, and trade-offs must often be made at the negotiation table. Making comparative preferences would have been a helpful data point.

Our third challenge related to the most foundational question in any survey: What should be asked? The goal was to gain insight and understanding into class members' preferences, but what are the best questions to gain that insight? How does one ask the questions in a manner that avoids generating biased responses (i.e., do you prefer the new, clean, soft pillows or the old, dirty, hard pillows?—to then conclude

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275 *Id.*

276 *See* Class Member Survey Results, *supra* note 103, at 8.

participants prefer soft over hard pillows)? How and whether does one avoid questions that might provide answers that will ultimately not favor class members? There is a popular axiom in litigation: "Don't ask a question you don't know the answer to."[277] But this refers to the opposing party and third-party witnesses, not the attorney's own or prospective client, whose private communications are typically protected by the attorney-client privilege. Indeed, attorneys generally want all the information possible from their clients so they can best represent them. The lack of an attorney-client relationship and accompanying attorney-client privilege between class counsel (and prospective class counsel) and putative class members adds quite the wrinkle.[278] At least according to some courts, class member survey responses are not privileged,[279] and a quick, perhaps poorly thought-out response from a class member participant could haunt and affect the entire class in the litigation if it is disclosed to the defendant.

Lastly, class members' survey responses were seemingly met with court apathy. This was perhaps the most devastating limitation. For representational notice to have any effect on class litigation, class members' preferences must be taken into consideration by those with the authority to implement those preferences: the court and class counsel. In the 23andMe data breach litigation, the court only briefly inquired into class members' preferences at the case management conference and did not engage with those preferences or discuss them when appointing counsel.[280] And it is unlikely that the attorneys appointed in the litigation, who were not involved in surveying class members, would litigate the case with class members' preferences in mind. Class members' voices thus seemed to go ignored.

Recognizing these challenges and limitations from the 23andMe data breach litigation, we, in Part IV, construct a blueprint to perfect the class member surveys that form the crux of representational notice. The blueprint focuses on enabling class members to have a meaningful voice in all future class actions and provides a directive for courts to listen to that deciphered voice.

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277 Daniel Small, *Lessons Learned from a Life at Trial*, BRIEF (Summer 2022) at 42, 46.

278 *See supra* note 38; *infra* note 283.

279 *See, e.g.*, Morisky v. Pub. Serv. Elec. & Gas Co., 191 F.R.D. 419, 423–26 (D.N.J. 2000); Depina v. FedEx Ground Package Sys., Inc., 730 F. Supp. 3d 954, 956–57 (N.D. Cal. 2024); Valdez v. Town of Brookhaven, No. 05-CV-4323, 2009 WL 10702070, at *1 n.1 (E.D.N.Y. Feb. 5, 2009).

280 *See* Transcript of Proceedings (Corrected) at 35, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-03098 (N.D. Cal. June 25, 2024), ECF No. 77; Pretrial Order No. 2: Order Appointing Counsel and Setting Initial Deadlines, 24-md-03098 (N.D. Cal. June 5, 2024), ECF No. 62.

IV. PERFECTING REPRESENTATIONAL NOTICE: A BLUEPRINT FOR CLASS MEMBER PARTICIPATION IN LARGE-SCALE CLASS LITIGATION

The 23andMe data breach litigation class member survey represented significant movement. To our knowledge, no previous attempt to comprehensively gather class member input beyond those of chosen class representatives had been made in a large commercial class action case involving millions of class members to gather their legal representation preferences. In the past, efforts to gain information from class members focused on class certification and settlement approval issues,[281] not class members' actual litigation preferences. The solitary confinement California prisoner class demonstrated class participation to some degree in a smaller-scale impact litigation class where class members were easily identifiable and centrally located,[282] but whether such an effort could be replicated in a large nationwide commercial class action case was not clear until the 23andMe data breach litigation. But how can we replicate this process and empower putative class members in future cases? This Part provides a blueprint for attorneys, third-party survey experts, and courts affecting representational notice in practice, detailing how to gather and analyze putative class members' preferences. The blueprint takes into account key considerations: How can a class speak fairly (not disregarding subsets of class members), efficiently (not hindering the efficiency gains of current class action procedures), and accurately (yielding information that truly represents what it purports to represent, as well as being digestible and actionable)?

The proposed blueprint incorporates the lessons we learned from our pilot experiments and the 23andMe data breach litigation class member survey and addresses the challenges we faced. It resolves the issues of time and question selection by providing a comprehensive list of general and specific sets of questions to ask class members, which we discuss in this Part and include in the Appendix. These proposed questions permit those effecting representational notice to more quickly and uniformly deploy it. There is still a risk that some class member participants will provide unhelpful answers to these questions, but we believe this is best resolved by attaching privilege to class members' responses that relate to or touch on litigation outcome preferences, litigation strategy preferences, injuries, etc.—as these types of communications would typically be protected by the attorney-client privilege, even if the attorney was not ultimately engaged by the client.[283]

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281 *See* cases cited *supra* note 279.

282 *See* Lobel, *supra* note 5, at 90.

283 *See* cases cited *supra* note 38.

Indeed, these communications form the basis of the information that attorneys need to provide legal advice and propose a litigation strategy.[284] Finally, the blueprint provides a structure for courts to consider class member survey results, ensuring they are properly analyzed by experts and incorporated by courts in class counsel appointment decisions.

The blueprint also works within the present class counsel appointment framework. It can be provided, as it was in the 23andMe data breach litigation, by one law firm.[285] It can be provided by multiple law firms. It can also be court-ordered before the appointment of counsel under Rule 23(g)(1)(B), which permits courts to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[286] Surely class members' interests in class counsel and litigation outcomes are relevant to those interests, but even assuming that they are not, Rule 23(d)(1)(B) provides another avenue for courts to order representational notice.[287] That Rule, as a reminder, permits courts to issue any order requiring counsel "to protect class members and fairly conduct the action," to "giv[e] appropriate notice to some or all class members of . . . any step in the action," and to provide "the members' opportunity to signify whether they consider [their] representation fair and adequate."[288]

We focus in this Part on the class member survey part of representational notice and courts' consideration of survey responses. There are four components to the class member survey blueprint: (1) administration, (2) design, (3) dissemination, and (4) analysis. "Administration" refers to best practices surrounding the logistics of who administers and funds the survey. "Design" focuses on the substance of the survey: the questions asked of class members, the format in which they were asked, and the topics addressed. "Dissemination" refers to the actual deployment of representational notice and ensuring a substantial number of diverse putative class members participate in the class member survey. "Analysis" focuses on quantifying, reporting, evaluating, and, importantly, considering survey results. If attorneys, courts, and other

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284 Banner v. City of Flint, 99 F. App'x 29, 36 (6th Cir. 2004) (noting that under state law "[w]hen a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client, and the elements of the attorney-client privilege" apply); *In re* Search Info. Associated with rickmaike@yahoo.com, No. 15-mj-42, 2020 WL 4373447, at *8 (W.D. Ky. July 10, 2020) (noting that attorney-client privilege "applies to confidential communications . . . in the context of initial consultations, regardless of whether the attorney is subsequently retained").

285 Motion to Appoint Interim leadership of Class Action, *In re* 23andMe, Inc., Customer Data Sec. Breach Litig., 24-md-03098 (N.D. Cal. May 1, 2024), ECF No. 36.

286 FED. R. CIV. P. 23(g)(1)(B).

287 FED. R. CIV. P. 23(d)(1)(B).

288 *Id.*

stakeholders follow the principles we outline, not only will class members have an intelligible voice, but they will be able to speak in a way that is fair to all class members, does not compromise the efficiency of the legal proceedings, and is comprehensible and actionable.

A. *Administration*

Surveying class members prior to counsel selection and using the results to inform the court's appointment and directives to counsel is promising. However, implementing this approach raises important questions, including who should conduct the surveys, how they should be funded, and how potential biases should be mitigated.

1. Two Approaches: Adversarial Versus Court-Led

There are two primary avenues to administer representational notice: an adversarial attorney-led administration and a court-led collective administration. Each has advantages and disadvantages. In an adversarial system, like our common law system, one or multiple law firms would independently hire qualified experts to survey class members. Conversely, in a court-ordered collective model, all law firms seeking to represent the class would, via a court-led approach, engage a qualified expert to survey class members and provide the results to the court.

The adversarial approach leverages the competitive nature of the system, where firms strive to present the best case for their selection as class counsel. The advantages include capturing a diverse range of class member preferences, driving innovation in survey design and methodology, and allowing other firms and experts to meaningfully analyze the results, leading to a better understanding of their meaning and value.

There are, however, disadvantages to the adversarial approach. There is a risk of bias, as researchers may feel beholden to the law firms that engage and pay them. Results unfavorable to the engaging law firm may not be reported and kept confidential.[289] Resource disparities could also pose an issue, as firms with more resources may be able to conduct more extensive surveys, potentially skewing the results in their favor or making other surveys appear inferior. Additionally, multiple surveys

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289 That said, these survey results may not be privileged, given several courts' holdings that communications with putative class members are not protected by attorney-client privilege. *See* cases cited *supra* notes 38, 86, 279; *see also infra* note 290.

without coordination can result in fragmented data that is difficult for a court to reconcile and compare. A "battle" of the class member survey experts would likely emerge between competing law firm-initiated surveys. Each law firm and its experts may attack the other's survey design, dissemination, and analysis. While this competition has pros and cons, it would likely require more resources from both counsel and the court, which would have to review and reconcile different results. This process might even necessitate an evidentiary hearing if class members' preferences appear to differ across surveys.

The court-led approach offers certain advantages. It would be less susceptible to claims of bias in terms of survey design, as the survey questions would be designed independently by experts without undue influence from any one law firm or attorney. The survey design would also be reviewed by multiple stakeholders prior to its deployment, helping to identify and eliminate potential biases. Furthermore, the results and methodology would be public, preventing any counsel from hiding the results or obscuring them by only disclosing ones favorable to the law. And by pooling resources, firms that lack substantial resources or access to the best experts could participate in the process. This model thus arguably promotes greater fairness and transparency.

A collective court-led approach, however, also has disadvantages. Courts might be required to entertain and settle disputes that arise between counsel ranging from which survey expert to engage to issues involving survey deployment, design, and analysis, thus taxing the court's resources ex ante. Even if the court ultimately did not need to get involved in these disputes, coordination among multiple law firms regarding survey design, deployment, and analysis could be time-consuming. Finally, there would be little avenue for an attorney or class member to challenge the collective results if the survey is flawed, biased, unrepresentative, etc., other than hiring their own expert, which would ultimately invoke the very adversarial process a court-led approach was meant to eliminate. The court-led approach may also eviscerate claims of privilege (though presently thin) class counsel might have over the survey results,[290] which would permit defendants to use any damaging answer by a class member against the entire class in the litigation. Finally, the court-led approach might fail to eliminate bias, as the independent third-party survey expert collectively retained could have worked previously with one attorney or law firm or hoped to generate future business from a particular attorney or law firm.

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290 *See, e.g.*, EEOC v. ABM Indus. Inc., 261 F.R.D. 503, 513 (E.D. Cal. 2009) (compelling disclosure of questionnaires sent by counsel to potential class members); Depina v. FedEx Ground Package Sys., Inc., 730 F. Supp. 3d 954, 956–58 (N.D. Cal. 2024) (holding that putative class members' responses to survey sent out by class counsel for class certification were not privileged).

2. Addressing Potential Biases

Regardless of the chosen approach, addressing potential bias is critical to ensuring the integrity of the survey process.[291] Several strategies can be employed to mitigate bias. We believe that employing an independent third-party expert to design and conduct the survey is paramount to ensuring the process remains as neutral as possible. This third-party should have no financial or professional ties to any of the involved law firms vying for class counsel or the defendant beyond the engagement.[292] More importantly, establishing a standardized methodology for the survey, including question design, sampling techniques, and data analysis is required to ensure consistency and fairness across all class member surveys. Public disclosure of all survey methodology must also be required to permit meaningful external scrutiny. Courts, regardless of whether they are ordering a joint survey or considering surveys led by individual attorneys or law firms, can play a crucial role in requiring full disclosure of any class member survey presented to ensure that it adheres to principles of fairness and impartiality.

3. Practical Implementation

Practical implementation would vary some across the two approaches. Under an adversarial approach, each law firm interested in presenting survey data would engage its own independent survey expert. In a court-led approach, the court would issue an order calling for representational notice to be financed by all the attorneys or law firms seeking to represent the putative class. The court would then select or collectively authorize all attorneys interested in representing the class to engage an independent survey expert. A mechanism for distributing survey costs among the law firms seeking to represent the class must also be established. Factors considered may include the size of the firm, the number of plaintiffs the firm represents, the specific position counsel seeks in the litigation, or a flat fee shared equally among all firms.

After gaining an understanding of the litigation and its potential objectives, the independent survey expert, in both scenarios, would then design the survey, determine the appropriate sample size, and ensure the

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291 *See* GREGORY J. PRIVITERA, RESEARCH METHODS FOR THE BEHAVIORAL SCIENCES 20–27, 81–168, 397–419 (3d ed. 2019).

292 *See* Mark R. Patterson, *Conflicts of Interest in Scientific Expert Testimony*, 40 WM. & MARY L. REV. 1313, 1327–35 (1999) (discussing bias in expert testimony, especially bias emerging from financial forces and conflicts of interest).

survey reached a representative sample of class members. The survey would be designed in consultation with the law firm or firms that engaged the expert. Next, the survey expert would analyze the survey results and present them in a report that included all findings, methodologies, and raw data.

In an adversarial approach, the report would be shared with the attorneys that engaged the expert. These could, in theory, decide not to use the survey results or only report results favorable to it. If the law firm chose to use the survey in its bid for counsel, it would attach the survey expert's report and raw data for other interested parties to review and challenge. In a court-led approach, the expert would share the results with all counsel involved in its commission and file its complete report with the court. Under both approaches, interested parties, including competitive counsel and putative class members, should have a reasonable period to challenge adversarial surveys.[293]

B. *Design*

To ensure that class member surveys forming representational notice capture the true preferences and values of class members, we developed a comprehensive set of questions. These are divided into general and specific categories, with provisions for open feedback and methods to gauge the relative importance of different factors. These questions cover three main areas: (1) counsel preferences, (2) litigation outcome preferences, and (3) communication and participation preferences. The Appendix provides a comprehensive list of general questions, including screeners to ensure participants are genuine and informed about the survey's purpose, and a proposed list of litigation-specific questions that are meant to be tailored to each case.[294]

The general question set aims to gather fundamental insights into class members' values and preferences. Used in every class action for consistency, these provide a considerable framework for class member

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293 Consideration should be given to the defendant's role in this process. Should defendants be allowed to challenge survey results? The results would likely point in favor of an outcome that is not agreeable to the defendant. Permitting defendants to challenge survey results could enhance the fairness of the proceedings by allowing an adverse party to raise concerns about survey methodology, potential bias in question-framing, or the representativeness of the sample. Such an approach might contribute to a more balanced examination of survey evidence and help prevent potential misuse of survey data in class action proceedings. Moreover, it could align with principles of due process and the adversarial nature of the legal system, where both parties have equal opportunities to scrutinize evidence that may significantly impact the course of litigation. It would, however, also require a greater expenditure of the parties' and the court's resources.

294 *See infra* Appendix.

surveys. For counsel preferences, they seek to understand the importance that class members assign to attorneys' characteristics, Rule 23(g)'s mandatory and permissible factors, types of litigation experience, and other criteria. For litigation outcome preferences, the general question set asks class members what they believe "the main goal of the litigation" should be, their preference for particular remedies, such as monetary versus nonmonetary relief, and whether they believe class members were equally harmed.[295] For communication and participation preferences, class members are queried on the frequency with which they would like to be informed about the case and their interest in participating more actively in the litigation. These general questions also include free-response sections for capturing additional insights and demographic questions to understand varied preferences. Open-ended feedback allows class members to share additional comments and concerns, providing a richer understanding of their preferences. Demographic questions ensure diverse perspectives are captured. To understand the relative importance of different factors, comparative questions and techniques like conjoint analysis can be used. Comparative questions rank priorities, while conjoint analysis assesses how members value various settlement attributes through hypothetical scenarios.

The specific question set is tailored to each case and is aimed to address the unique aspects of each litigation, such as preferences for specific firms or desired outcomes. These questions help understand class members' expectations and priorities within the context of the litigation. For instance, they include which specific law firms or attorneys are preferred, the importance of prior experience litigating against the defendant, the types of damages most important to class members, and preferences for remedies common in litigation of the type at issue.[296] Including an "Other" option allows class members to suggest unanticipated remedies.

By utilizing these comprehensive survey questions, most of which are designed, as explained in the analysis section, to capture class members' relative preferences, courts can accurately capture class members' preferences in the counsel selection process. This approach ensures a robust framework for understanding and representing class member interests in class action litigation.

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295 *See infra* Appendix.

296 *See infra* Appendix.

C. *Dissemination*

To ensure the success and reliability of representational notice, we must meticulously address three key factors: timing, power, and representativeness. Each of these elements plays a crucial role in the effective dissemination and the overall validity of the survey results. Using a qualified third party, such as NERA in the 23andMe data breach litigation, to source the population and disseminate the survey is necessary to achieve reliable and unbiased results, but it is hardly enough. The timing, population size, and representativeness of the population are also required to produce meaningful and actionable insights from class members that can be gathered and acted upon.

1. Timing

The timing of the survey is critical to its efficacy and relevance. To maximize the impact and utility of the survey findings in an adversarial process it should be conducted alongside class counsel applications and in a court-led process after counsel has applied but before the court makes its selection. This window is optimal because it allows the gathering of timely insights from class members that can directly inform the court's decision-making process regarding the appointment of lead counsel. Conducting the survey earlier would result in collecting opinions that may not align with the actual candidates under consideration. Conversely, conducting it too late, after the court has made its selection or before the court has time to consider the survey prior to making a class counsel appointment, would render a good portion of the survey's findings on class members' preferences moot. Precise timing ensures that the gathered data is actionable and relevant, permitting the court and later counsel to meaningfully consider and act upon the data.

2. Power

Ensuring that the survey sample size is sufficiently powered is also fundamental.[297] A well-powered survey means having a large enough sample to accurately represent the views of the entire class.[298] In statistical

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297 *See* Roger Giner-Sorolla et al., *Power to Detect What? Considerations for Planning and Evaluating Sample Size*, 28 PERSONALITY & SOC. PSYCH. REV. 276 (2024).

298 Mumtaz Ali Memon et al., *Sample Size for Survey Research: Review and Recommendations*, J. APPLIED STRUCTURAL EQUATION MODELING (2020); *see also* Jacob Cohen, *Things I Have*

terms, power is the probability that the survey will detect an effect or difference when there is one to be detected.[299] A survey with low power can lead to misleading conclusions due to sampling error or lack of representation.[300] For class actions, which can involve thousands or even millions of members, achieving a sufficiently powered survey requires obtaining a considerable sample size of class members to participate in the survey to ensure the results are statistically significant and reflective of the broader class.

To achieve this, the total number of class members must be estimated and then the appropriate sample size calculated to achieve the desired level of confidence and margin of error. Tools, such as power analysis, can assist in determining the necessary sample size.[301] When in doubt of the ultimate class's size, erring on the size of a larger class is preferred. Moreover, the sample size should also account for potential non-responses and ensure that the final sample is robust enough to withstand such variability.

3. Representativeness

Achieving representativeness in class member surveys is a complex but essential goal, particularly given the unique challenges posed by class actions. Representativeness means that the survey sample accurately reflects the demographics and characteristics of the entire class, particularly the most relevant ones.[302] This aspect is distinct from ensuring the survey is well-powered; while a well-powered survey ensures statistical significance, a representative survey ensures that the diversity within the class is captured and that the survey results are meaningful and applicable to the class as a whole.[303]

In class actions, the entire class is often not fully identified until later in the litigation process, which can present a challenge for survey design and implementation. Representativeness is a dynamic target, requiring a flexible and adaptive approach. Class member surveys must be designed to account for various demographics and characteristics that could comprise the class, ensuring the inclusion of individuals from all relevant

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Learned (So Far), 45 AM. PSYCH. 1304, 1308 (1990) (discussing the importance of sample size and power); Joseph P. Simmons, Leif D. Nelson & Uri Simonsohn, *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 PSYCH. SCI. 1359 (2011) (discussing harms arising from improperly powered studies).

299 Memon et al., *supra* note 298, at viii.

300 *See id.*

301 *Id.*

302 *See id.* at iii–iv.

303 *Id.* at viii.

subgroups. This goes beyond gender, racial, or ethnic diversity to include factors such as age, parental status, political affiliation, or product purchase history, depending on the relevant facts in the litigation. Accurately capturing this diversity may also help the court and counsel identify potential intra-class conflicts when interests appear too divergent.

Achieving representativeness also involves considering the specific context and demographics of the class action. For instance, in a class action by TikTok users against TikTok, younger individuals, whom we may assume are more likely to be users of the platform,[304] must be adequately represented in the sample. This means stratifying the sample to include representative subsets of the demographic profiles most likely to be involved in the class action.

Representativeness can sometimes lead to conflicts with attorneys. The desire to survey a large, representative sample might lead to surveying individuals who are already working with specific attorneys. This can create biases or conflicts of interest that need to be managed carefully.

D. *Analysis*

Establishing best practices for analyzing class member surveys is essential to accurately interpret and apply survey results in class actions. These surveys are designed to provide relative comparisons, such as class members' preferences for attorneys or law firms, the outcomes they prioritize, how they make trade-offs, and their expectations for communication during litigation. While independent third-party experts provide robust statistical analyses, it is ultimately up to the courts to determine how these results are applied to ensure meaningful and informed decisions in each class action. This Section outlines best practices for interpreting and applying the survey outcomes.

1. Best Practices

To aid courts as they apply class member survey results, it is crucial that experts present the information in a manner that is easily digestible and applicable to the case at hand. The experts should adhere to best

304 *See* Raymond Zhong & Sheera Frenkel, *A Third of TikTok's Users May Be 14 or Under, Raising Safety Questions*, N.Y. TIMES (updated Sept. 17, 2020), https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html [https://web.archive.org/web/20250618232917/https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html].

statistical practices and use standardized reporting formats, providing detailed explanations of survey methodology, sample characteristics, and potential limitations. This structured approach ensures that all critical information is robust and reliable, allowing courts to systematically apply the findings.

Experts can assist courts by clearly defining the methodologies used, highlighting the importance of standardized reporting formats to prevent the omission of vital information. This preparation aids in the analysis of complex data and ensures that courts can focus on the key insights from the surveys without getting lost in technical details.

Experts must also emphasize the importance of transparency in using survey results for court decisions. Courts should document their reasoning, providing a clear record of how survey data influenced their class counsel appointment decision or other decisions where class member survey responses were considered. This documentation should include key points, such as the rationale behind prioritizing certain preferences and evaluating trade-offs, which builds trust in the process and ensures accountability.

To facilitate understanding, experts should provide courts with a step-by-step guide to interpreting class member survey results. This guide should outline the survey methodology, sample selection, question phrasing, and data analysis, helping to identify potential biases or limitations. The guide should also assist in understanding the rank order and relative preferences among survey options, highlighting which choices are most favored by class members. Evaluating how class members prioritize different outcomes when faced with trade-offs provides insight into their collective values and priorities. Engaging with survey experts to discuss findings and complexities ensures that nuanced results are interpreted correctly.

By framing the survey analysis process in a manner that courts can readily digest, experts not only enhance the legitimacy of the class action process but also ensure that class members' voices are meaningfully considered. This approach supports the goal of making class actions truly representative of the individuals they are meant to serve, thereby empowering courts to make well-informed decisions that reflect the class's preferences and priorities.

2. Understanding Relative Preferences and Statistical Markers

To assist courts in effectively applying class member survey results, it is crucial for experts to present information in a way that captures relative preferences among class members. As seen in the Appendix, our representational notice surveys are designed to focus on comparisons

rather than absolute values, allowing courts to see which attorneys or law firms class members prefer relative to others.[305] This approach helps avoid the challenge of determining whether a single attorney or law firm is universally liked or disliked. Similarly, when assessing which outcomes are most important, the survey will reveal preferences in terms of priority, especially when trade-offs need to be considered, as is common in litigation.

Experts can aid courts by emphasizing the rank order of preferences rather than focusing on absolute scores. For instance, if a survey asks class members to rank attorneys or law firms, the analysis should prioritize the order in which they are ranked, rather than the specific scores each received. When evaluating outcomes involving trade-offs, such as choosing between immediate compensation and long-term policy changes, the analysis should focus on the majority preference. This enables courts to make decisions that align with the collective will of the class. Additionally, it is important for experts to highlight that preferences are context-dependent. Preferences for legal representation in a data breach case may, for example, differ significantly from those in a products liability case. Interpreting survey results within the specific context of the litigation ensures that the unique aspects of each case are considered.

In presenting survey data, experts should emphasize both statistical and practical significance. While statistical significance, which measures the likelihood that an outcome is due to chance, is important, courts should understand that practical significance provides crucial real-world implications.[306] For example, a statistically significant preference for one legal strategy over another may not hold practical importance if the difference is minimal (e.g., 51% vs. 49%). Conversely, a larger difference, even if not statistically significant due to sample size, might be more relevant in shaping legal strategies. By clearly presenting these aspects, experts ensure that courts make informed decisions that reflect the true preferences and priorities of class members. This approach not only enhances the court's ability to interpret survey data but also ensures that class actions remain representative and responsive to the individuals they are intended to serve.

The blueprint presented, along with the Appendix to this Article, should ensure proper survey administration, design, dissemination, and analysis. While these steps are crucial for the effective use of

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305 *See infra* Appendix.

306 *See generally* Kaveh Mohajeri, Mostafa Mesgari & Allen S. Lee, *When Statistical Significance Is Not Enough: Investigating Relevance, Practical Significance, and Statistical Significance*, 44 MGMT. INFO. SYS. Q. 525 (2020) (discussing differences between statistical significance and practical significance).

representational notice, the participation and feedback gathered are rendered meaningless if courts and counsel choose to ignore it. Ignoring class member input further delegitimizes the class action vehicle.[307] It is particularly damaging when class members are informed, asked for their preferences, take the time to thoughtfully express those preferences, and are subsequently ignored by counsel, the court, or both. This not only cements the exclusion of class members from the process but also sends a clear message that their preferences are inconsequential, and that the litigation is not about or for them. For representational notice to have meaning or value, courts and counsel must listen and respond to class members' speech. When they do, the future of class litigation will become what it was always intended to be—representational.

CONCLUSION

The developments discussed in this Article represent a transformative shift in class action litigation, promising to elevate the voices of class members and bring them to the forefront of legal processes that have historically marginalized their input. The 23andMe data breach litigation, with its pioneering use of representational notice to capture class member preferences, marks the beginning of a new era where class actions will genuinely reflect the interests and desires of those they are meant to represent. This shift is grounded in both theoretical advancements and practical applications, demonstrating that meaningful participation by class members is not only feasible but also essential for the legitimacy and efficacy of class action litigation.

The insights gained from the debut of representational notice in the 23andMe litigation enabled this Article to provide a blueprint for future cases, illustrating how technology and innovative legal strategies can bridge the gap between class members and their legal representatives. By following this blueprint, legal practitioners and scholars can ensure that the momentum generated by recent developments is sustained, leading to a more inclusive, responsive, and just class action system. The goal, now within reach, is to transform class actions into a powerful tool for collective redress, one that genuinely amplifies the voices of the injured and isolated, thus fulfilling the original promise of this critical legal mechanism.

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307 *See* Leslie, *supra* note 51, at 107 (discussing "the message of judicial apathy towards class member input" in the context of class settlements).

APPENDIX

Sample Representational Notice

In this Appendix, we present a comprehensive sample set of survey information and questions designed to provide class members with a voice in class actions. The central aim of representational notice is to capture the preferences of class members regarding both their choice of counsel and their desired outcomes, with some questions touching upon strategy preferences.

The survey is divided into three distinct categories:

(1) Basic Information: Prior to and concurrent with the questions, representational notice should provide information to class members about their potential claims, the existence of a class lawsuit, and the attorneys seeking to represent them. Some of this information is included below (see the section titled "Introduction to Class Actions"), but depending upon the specific litigation, it may make sense to provide this information up-front before progressing to the questions.
(2) General Questions: These questions are foundational and should be asked in every class action case. They are designed to capture essential demographic and preference information that can vary significantly among class members. Recognizing that class actions encompass a wide range of plaintiffs from diverse backgrounds, it is crucial to understand how factors such as age, race, gender, and other demographic variables influence their responses. These questions are intended to provide a baseline understanding of class members' preferences, ensuring that their collective voice is adequately represented in the litigation process.
(3) Specific Questions: These questions are tailored to the particular circumstances and details of individual cases. They address specific aspects of the litigation that are unique to the case at hand, allowing for a deeper and more precise understanding of class member preferences in those particular contexts. By focusing on the unique elements of each case, these questions help to uncover nuanced insights that may be critical for achieving fair and satisfactory outcomes for participating class members.

GENERAL	SPECIFIC
Screeners	
[Include attention check questions and/or bot-screening mechanisms.]	[Include questions that identify individuals who meet the criteria for class membership, ensuring these criteria align precisely with those used for admission to the class. Only qualified putative class members should be permitted to complete the survey. Disguise these qualifying que stions by interspersing them with irrelevant questions to prevent survey takers from discerning the criteria being assessed. This approach maintains the integrity of the selection process.]
Introduction to Class Actions	
Based on your answers to the questions so far, you may be a class member in a class action lawsuit against [insert case-specific information]. What's a class action? A class action is a lawsuit in which an individual or individuals called "class representatives" bring a single lawsuit on behalf of themselves and other people ("class members") who have similar legal claims. What is this case about? [Insert case-specific information.] The court will ultimately determine which attorney and law firm, or group of attorneys and law firms, will represent class members in this	[Note: Case-specific information must be added for the general information provided in the Introduction to Class Actions text in the left-side column.]

case. The legal team chosen will make crucial decisions about how to litigate the case, what compensation to seek for the class, and more. As a potential class member, your opinions on these matters—i.e., who counsel should be, what remedies should be sought—are important. This survey presents an opportunity for you to provide your opinions and to have a voice in this litigation.	
Choice of Counsel	
1. [Ideal law firm/attorney characteristics] Rank the following characteristics from most to least important for your ideal law firm/attorney in this lawsuit: [Present options in random order.] a. Experienced b. Knowledgeable c. Dedicated d. Cooperative e. Diverse f. Communicative/Responsive g. Aggressive h. Reasonable i. Well-Funded 2. [Important factors in selecting a law firm/attorney] Rank the following factors from most to least important in selecting your law firm/attorney for this lawsuit: a. The work the law firm/attorney has done in identifying and investigating potential claims in your action	[Insert description of each candidate law firm/attorney] 1. Rate [law firm/attorney] on the following scale: [Include a 7-point Likert scale, ranging from "I definitely do not want to hire this [law firm/attorney]" to "I definitely want to hire this [law firm/attorney]."] 2. If you could hire only one [law firm/attorney] to represent you, whom would you hire? [List all law firms/attorneys presented above.] 3. If you could hire a second [law firm/attorney] to represent you, in addition to the one you selected above, whom would you hire? [List all law firms/attorneys presented above.] 4. If you could hire a third [law firm/attorney] to represent you, in addition to the one you selected above, whom would you hire? [List all law firms/attorneys presented above.] 5. [Include case-specific counsel questions. For example, in the 23andMe class action, an important case-specific counsel

b. The law firm/attorney's experience in these types of cases c. The law firm/attorney's knowledge of the applicable law d. The resources that the law firm/attorney will commit to your case (financial resources, human capital, etc.) e. The law firm/attorney's willingness and availability to commit to this time-consuming case f. The time the law firm/attorney will dedicate to listening to you and other class members' preferences regarding the litigation g. The law firm/attorney's ability to work cooperatively with others h. The amount of support the law firm/attorney receives from other firms/lawyers that filed claims in the same litigation i. The law firm's attorney(s)'/attorney's personal background (where they grew up, their marital status, whether they have kids, etc.) j. The law firm's attorney(s)'/attorney's educational background (college and law school they graduated from) k. The law firm's attorney(s)'/attorney's demographic characteristics (their gender, race, age, etc.)	question was, "How important is it to you that the law firm/attorney representing the class has experience handling legal cases under state genetic privacy laws?" (We recommend using questions like this, but instead of bare importance, the questions should have participants assess relative importance to competing considerations.)] 6. In terms of experience, which type of experience is most important to you in this litigation? [List unique and diverse experience pertinent to the litigation possessed by the law firms/attorneys who applied.]

l. Something else about the law firm/attorney. Please specify: 3. [Ranking law firm/attorney's experience] Rank the following types of experience from most to least important when evaluating the law firm/attorney's experience: a. Experience litigating class action lawsuits b. Experience litigating the claims at issue in this litigation c. Experience litigating in the area(s) of law at issue in the litigation d. Experience litigating for the Department of Justice or the federal government e. Experience defending the claims at issue in the litigation f. Experience litigating before the judge presiding over the case	
Litigation Outcome Preferences	
1. What, in your own words, should the main goal of this litigation be? [Free response.] 2. Sometimes there are trade-offs between how long litigation takes and the amount of damages received. Indicate on the following scale your preference. [Include a sliding scale with "Quicker Resolution/Lesser Damages" on the far left and "Slower Resolution/Greater Damages" on the far right.] 3. [Types of relief/preferred remedies] Given the size of the	[Include case-specific litigation outcome possibilities. Here is an example from the 23andMe class action: The 23andMe data breach involved sensitive information, including customers' genetic heritage, ancestral origin, full names, home addresses, profile pictures, and birth dates. Hackers have already posted some of this information on the Dark Web identifying lists of certain vulnerable groups. How important is it to you that the law firm representing the class focuses on getting measures that would prevent others from using your data to

class and that the past settlement amounts obtained in these cases range from $[insert amount] to $[insert amount] per class member, what type of relief would be most valuable to you? Rank the following options from most to least valuable: a. A public admission of wrongdoing from the defendant, which may open the defendant to criminal liability depending on the nature of the conduct b. The defendant to cease their wrongful conduct c. An apology from the defendant d. Mitigation of harm (i.e., [add relevant examples from the case]) e. The defendant to implement safeguards to ensure this type of conduct does not occur in the future f. The defendant's reputation and public image to suffer, possibly affecting the defendant's profits g. Some other relief. Please specify: 4. [Differentiated relief] Do you believe all class members should receive the same (equal) relief in this litigation? a. Yes b. No c. Not enough information to determine d. Other. Please specify: 5. [Differentiated relief justification] If you answered "No" to the question above,	harass, intimidate, harm, or discriminate against you online or in real life? (As mentioned above, we recommend using questions like this, but instead of bare importance, the questions should have participants assess relative importance to competing considerations.)]

please explain why you believe some class members have been harmed more than others and/or are entitled to greater relief. [Free response.] If you answered "Not enough information to determine," what information would you need to make that determination? [Free response.]	
Communication and Participation Preferences	
1. [Frequency of communication] Rank the following preferences for how often you would like to receive information from the law firm(s)/attorney(s) selected to represent you: a. Weekly b. Monthly c. Quarterly d. Annually e. No preference f. Other frequency. Please specify: 2. How interested are you in actively participating in the litigation, meeting with appointed counsel, and dedicating time to further develop the case? [Very/Somewhat/Not at All] [Send me information regarding this]]	
Catch-All	
1. Is there anything else you would like the court to consider when it chooses the law firm(s)/attorney(s) that will represent the class in this case? [Free response.] 2. Is there anything else you would like the attorneys or law firms ultimately chosen to represent	

you in this case to know (i.e., any injuries you have suffered because of the defendant's conduct) or attempt to obtain via the litigation? [Free response.]	
Demographics/Putative Class Member Characteristics	
1. What is your age? [0-110] 2. Which of the following best represents you? a. Male b. Female c. Transgender male d. Transgender female e. Gender variant/non-conforming f. Not listed. Please indicate: g. Prefer not to answer 3. Which of the following best represents you? a. White/Caucasian b. Black/African American c. Hispanic/Latino d. Asian/Pacific Islander e. Native American f. Middle Eastern/Arab g. Multiracial h. Not listed. Please indicate: i. Prefer not to answer 4. In which state do you reside? [Dropdown list of U.S. states.]	1. [Include additional demographics questions that are relevant to the case, such as questions pertaining to income, level of education, marital status, etc.] 2. [Include additional putative class member characteristics. For example, in an automotive class action, it may be relevant if the plaintiff owned a BMW X5 model or an X3 model vehicle or an X5 with certain add-on features, etc.]