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Contact by Counsel with Putative Members of Class Prior to Class Certification

Prepared by the Class Action Litigation Committee and the Ethics and Professionalism Committee

This report responds to Formal Opinion 07-445 of the ABA Standing Committee on Ethics and Professional Responsibility, "Contact by Counsel with Putative Members of Class Prior to Class Certification" (April 11, 2007) ("ABA Opinion").

"The basic assumption underlying the ABA Opinion is that there is no lawyer-client relationship with putative class members until the class is certified and the opt-out period has expired."

The ABA Opinion concludes that: (a) counsel for any party may communicate to putative class members, provided that they comply with Model Rule 4.3, which governs lawyers' contacts, on behalf of a client, with unrepresented persons; AND (b) counsel representing named plaintiffs must also comply with Model Rule 7.3, which governs lawyers' direct contacts with prospective clients.[1] However, according to the opinion, Model Rule 7.3 does not apply to communications with potential class members as witnesses provided they are appropriate and comport with the Model Rules. ABA Opinion at 5-6.

The basic assumption underlying the ABA Opinion is that there is no lawyer-client relationship with putative class members until the class is certified and the opt-out period has expired.

> A lawyer-client relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent [in the form of class certification], there is no representation. Therefore, putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period.

ABA Opinion at 3.

The Association of the Bar of the City of New York took a similar position in Formal Opinion Number 2004-01, "Duties of Lawyers in Class Actions: Decision to Sue; Conflicts of Interest; Duties to Class Members; No-Contact Rule; Disputes Within Class" (March 2004), concluding, *inter alia*, "When a class has been certified but *not before*, DR-7-104 requires the consent of the class action lawyer or the court before a lawyer opposing the class may communicate directly with class members about the action." *Id*. at 7.[2]

The position that there is no attorney-client relationship between members of a potential class and the lawyers representing the named plaintiffs is the majority view in federal courts. This view, however, leads to serious practical imbalances between the ability of defense counsel and plaintiff's counsel to communicate with putative class members. *See* Debra Lynn Bassett, Pre-Certification Communication Ethics in Class Actions, GEORGIA LAW REVIEW, Winter 2002, at 355-56. As that article notes:

> The implications of this majority view upon class action communication and discovery are profound. Until the class is certified, opposing counsel may conduct ex parte interviews,[3] obtain statements regarding the matter in controversy,[4] and negotiate settlements[5]--all without the consent of, or even without notifying, class counsel.[6] Indeed, at least one court has held that opposing counsel need not even inform putative class members that a class action lawsuit is pending.[7] In addition, this view constrains class counsel's communications with putative class members due to the ethical proscriptions concerning solicitation,[8] and the limitations on communicating with unrepresented parties generally.[9]

Id. at 356.

The majority view fails to acknowledge that the filing of a putative class action creates a representative relationship between counsel and putative class members prior to the class certification determination. From the moment the class action complaint is filed, the lawyer filing the complaint assumes fiduciary duties toward the putative class members.[10] Moreover, because members are assumed to rely on the pendency of the class action to preserve their rights, the statute of limitations is tolled from the date of filing of the complaint to either the conclusion of the case (in the event a class is certified) or to the date class certification is denied.[11] Further, plaintiff's counsel's decisions in the litigation directly benefit or harm putative class members, and settlement prior to certification must provide a benefit to putative class members to merit approval by the court. In addition, it is likely that some class members will seek information regarding the litigation from plaintiff's counsel prior to class certification; counsel have a duty to give accurate information to putative class members in such cases.[12]

Defense counsel, however, do not have the same relationship to class members that they have with the unrepresented world at large. Defendants' interests are adverse to the interests of class members vis-à-vis the issues raised by the complaint even before certification. Thus, defendants and their counsel have great incentive to seek quick, cheap settlements with putative class members who have no legal representation, to dissuade putative class members from joining the class, to obtain statements from unrepresented putative class members that will further defendants' position in the litigation, and to undermine cooperation with or confidence in class counsel. Indeed, the case law is replete with examples of defense counsel communicating with putative class members to achieve these and other improper aims.[13] Thus, the policy interests implicated by Model Rule 4.2[14] and its counterpart in the New York Code of Professional Responsibility ("Code"), DR7-104, prohibiting contact with represented parties without counsel's consent, are also implicated by the issue of defense counsel's contact with class members prior to certification.[15]

Model Rule 4.3 and DR 7-104(a)(2) of the Code recognize that these policies apply to unrepresented persons as well, by providing that while representing a client, the lawyer may not give advice to unrepresented persons if the unrepresented persons' interests are in conflict, or have a reasonable possibility of being in conflict, with the interests of the client. Clearly, this provision prohibits defense counsel from giving advice to putative class members, whose interests in the litigation are adverse to those of the defendant. Such advice would include clearly improper practices such as advising class members that the class claims are unlikely to succeed,[16] falsely advising class members that the class action would cost them money,[17] inducing agreements to arbitrate without informing the class member of the pendency of the class action,[18] as well as the giving of advice generally regarding the class action.[19]

The ABA Opinion appears to recognize these incentives for improper overreaching by implying that communications should be limited to factual inquiries. "Both plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified." ABA Opinion at 5. However, the ABA Opinion's conclusion is not limited to factual inquiries; rather, the only limits on defense counsel's communications are those set forth in Model Rule 4.3, which does not limit counsel to factual inquiries. Moreover, "reaching out" to class members regarding the facts that are the subject of the class action is dangerously vague; it is not clear whether such conduct could extend to efforts to undermine the claims of individual class members with whom they speak, maybe including even obtaining releases on the ground that a release concerns the facts that are the subject of the class action.

The ABA Opinion also argues that "the theoretical potential for abuse by defense counsel does not justify limiting a channel of communication that is vital to efficient and fair class litigation." ABA Opinion at 5, citing Vincent R. Johnson, The Ethics of Communicating with Putative Class Members, 17 REV. LITIG. 497 (Univ. of Texas Law School) (1998).[20] Following this line of reasoning, the ABA Opinion concludes that "[b]oth plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified." ABA Opinion at 5. However, it is difficult to see why legitimate fact-finding requires permitting unsupervised communications with putative class members by defense counsel any more than it would require such communications after class certification.

Moreover, after the class is certified, defense counsel are generally prohibited from gathering discovery from class members without showing the court that such information is not available from the named plaintiff, the requests are not unduly burdensome, and the information sought is relevant to common questions. *See* Bassett, 36 GA. L. REV. at 399-400 and fns. 224, 225 (citing cases); Craig M. Freeman, John Randall Whaley & Richard J. Arsenault, Knowledge Is Power: A Practical Proposal to Protect Putative Class Members from Improper Pre-certification Communication, 2006 FED. CTS. L. REV. 2, ¶ IV.5 & fn. 40 (2006). Thus, the ABA Opinion's rule would

impede efficient class action administration by permitting defense counsel to circumvent the rules regarding discovery of class members--particularly rules designed to minimize the burden of the litigation on absent members. As to facts concerning whether a class should be certified and how it should be defined, there is no discernible reason that counsel's fact-gathering from putative class members cannot take place under the regimen of the Federal Rules of Civil Procedure and their state-court equivalents, with notice to all parties.

Cases have recognized a First Amendment aspect to rules governing communications with putative class members. Communications intended to induce opt-outs and achieve settlements constitute commercial speech. *Kleiner v. First National Bank*, 751 F.2d 1193 (11th Cir. 1985). Factual communications constitute traditionally protected speech. *Kleiner*, 751 F.2d at 1205; *Bernard v. Gulf Oil*, 619 F.2d 459 (5th Cir. 1980) (*en banc*), *aff'd* 452 U.S. 89 (1981).

In addition, the Supreme Court in *Gulf Oil Company v. Bernard*, 452 U.S. 89, 101-02 (1981), held that "an 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" and should limit "speech as little as possible. . . ." Factual inquiries would be subject to the same rules as discovery undertaken after class certification; other communications, in the absence of notice to plaintiff's counsel, should be recognized as improper under standard ethical rules, which do not conflict with the First Amendment.

"The Committees believe that these requirements would advance the goal of fair and efficient class action administration far more than permitting defense counsel unfettered, unnoticed access to putative class members."

In addition, in order to prevent well-documented abusive pre-certification communications by defense counsel, courts should require defense counsel to notify plaintiff's counsel of all intended pre-certification communications with putative class members and to state why such communications are needed. Such an approach does not violate defendants' First Amendment rights and gives plaintiff's counsel the opportunity to correct potentially misleading communications. *See* Freeman et al., 2006 FED. CTS. L. REV. 2 at ¶¶ VII.1 *et seq.* (2006).

In summary, the Committees agree that Model Rule 4.3 governs all counsel's contact with putative class members, and Model Rule 7.3 and its counterpart in the Code, DR 2-103 (the anti-solicitation rules), provide additional constraints on plaintiff's counsel's contact with putative class members. The Committees believe that Model Rule 4.3 and Rule DR 7-104(a)(2) of the Code bar defense counsel from giving advice to putative class members because such members' interests are in conflict with the interests of defense counsel's clients.[21] Model Rule 4.2 and DR 7-104 should apply to defense counsel's communications with putative class members. Defense counsel's inquiries concerning factual matters should be subject to the discovery rules applicable to the case, and particularly to the notice requirements therein.[22] Other communications from defense counsel to putative class members, including offers of settlement and efforts to obtain releases, waivers, and opt-outs, should receive the prior approval of plaintiff's counsel; defense counsel could apply to the Court for relief under Fed. R. Civ. P. 23(d) if they believe plaintiff's counsel is unreasonably withholding consent.

The Committees believe that these requirements would advance the goal of fair and efficient class action administration far more than permitting defense counsel unfettered, unnoticed access to putative class members.

Endnotes

1. State bar opinions generally agree that plaintiff's lawyers' contact with potential class members is governed by the rules governing attorney advertising and marketing generally. See New York State Bar Association Committee on Professional Ethics, Opinion 676 (Oct. 31, 1995) (permitting advertisements, as well as letters to current or former employees of a corporation, stating that the attorney represents clients who intend to bring an employment discrimination class action and inviting others similarly situated to participate or furnish information); District of Columbia Bar Legal Ethics Committee Opinion 302 (Nov. 2002)) (permitting lawyers to seek plaintiffs for class actions on the internet); Florida Bar Association Ethics Opinions, Opinion 71-22 (Sept. 17, 1971) (permitting attorneys to make inquiry of possible class members to determine whether they are interested in having monies returned to them by defendant); Iowa State Bar Association, Committee on Ethics and Practice Guidelines, Opinion No. 07-03 (Aug. 8, 2007) (permitting advertising in class actions to the same extent permitted generally); Massachusetts Bar Association Ethics Opinion 82-5 (Mar. 10, 1982) (permitting plaintiff's attorney to advertise to determine whether there are other similarly situated persons to justify a class action); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 92-2 (1992) (permitting out-of-state attorneys to communicate by direct mail with potential class members in Ohio); Supreme Court of Texas Professional Ethics Committee, Opinion 507 (Oct. 1994) (permitting advertising in print media for clients with specific legal problem). In addition, a Texas bar opinion permitted counsel for the defense to contact other members of a potential defendant class. See Supreme Court of Texas Professional Ethics Committee, Opinion 376 (Dec. 1974).
2. A bar opinion from Michigan agrees on this point as well. See Michigan Ethics Board, RI-219 (1994) (permitting defense counsel to answer questions from putative class members about the class action).
3. *Citing Fulco v. Cont'l Cablevision, Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992).

4. *Citing Weight Watchers, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Babbitt v. Albertson's, Inc.*, No. G-092-1883, 1993 WL 128089, at *4 (N.D. Cal. Jan. 28, 1993); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982).

5. *Citing Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987); *Weight Watchers*, 455 F.2d at 773; Manual for Complex Litigation (Third) § 30.24 at 257.

6. *Citing Christensen*, 815 F.2d at 213; *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1303-05 (4th Cir. 1978); *Weight Watchers*, 455 F.2d at 770; *Winfield v. St. Joe Paper Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977).

7. *Citing Jankousky v. Jewel Cos., Inc.*, 538 N.E.2d 689, 692 (Ill. App. Ct. 1989). However, this is not the majority view. Most courts require defendants and their counsel, if they do communicate with putative class members, to inform them of the pendency of the putative class action. *See, e.g., Carnegie v. H&R Block*, 687 N.Y.S.2d 528, 532 (1999) (inducing putative class members to agree to arbitration clause precluding class actions without informing them of the pending class action was "patently deceptive"); *Burford v. Cargill, Inc.*, No. 05-0283, 2007 WL 81667, at *2 (W.D. La. Jan. 9, 2007) (sending release to putative class members without notification of pending class actions "is misleading as a matter of law").

8. *Citing Jackson v. Motel 6 Multipurposei, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997); *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga. 1999); *Guichard v. State Farm Fire & Cas. Co.*, No. 95-2963, 1995 WL 702510, at *3 (E.D. La. Nov. 28, 1995).

9. *Citing* Model Rules Of Prof'l Conduct R. 4.3 (1999).

10. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, No. MDL No. 1409, M 21-95, 2004 WL 2453927 (S.D.N.Y. Nov. 3, 2004) (*citing In re Avon Sec. Litig.*, No. 91 Civ. 2287, 1991 WL 834366 (S.D.N.Y. Nov. 30, 1998) ("Even before a class has been certified, counsel for the putative class owes a fiduciary duty to the class."); *Kingsepp v. Wesleyan Univ.*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("The role of class counsel is akin to that of a fiduciary for the class members."); *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 778, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); *Dondore v. NGK Metals*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (noting "putative class members stand at least in a fiduciary relationship with class counsel"); *Wagner v. Lehman Bros. Kuhn Loeb*, 646 F. Supp. 643, 661 (N.D. Ill. 1986); (class counsel "stands in a fiduciary relationship with the absent class"); *Schick v. Berg*, No. 03 Civ. 6513 (LBS), 2004 WL 856298, at *6 (S.D.N.Y. April 20, 2004) (class counsel owes a fiduciary duty to putative class members vis-à-vis the issues in the class action).

11. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

12. In securities fraud class actions, the first issue to be determined by the Court is to designate a "Lead Plaintiff" who must be preliminarily found to be the most adequate plaintiff for purposes of representing the interests of the class. 15 U.S.C. § 78u-4(a)(3) (B). One of the jobs of Lead Plaintiff is to choose Lead Counsel. 15 U.S.C. § 78u-4(a)(3)(B)(v).

13. *See, e.g., Carnegie v. H&R Block*, 687 N.Y.S.2d 528 (1999) (including mandatory arbitration clauses in new contracts without mentioning a pending class action); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 250 (S.D.N.Y. 2005) (same); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (pressuring putative class members to opt out); *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 342-43, 5 S.W.3d 423, 4356 (1999) (pressuring putative class members into signing releases); *In re School Asbestos Litig.*, 842 F.2d 781 (3d Cir. 1988) (misleading communications intended to influence choices of remedies to presence of asbestos in buildings); *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (discouraging class members from meeting with class counsel); *Ralph Oldsmobile Inc. v. General Motors Corp.*, No. 99 Civ. 4567 (AGS), 2001 WL 1035132 (S.D.N.Y. Sept. 7, 2001) (obtaining releases without informing members of the class action); *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994) (denigrating class action and claiming it would cost putative class members substantial sums).

14. As stated in Formal Opinion 95-396 of the ABA Standing Committee on Ethics and Professional Responsibility, "Communications with Unrepresented Persons" (July 28, 1995) at 4, "the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."

15. For these reasons, some courts agree that putative class members should be protected against unregulated communications from defense counsel. *See EEOC v. Morgan Stanley & Co., Inc.*, 206 F. Supp. 2d 559, 561 (S.D.N.Y. 2002) (EEOC suits are "in the nature of class actions"; employers' communications with employees had to be approved by the court); *Dondore v. NGK Metals*, 152 F. Supp. 2d at 665-666 ("truly representative" nature of a class action affords its putative members the protections contained in Rule 4.2); *Braun v. Wal-Mart Stores, Inc.*, 2003 WL 247695 (Phila. C.P. 2003) (defense could not conduct ex parte interviews with putative class members because their interests were adverse to the defendant's interest).

16. *Am. Fin. Sys., Inc. v. Harlow*, 65 F.R.D. 572, 576 (D. Md. 1974).

17. *Hampton Hardware*, 156 F.R.D. 630.

18. *Long v. Fid. Water Sys., Inc.*, No. C-97-20118 RMW, 2000 WL 98914, at *3 (N.D. Cal. May 26, 2000).

19. *Impervious Paint Indus. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981).

20. Professor Johnson argues, in the cited article, that the strict rule against contact with represented persons should be reconsidered because the rationales for that rule do not hold up to scrutiny. In addition, he argues that those rationales apply with far less force to members of putative classes. Professor Johnson points out that a rule against contact with putative class members would protect such members more extensively than victims of non-mass torts, with whom defense counsel are permitted unfettered access prior to their representation. Johnson, 17 REV. LITIG. at 516-17. However, this fact more readily supports a rule against contact with unrepresented tort victims generally, rather than support for a rule allowing defense counsel unfettered contact with putative class members. In any event, Professor Johnson points to no specific benefit to be obtained, and no specific reason that allowing defense counsel unfettered contact with putative class members is "vital to efficient and fair class litigation."

21. *See Impervious Paint*, 508 F. Supp. at 723 (applying old Model Code DR 7-104(a)(2) to prohibit the giving of advice by defendants' representatives to class members).

22. The proposed rule would not limit communications concerning matters unrelated to the litigation with putative class members from defendants where there is a prior relationship between them--for example, communications from employers to employees who are members of a putative class in employment litigation, or communications in the normal course of business from credit card issuers to credit card holders.

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