Whose Clients Are They? Contacting Putative Class Members

By Cara Greene and Jill Maxwell

The prosecution and defense of class actions involve an abundance of ethical considerations. Attorneys must balance zealous advocacy with the governing rules of professional responsibility. For instance, ex parte communications are often an effective and cost-conscious way to glean information, but attorneys on both sides must consider whether contact with putative class members is permissible and, if so, what form that contact may take. With a little forethought, however, lawyers can ensure that they do not overstep ethics rules when contacting putative class members.

Unlike a traditional lawsuit, in a class action an attorney files a complaint on behalf of an individual *and* a proposed class of individuals. While there is obviously an attorney-client relationship between the attorney and the named plaintiff, and most courts agree that an attorney-client relationship is established for all class members *following* certification, the courts are divided as to whether an attorney-client relationship exists between class counsel and putative class members *before* class certification.

The point at which the attorney-client relationship commences is particularly relevant to determining whether attorney communications with putative class or collective members conform to the applicable rules of professional responsibility. Rule 4.2 of the ABA Model Rules of Professional Conduct governs ex parte contact with represented individuals, stating:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The rule preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that clients will disclose confidential information.

Those courts holding that putative class members are represented parties recognize that unnamed class members have certain interests in the lawsuit. On the other hand, those courts that have declined to recognize an attorney-client relationship have done so because the putative class members were not active participants in the litigation and had not cultivated a relationship with class counsel.

Prudent defense counsel should act cautiously when initiating ex parte contact with putative class members. While there are legitimate reasons that defense counsel might want to contact putative class members prior to certification (such as to gather information to oppose class certification), case law is replete with abuses by defense counsel in the class action context, including misrepresentations concerning the class action's purpose, status, or effect, as well as threats and other acts of coercion against the putative class members. In such instances, courts may limit otherwise permissible contact between defendants' counsel and putative class members in order to counteract threats to the fairness of the litigation process and manage the prosecution of a class action.

Even if defense counsel's contact with putative class members does not violate the ethics rule regarding ex parte contact or a court order, the attorney must still comply with Model Rule 4.3. Model Rule 4.3 governs attorneys' contact with unrepresented parties and requires that attorneys (1) not state or imply that they are disinterested, (2) correct a layperson's understanding of the attorney's role, if the attorney knows (or should reasonably know) that there is a misunderstanding, and (3) not give legal advice, other than the advice to secure counsel, if the attorneys know (or should reasonably know) that there is a possibility of a conflict of interests.

Defense counsel are not the only ones who must grapple with ethical obligations owed to putative class members; plaintiffs' counsel also must consider whether contact with putative class members conforms to the applicable rules of professional responsibility. For instance, Model Rule 7.3 limits attorneys' direct solicitation of clients *primarily* for the attorneys' own pecuniary gain. However, plaintiffs' counsel may contact putative class members to further the prosecution of an existing case, thus fulfilling their ethical obligations to "act with reasonable diligence and promptness in representing a client." Model Rule 1.3.

Plaintiffs' counsel also must tread carefully if putative class members are sufficiently high-level employees of a corporation so as to trigger Model Rule 4.2's prohibitions. Furthermore, where plaintiffs' counsel's communications are clearly calculated to be injurious to the defendant, the court may use its discretionary powers to limit the communications. Even if communications are not otherwise limited, plaintiffs' counsel should take care not to solicit privileged information from putative class members.

Both plaintiffs' counsel and defense counsel must exercise caution when contacting putative class members. By carefully considering the rules of professional responsibility and seeking the court's direction when necessary, counsel can ensure that their communications are an appropriate and ethical means to gather information necessary for prosecuting or defending a class action. ■

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