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## Defense Can Contact Members Of Proposed Class

ETHICS PANEL OPINION LEVELS PLAYING FIELD, MAY PROMOTE SETTLEMENTS

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The Connecticut Bar Association Professional Ethics Committee recently released an important opinion clarifying the strategic options available to class action defense counsel. For the first time in Connecticut history, the committee stated that defense counsel can directly contact members of a putative class without fearing ethical violations. (CBA Informal Op. 2011-09). Until now, Connecticut offered no clear guidance on this important issue.

Previously, defense counsel generally avoided directly contacting members of the putative class. Rule of Professional Conduct 4.2 generally forbids an attorney from communicating with a party who is represented by another lawyer. It was unclear whether members of a putative class counted as parties. If a court later denied certification, then

the members of the putative class were never parties to the case. But if the court later granted certification, could one say in hindsight that they were represented parties all along?

Worried about that possibility, class action defense counsel generally avoided contacting members of a proposed class. That hamstrung defendants in two ways. First, defendants could not ask members of a proposed class the very questions that would help defendants defeat class certification: e.g., questions relevant to the requirements of commonality (does the class share common issues?) and predominance (do issues common to the would-be class predominate over issues unique to each plaintiff?). In a class action alleging fraud on the basis of uniform documents sent to each member of the putative class, for instance, it can be crucial to determine the content of oral conversations with the defendant, as individualized conversations can defeat predominance.

Second, defendants could not investigate the merits of the claims by talking with the very people whom the named plaintiffs claim to have been harmed by the product or service. That inability hindered counsel's ability to mount a defense, of course, but by delaying defendants' ability to gain a greater understanding of the issues in dispute, it also delayed reasonable settlements and, on occasion, remedial efforts.

At least as importantly, fear of the ethical rule often meant that defendants could never ask questions of most members of the putative class. Because courts are often reluctant to authorize discovery against class members even



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after a class is certified, a defendant who can't ask a question of a member of a putative class may never be able to ask that person a question.

The CBA committee removed those constraints, making the playing field more even. "The issue," it noted, "turns on whether a putative class member is represented by the attorney or attorneys representing the named plaintiffs where class certification has been sought but not yet determined." The answer was no: "The mere fact that an attorney has filed an action and unilaterally asked the court to appoint him or her as the class' attorney, does not – without more – establish an attorney-client relationship between that attorney and members of the proposed class such that the proposed class members cannot be contacted by attorneys for defendants in that action."

The committee concluded "that unless and until the class is certified by the Court, [defense counsel] may contact the putative class members." As a result, defense counsel "do not violate Connecticut Rule of Professional Conduct 4.2 by contacting putative class members."

Before contacting members of a proposed class, however, defense counsel should keep three points in mind.

First, contact is only permissible before class certification has

been granted. Before certification, the putative class members are not represented by the named plaintiff's attorney and Rule 4.2 does not bar communications by defense counsel. But after the court grants a motion for class certification, the attorneys who are appointed as class counsel represent every member of the certified class and are considered to have an attorney-client relationship with them. At that point, defense counsel must abide by Rule 4.2 and cannot communicate with members of the certified class without the consent of class counsel. (Connecticut has not yet addressed whether defense counsel may contact members of a certified class until the opt-out period has expired; prudence suggests they should not until the ethics committee says otherwise.)

Second, defense counsel cannot contact the named plaintiffs at any time, or any member of the putative class whom counsel knows to have an individual attorney-client relationship in the case. Such plaintiffs in a putative class action should be treated no differently than a plaintiff in an individual lawsuit.

Third, when communicating with members of the proposed class, attorneys must be cognizant of Rule 4.3, which governs an attorney's interactions with an unrepresented person. That rule prohibits an attorney from stating

or implying that he is disinterested in the matter, requires the attorney to correct any misunderstandings about the attorney's role in the matter, and bars the attorney from giving the unrepresented person any legal advice, except the advice to retain an attorney.

Ethics committee opinions are advisory, persuasive though not binding on the Statewide Grievance Committee or the courts. But here, where the opinion aligns with similar pronouncements from the American Bar Association, disagreement with the ethics committee opinion is unlikely. Class action defense counsel with the same view will now likely choose to directly contact putative class members to gather evidence relevant to the underlying claims and questions of class certification. Competent counsel will consider doing so promptly after a class action complaint is filed, ensuring that critical information can be learned directly from putative class members, rather than filtered through plaintiffs' lawyers or their hand-picked named plaintiffs. ■