Connecticut Bar Association

Professional Ethics Committee

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

Approved November 16, 2011

INFORMAL OPINION 2011-09

DEFENSE COUNSEL CONTACT WITH PUTATIVE CLASS MEMBERS BEFORE CERTIFICATION

An attorney represents a defendant who has been sued in the United States District Court for the District of Connecticut ("Requesting Attorney"). The named plaintiffs have filed their action as a putative class action purporting to bring the action on behalf of themselves and other similarly situated persons. The district court has not yet decided whether to certify the case as a class action. The Committee has been asked whether the Connecticut Rules of Professional Conduct allow the Requesting Attorney to contact putative class members regarding the subject matter of the litigation.[1]

Connecticut Rule of Professional Conduct 4.2 states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so." The issue thus 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. We conclude that unless and until the class is certified by the Court, the Requesting Attorney may contact the putative class members.

Although our research has not disclosed any State of Connecticut authority on this issue, in *Weight Watchers of Philadelphia v. Weight Watchers Int'l*, 455 F.2d 770 (2d Cir. 1972), the Second Circuit, in rejecting the appealability of an order under Fed. R. Civ. P. 23(e), implicitly approved the defendant's counsel

[1] The Requesting Attorney may not contact the named plaintiffs who are, in fact, represented by counsel regarding the subject matter of the litigation.

contact with several putative class members to reach a settlement prior to the class being certified. The Second Circuit held that the "plaintiff has no legally protected right to sue on behalf of other [putative plaintiffs] who prefer to settle; F.R. Civ.P.23(e) requiring court approval of the dismissal or compromise of a class action does not bar the non-approved settlements with individual members which have no effect upon the rights of others." 455 F.2d at 775 (citation omitted). The Second Circuit reaffirmed this holding in *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987), stating that "defendants do not violate [Fed. R. Civ. P. 23(e)] by negotiating settlements with potential members of a class." In *Garrett v. Metro. Life Ins. Co.*, 1996 WL 325725 at *6 (S.D.N.Y. Jun. 12, 1996), the court, citing, *inter alia*, *Christensen*, held that, "before class certification, . . . putative class members are not 'represented' by the class counsel for purposes of [New York's counterpart to Connecticut Rule of Professional Conduct] 4.2."

In addition, both the American Bar Association and New York City Bar Association have opined that there is no ethical violation when counsel contacts putative members of a class prior to any certification by the court. In Formal Opinion 07-445 (Apr. 11, 2007), the ABA's Standing Committee on Ethics and Professional Responsibility concluded that neither the Model Rules of Professional Conduct 4.2 or 7.3 generally prohibit counsel for either the plaintiff or the defendant from communicating with persons who may in the future become members of a class. Likewise, in Formal Opinion 2004-01, reported at 2004 WL 2155078, the New York City Bar Association considered the application of New York's Disciplinary Rule relating to contact with a represented party in a class action. The Opinion found that "[w]hen the lawyer proposing to communicate represents a party opposing a class, the prohibition [regarding contacting a represented party] applies when the class has been certified, although it does not apply before certification." 2004 WL 2155078 at *5 (footnotes omitted); *see also* Philadelphia Ethics Opinion 2009-1, reported at 2009 WL 964148 at *2-3 (answer governed by jurisdiction where action pending; majority rule is that contact with putative class members permissible); Michigan Ethics Opinion RI-219, reported at 1994 WL 761155 at *4 (defense counsel not restricted by Rule 4.2 from pre-certification communications with putative class members).

In addition, the Restatement (Third) of Law Governing Lawyers Section 99, Comment l (2000), notes that:

> A lawyer who represents a client opposing a class in a class action is subject to the anti contact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

Likewise, the Manual for Complex Litigation (Fourth) Section 21.12 at 249 (2004), states that "[d]efendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification. . . ."

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. Accordingly, the Committee agrees with the majority rule that putative class members are not represented until the class is certified. There are legitimate reasons for counsel to contact putative class members regarding the facts that are the subject matter of the litigation. While counsel may seek to place reasonable restrictions on such contact, *see Gulf Oil v. Bernard*, 452 U.S. 89, 100-04 (1981), and while attorneys seeking to contact putative class members should be mindful of all of the Connecticut Rules of Professional Responsibility, including Rule 4.3 (addressing the ethical obligations incumbent upon an attorney dealing with an unrepresented person, in particular, one whose interests may be adverse to the Requesting Attorney's client), such attorneys do not violate Connecticut Rule of Professional Conduct 4.2 by contacting putative class members.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
John R. Logan, Chair