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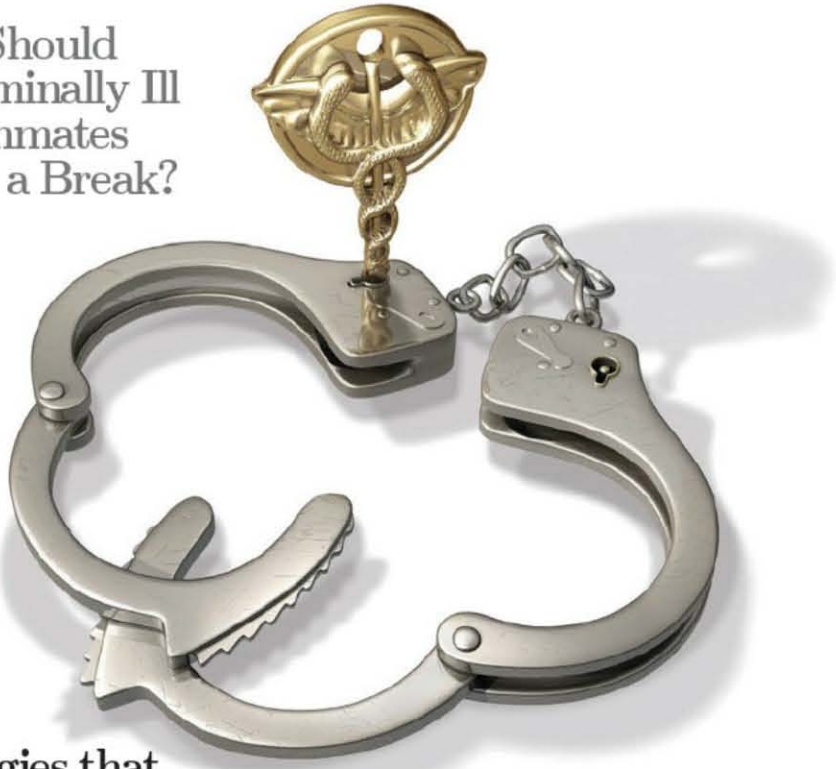

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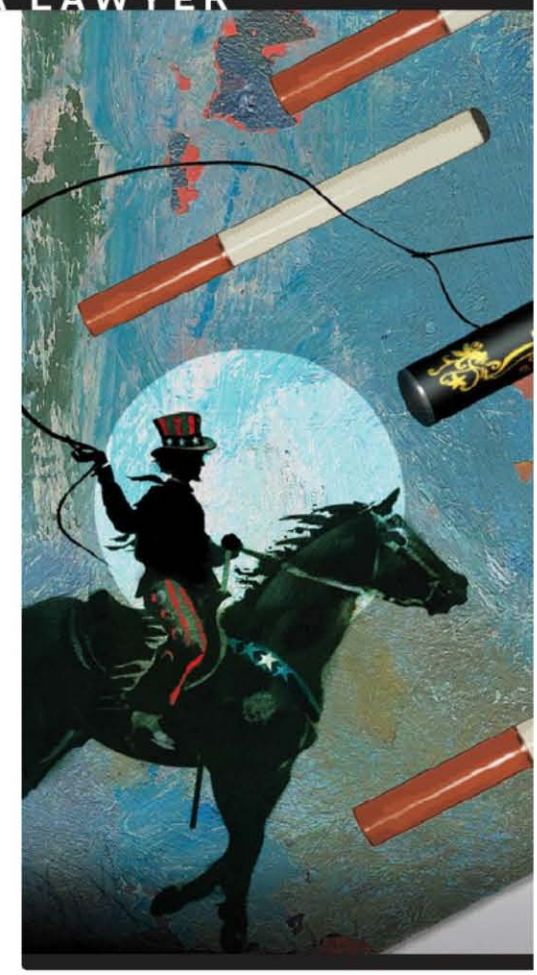

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TALKING TO THE CLASS

BY RAY E. GALLO and PATRICK V. CHESNEY

IN CLASS ACTIONS, HEATED BATTLES can result when attorneys communicate with members of a putative (yet to be certified) class. Communications during the notice period—after the class has received notice of the proposed class settlement but before the opt-out/claims period ends—are particularly sensitive.

DIFFERENT INTERESTS

Three different groups of lawyers may want to communicate with putative class members during the notice period: defense counsel, competing plaintiffs counsel, and provisionally appointed class counsel.

The law and related ethics rules apply differently to each of these groups. The first two are governed by clear precedent and are essentially muzzled, principally by the rules prohibiting communications with represented parties. But the rules governing provisionally appointed class counsel are less clear.

Some plaintiffs lawyers have argued that the controlling principles are (or ultimately will be determined by the courts to arise from) those requiring class counsel to be available to communicate with class members during the notice period. After all, class members need accurate information to decide their responses to a class notice, and only class counsel knows the case well enough to provide meaningful advice (particularly because key discovery is exclusively held by class counsel and is often shielded from public view by a protective order).

LIMITS ON DEFENSE COUNSEL

Defense counsel may communicate with putative class members in nonexploitive ways before the class notice goes out. Even a precertification settlement offer sent by the defendant to individual class members, if not abusive, does not justify an order limiting communications. (See *Cox Nuclear Med. v. Gold Cup Coffee Svcs., Inc.*, 214 F.R.D. 696, 698–99 (S.D. Ala. 2003).) However, communications with the potential for abuse,

such as seeking releases or waivers from class members without notifying them of the proposed class action, may provide putative class counsel with grounds for obtaining a protective order. (*Manual for Complex Litigation* (4th Ed.) (*MCL*), § 21.12, pp. 248–49.) This is especially true when there is a potentially coercive relationship, such as when the putative class consists of the defendant's current employees or students. (See *Rankin v. Bd. of Educ. Wichita Pub. Sch.*, U.S.D. 259, 174 F.R.D. 695, 697 (D. Kan. 1997).)

But defense counsel's right to communicate with putative class members during the notice period is strictly limited. Once provisional certification is granted, contact with class members violates the rules barring communication with represented parties. (*Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1460 (2009).) Moreover, defendants cannot benefit themselves by discouraging or preventing potential class members from participating in a pending class action. (*Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051, 1057 (1986); *Rankin*, 174 F.R.D. at 697.) Such communications undermine the goals of the process: to allow an opportunity for class members to choose inclusion or exclusion in the class based on their personal best interests (*MCL*, § 21.31, p. 285). When the litigants already have reached an agreement to settle on a class-wide basis, the notice period allows for a "vetting" of the proposed settlement with the proposed class, which has the opportunity to opt out or object to it. In addition, the court will be able to exercise its duty to protect the class against an unfair settlement resulting from collusion between class counsel and the defendant. (*7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000).)

COMPETING PLAINTIFFS COUNSEL

Rival plaintiffs counsel may wish to defeat a proposed settlement so they can prosecute a competing class action. They also may attempt to solicit and represent opt-outs from a proposed class or settlement.

The law prohibits those communications during the class-notice period. In *Hernandez*, the trial court conditionally certified a class for settlement purposes and approved the class notice. Putative class counsel in a competing class action sent a letter to portions of the provisionally certified class stating that members should "protect" themselves from the settlement by opting out and joining the competing action that was "in progress." The court determined that these letters violated California ethics rules governing

communications with represented parties—rules that applied upon the provisional certification of the class based on the court's provisional appointment of class counsel. (*Hernandez*, 174 Cal. App. 4th at 1447, 1458–59.)

PROVISIONALLY APPOINTED CLASS COUNSEL

Attorneys who have been appointed to represent the proposed class—provisionally appointed class counsel—seemingly have the right of unfettered attorney-client communications with the provisionally certified class. Defendants frequently argue that, like defense counsel, provisionally appointed class counsel cannot "compete with" the class notice by volunteering any substantive information beyond the content of the notice and settlement mechanics. But this often-accepted notion does not appear to follow the law.

The key precedents in the area (*Hernandez* and *Gainey*, cited above) hold *nothing* regarding provisionally appointed class counsel—they only prohibit *other* lawyers from communicating with class members. And the dicta in those cases (asserting that the court has a duty to control all communications with the class) appears to contravene the true rationale of those cases, which seems to be that defendants and interloping plaintiffs lawyers should not be communicating with parties who are provisionally represented by class counsel.

Unfettered communication between class members and their counsel seems essential. Class members should be entitled to meaningful representation during the notice period, so putative class counsel should be free to communicate with class members about the case. Consistent with this view, case law holds that class counsel has a duty to represent the interests of the entire class. (See *7-Eleven*, 85 Cal. App. 4th at 1159.) That obligation is understood to include responding to class members' inquiries during the notice period. (*MCL*, § 21.641, p. 323.)

These communications can encompass advice about whether to opt out of the settlement. Class resolutions are almost always "rough justice," as no settlement is best for every class member. (See *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 743 (2009).) Accordingly, questions such as "should I opt out?" are inevitable. And they cannot be answered meaningfully without going beyond the bare content of the class notice.

The interests of justice therefore suggest class counsel must be free to volunteer at least general advice regarding

under what circumstances opting out might be wise for a particular person, unless doing so conflicts with the duty owed to the class as a whole in some irreconcilable way. But such an irreconcilable conflict would appear legally implausible.

Class counsel's duty is to the class, not the settlement. If the settlement is truly unfair or inadequate as to any part of the class, then confirmation is illegal and cannot occur. Accordingly, even advice that theoretically jeopardizes a proposed class settlement (for example, advice that leads to a successful objection to final approval) is nevertheless appropriate. If a flawed settlement fails (is found to be unfair or inadequate and thus is not approved by the court) because class counsel gives accurate information to class members, then the "vetting" aspect of the class-notice period will have served its purpose. Class counsel's conduct will have served the class and assisted the court in its exercise of its duty to act on behalf of class members.

Most cases discussing communications by class counsel concern only the class notice, not how counsel should or may respond to individualized inquiries. These decisions state the obvious: that the official notice should not advise all class members to opt out or serve as court-sanctioned solicitations. (See *White v. Experian Information Solutions, Inc.*, 2009 WL 4267843 at *7–*8 (C.D. Cal. 2009).)

It is common and proper to send notice to class members of their right to contact class counsel if they wish to opt out. But in one case, the court struck language from a proposed class notice stating that class counsel "may be willing to represent [opt-outs] in individual cases" as an improper solicitation. However, the court did so because that language was "duplicative of other less leading information stating that class members should contact either class counsel or their own attorney if they wish to opt-out." (*Macarz v. Transworld Sys., Inc.*, 201 F.R.D. at 54, 57 (D. Conn. 2001).)

Defendants argue that for class counsel to advise anyone to opt out creates a conflict of interest because opt-outs could jeopardize the settlement. Defendants seeking closure understandably want as many releases for their settlement dollars as possible. Many class settlements include a "blow-up" provision entitling defendants to void the settlement if too many putative class members exclude themselves. Advice that tends to increase the opt-out rate and empower defendants to rescind their offer arguably conflicts with class counsel's duty to those members who support the settlement. Also, opting out (or participating) is just one factor a court considers in deter-

mining the fairness and adequacy of a proposed settlement.

However, any settlement later disapproved by the court has to be found "unfair, inadequate, or unreasonable" and therefore not in the interest of the class. So in such circumstances class counsel will be seen to have served the class ably by providing accurate information, even if the settlement fails as a result.

Moreover, blow-up provisions aside, opt-outs seemingly have little or no correlation with settlement approval. One excellent statistical study suggests that opt-outs (who do not vote yes or no on a proposed settlement but merely decline to participate in it) have little or no effect on a court's decisions regarding settlement approval. (See Theodore Eisenberg and Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VANDERBILT L. REV. 1529, 1558 (2004).) This makes sense. A court should ascertain whether the opt-outs indicate that some identifiable segment of the class is being unfairly treated, or that the case is simply not certifiable as a class action due to a lack of commonality. But if the opt-outs do not suggest either of these problems, their existence would seem to be irrelevant to settlement confirmation.

Finally, conflicts are inherently built into the device of the class action, when "a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests and views." (*Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988).) In other words, resolution of a class case requires a pragmatic approach. Courts and class counsel should not lose sight of the ultimate goal: to ensure that class members may make fully informed decisions. Rules of professional conduct, written with the traditional one-client-per-attorney model in mind, should not be rigidly applied when their effect would be to limit the amount of information class members receive from the attorney charged with protecting their interests.

PROVIDING SOUND ADVICE

There appears to be no case holding putative class counsel liable, or guilty of any ethics violation, for failing to provide advice or information beyond the settlement terms and mechanics to individual class members. Limiting information to generic, one-size-fits-all documents and scripts approved by the defense is likely acceptable as being "standard" in the industry.

Still, this argument seems unfair to class members. Consider these questions: At what point may an unnamed class member have a claim against class coun-

sel for denying them additional information or services, where only class counsel had the information the class member needed to make an informed decision about participating in a proposed class action? Doesn't class counsel have a duty to all class members? Aren't all class members entitled to equal treatment?

Class representatives, having been individually represented, obtained significant personal advice from class counsel. Other class members' information shouldn't be limited to boilerplate documents drafted with input from defendants whose interests are directly adverse to theirs. Moreover, class counsel is usually the only lawyer who has obtained and reviewed the discovery that informs any valuation of the case. It is therefore extremely unlikely that any class member can obtain informed legal advice from anyone other than class counsel. Restricting class counsel's right to communicate thus effectively deprives individual class members of legal advice and representation from the only lawyer(s) who can capably advise them. This approach would appear to violate the letter and spirit of published guidelines. (See *MCL*, § 21.12, p. 249 n.753 (noting putative class counsel is a fiduciary "and owes class members 'duties of loyalty and care' "); *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997) ("Class counsel must be available to answer class members' questions. . . .").)

In our opinion the correct approach is for class counsel to provide the best available advice through "mass" means, such as a secure website available only to class members. As class members' "provisional" lawyers, aren't they obliged to make available to inquiring class members what they know that members should consider in deciding how to respond to the notice?

Class counsel may wish for clearer rules to govern their contacts with class members, perhaps hoping for provisions similar to those applicable to communications by defense counsel (or from competing plaintiffs counsel). But until class counsel are willing to risk having their proposed class settlements hung up on appeal while class counsel's communications with putative class members are evaluated for ethical propriety, they are unlikely to get those rulings. Courts should simply require provisionally appointed class counsel to provide the best advice they reasonably can, and to offer it through an economical procedure, to all class members. And class counsel must remain aware that defendants may challenge their right to do so, albeit with little or no on-point authority.

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