

July-September 2011 Alaska Bar *Rag*

## The “No Contact” Rule in Class Actions

By Mark J. Fucile  
Fucile & Reising LLP

Class actions are a unique procedural vehicle and pose equally unique issues for the application of the “no contact” rule, RPC 4.2. The Alaska class action rule, Rule of Civil Procedure 23, generally mirrors its federal counterpart, FRCP 23. Similarly, Alaska’s “no contact” rule is patterned on its ABA counterpart, Model Rule 4.2. In this column, we’ll first look briefly at those aspects of RPC 4.2 that have particular resonance in the class action context and then we’ll turn to how the no contact rule has been interpreted in class actions in both Alaska and beyond.

### ***The “No Contact” Rule***

RPC 4.2 prohibits communication “about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter[.]” It applies to both individuals and organizations. With the latter, Alaska Bar Ethics Opinion 2011-2 notes that managers and other “speaking agents” (defined by evidence law as those whose statements will bind the organization) are generally included within the scope of the entity counsel’s representation (both internal and outside counsel). Contact is also permitted under exceptions specified in the rule, the most significant of which in class actions is by court order.

The “no contact” rule is predicated on the fact of representation by another attorney. Under both the Alaska RPCs (Scope, Paragraph 17) and the ABA Model Rules (Scope, Paragraph 17), the question of whether an attorney-client relationship exists is governed by the substantive law of the jurisdiction rather than the professional rules. In Alaska (see *Doyon Drilling, Inc. v. Loadmaster Engineering, Inc.*, No. 3:10-cv-0094-HRH (D. Alaska Apr. 29, 2011), Order at 11 (unpublished)) and nationally (see Restatement (Third) of the Law Governing Lawyers (Restatement), § 14 (2000)), the analysis usually turns on the subjective belief of the client and whether that belief is objectively reasonable under the circumstances. In the class action context, however, lawyers for the class typically don’t have a “traditional” attorney-client relationship with their clients beyond the class representatives. For example, Alaska RPC 1.7(d) excludes unidentified class members for conflict purposes. Therefore, courts have attempted to fashion guidelines that blend the traditional yardstick for determining an attorney-client relationship with the unique procedural setting of class actions.

***Applying the “No Contact” Rule to Class Actions***

Most authorities hold that prior to class certification, class counsel does not represent potential class members other than the class representatives with whom the lawyer has a direct attorney-client relationship (see *generally* Restatement, § 99, cmt. I; New York City Bar Ethics Op. 2004-1, § 4 (2004)). Accordingly, prior to class certification, potential class members are generally

“fair game” for contact absent a direct attorney-client relationship or a controlling court order.

Similarly, most authorities hold that after class certification and the expiration of any “opt out” period, class counsel by virtue of the procedural process has an attorney-client relationship with remaining class members (see *generally* ABA Formal Ethics Op. 07-445 (2007) at 3). Therefore, after class certification and the expiration of the “opt out” period, class members remaining are “off limits” outside of formal discovery. (Some statutes use “opt-in” periods instead. In those instances, the same prohibition would apply to class members who had “opted in.” See *Parks v. Eastwood Ins. Services, Inc.*, 235 F. Supp.2d 1082 (C.D. Cal. 2002).)

The situation is much less clear, however, for the period between class certification and the expiration of the “opt out” period. Some courts have held that contact is impermissible because, as *Resnick v. American Dental Ass’n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982), put it, once the class is certified “[c]lass counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client.” By contrast, ABA Formal Ethics Opinion 07-445 reasoned (at 3)—without citation to any authority—that no attorney-client relationship should be inferred until the expiration of the “opt out” period because “[i]f the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation.”

Since the ABA opinion was issued in 2007, several decisions have quoted its conclusion without analyzing whether or not it is correct (see, e.g., *Kay Co., LLC. v. Equitable Production Co.*, 246 F.R.D. 260, 264 (S.D. W. Va. 2007); *Morris v. General Motors Corp.*, No. 2:07-md-01867, 2010 WL 931883 at \*5 (E.D. Mich. Mar. 11, 2010) (unpublished)). By contrast, the trial court in *Throop v. Air Logistics of Alaska, Inc.*, No. 4FA-03-835 CI (Alaska Sup. Ct. 4th Dist. Jul. 2, 2004), Order (unpublished), found that contact by defense counsel during this interim period violated RPC 4.2. (This issue was not addressed in a subsequent appeal, see *Air Logistics of Alaska, Inc. v. Throop*, 181 P.3d 1084 (Alaska 2008).)

The period between class certification and “opt out” can be especially sensitive—with the “opt outs” potentially shaping the litigation significantly. In that setting, class members weighing whether to remain “in” or “out” may be tempting targets for class counsel, defense counsel or even other claimants’ counsel looking to separately represent the “opt outs” (see, e.g., *Austen v. Catterton Partners V, LP*, \_\_\_ F.Supp.2d \_\_\_, 2011 WL 1374035 at \*7 (D. Conn. Apr. 6, 2011) (discussing the contrasting communications interests of class and defense counsel); *In re McKesson HBOC, Inc. Securities Litigation*, 126 F.Supp.2d 1239 (N.D. Cal. 2000) (involving other claimants’ counsel interested in representing “opt outs”).

At the same time, the penalties for “guessing wrong” on the “no contact” rule range well beyond bar discipline (see generally *In Korea Shipping Corp.*, 621 F.Supp. 164 (D. Alaska 1985) (discussing range)). Court-imposed sanctions can include exclusion of evidence (see, e.g., *Bell v. Kaiser Foundation Hospitals*, No. 03-35876, 2004 WL 2853107 at \*\*1 (9th Cir. 2004)), disqualification (see, e.g., *In re News America Publishing, Inc.*, 974 S.W.2d 97 (Tex. App. 1998)), and monetary sanctions for corrective notices (see, e.g., *Tedesco v. Mishkin*, 629 F.Supp. 1474, 1485-87 (S.D.N.Y. 1986)).

In light of lack of firm appellate authority and the potential risks involved, a prudent approach for defense (or other) counsel interested in contacting class members between class certification and “opt out” is to seek the court’s permission first. The United States Supreme Court in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-103, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), noted that FRCP 23 permits courts to regulate contact with class members. Alaska Rule of Civil Procedure 23(d) contains a similar provision allowing courts to manage class actions. Moreover, RPC 4.2, like its ABA Model Rule counterpart, includes a specific exception authorizing contact by court order. In short, this is an area where it is far better to be “safe” than “sorry” by asking for court permission.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark

handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.