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Class Actions: Unique Issues, Unique Solutions

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Class actions are a unique procedural tool. They also present some unique ethical issues along with some unique solutions. In this column, we'll look at four: (1) the marketing rules that apply to recruiting class members; (2) the application of the "no contact" rule; (3) conflicts; and (4) settlements. With each, the unique aspect of class actions is that the lawyers involved don't necessarily have the same degree of personal contact with their clients that lawyers handling even a multi-party case do. In light of that, the ethics rules rely heavily on the accompanying procedural rules governing class actions to supply the difference.

Oregon has less guidance in these areas than in most others for two reasons. First, there are no Oregon State Bar formal ethics opinions specifically addressing class actions. Second, much of the national guidance comes from the comments to the ABA's influential Model Rules of Professional Conduct on which Oregon's RPCs are patterned, but Oregon did not adopt the comments when we moved to the RPCs in 2005. Nonetheless, the ABA Model Rule comments have been cited in other areas by both the Oregon Supreme Court and the Oregon State Bar and should offer useful lessons to Oregon lawyers even though they are not "official." Several ABA ethics opinions also deal with these issues in the class action context. We'll discuss both the ABA comments

and two ABA ethics opinions in particular here. These are both available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr. Finally, the key class action procedural rules, ORCP 32 and FRCP 23, together with accompanying court decisions, supply important guidance, too.

Marketing. The unique aspects of class actions begin at the beginning. Although some persons who may become the lawyer's clients actually meet and work with the lawyer in the "usual" way, many, especially in larger class actions, do not. Rather, they may hear of the attempt to form a class through news media reports, targeted mailings or court-required notices to potential class members. ABA Formal Ethics Opinion 07-445 (2007), and Comment 4 to ABA Model Rule 7.2 both address marketing in the class action context. The former notes that both the First Amendment and the ABA's solicitation rule generally allow direct contact with prospective clients through targeted direct mail (*see Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 SCt 1916, 100 LEd2d 475 (1988) and ABA Model Rule 7.3; *see also Gulf Oil Co. v. Bernard*, 452 US 89, 101 SCt 2193, 68 LEd2d 693 (1981) (reaching the same conclusion under FRCP 23)). The latter notes that court-required notices to potential class members are permitted under the marketing rules. It is important to remember, however, that although Oregon's marketing rules are patterned generally on their ABA Model Rule counterparts, there are some variations. In particular, Oregon RPC 7.3(c) requires that targeted direct mailings contain the word "advertisement" on the

outer envelope if in hard copy and at the beginning and end of any electronic communication.

"No Contact" Rule. The primary question in the class action context under RPC 4.2's "no contact" rule is whether members of a potential class are "represented parties" or not before the class is certified by the court involved under the applicable procedural rule. ABA Formal Ethics Opinion 2007-445 answers this question by drawing a distinction between individual class representatives and potential class members:

> "Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period." (*Id.* at 3.)

Conflicts. Conflicts is an area where the class action procedural rules play an especially important role. The Ninth Circuit noted in *Wininger v. SI Management L.P.*, 301 F3d 1115, 1122 (9th Cir 2002), that even in federal class actions state ethics rules control the question of whether a conflict exists. At the same time, the procedural rules in both federal and state court play an important role in vetting conflicts on the part of class counsel. Both FRCP 23(a)(4) and 23(g)(1)(B) and ORCP 32A(4) require a showing that proposed counsel for the class will "fairly and adequately" represent the class and the courts have framed this requirement in roughly comparable terms as it relates to conflicts: s*ee, e.g., Linney v. Cellular Alaska Partnership*, 151 F3d 1234, 1239 (9th Cir 1998) ("This requirement ensures that the class is adequately represented both by counsel and the named representative parties."); *Alsea Veneer, Inc. v. State*, 117 Or App 42, 53, 843 P2d 492 (1992), *aff'd in part and rev'd in part*, 318 Or 33, 862 P2d 95 (1993) ("In this context, the interests of the class can be adequately protected if (1) there are no disabling conflicts of interest between the class representatives and the class; and (2) the class is represented counsel competent to handle such matters.").

Comment 25 to ABA Model Rule 1.7 addresses what can be an equally important aspect of conflicts analysis—who is *not* included in the equation:

> "When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the

> class are ordinarily not considered to be clients of the lawyer for … [conflict purposes]. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."

Settlement. As with conflicts, the comments to the ABA Model Rules rely principally on the procedural safeguards built into the class actions rules to ensure that clients are adequately protected in settlements. In particular, Comment 13 to ABA Model Rule 1.8 notes that class action settlements are not measured by the Model Rule 1.8(g)'s aggregate settlement standards in light of the alternative procedural protections afforded by the class action rules:

> "Lawyers representing a class of plaintiffs or defendants . . . may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class."

Summing Up. Class actions are a unique procedural vehicle. The ABA comments and ethics opinions in this setting mirror their uniqueness by relying heavily on their procedural counterparts to craft solutions that are both ethical and practical.

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