Ethical issues in developing a class or collective case

Common questions in the early stages of class cases and the applicable ethical rules

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When we were starting out as plaintiffs' attorneys working on class and collective action employment cases in private practice, we felt the need for a primer on the ethical rules that were likely to come into play. Here are a few common questions facing plaintiffs' lawyers in the early stages of class cases, and what the ethical rules have to say about them.

Contacting potential class members

My firm is investigating a potential wage and hour case. Can I call potential class members and ask if they want to join? Email them? Send a letter?

In broad strokes, attorneys are free to solicit potential clients in writing, provided that the solicitations comply with certain requirements, but attorneys are not permitted to solicit by telephone or in person. One purpose of prohibiting telephone solicitations is, as the ABA Model Rules put it, to address the concern that a person "who may already feel overwhelmed by the circumstances giving rise to the need for legal services [] may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately." This concern is largely absent if the potential client has received a letter, had an opportunity to consider his or her options, and then affirmatively made a telephone call to you. In addition, if a person is contacting you for legal advice after receiving a letter from you, the contents of the conversation are likely privileged, even if the call does not lead to representation. (See Cal. Evid. Code, §§ 951, 954.

The California Rule of Professional Conduct ("CRPC") dealing with advertising and solicitation is rule 1-400. Under this Rule, "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client" is defined as a "communication." The rules define a subset of communications as "solicitations," which consist of communications "[c]oncerning the availability for professional employment of a member [of the Bar] or a law firm in which a significant motive is pecuniary gain" and which are "(a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Solicitations – i.e., advertisements communicated in person or by telephone – "shall not be made by or on behalf of a member," unless the attorney has a "family or prior professional relationship" with the prospective client, or the solicitation is to a "former or present client in the discharge of a member's or law firm's professional duties." (CRPC 1-400.) The rule also notes that solicitations are permitted to the extent that they are protected by the U.S. or California Constitutions, but an attorney in private practice who relies on that exception to engage in conduct otherwise prohibited by the rule would seem to be taking a risk.

To be permissible, written solicitations (including letters, emails, and statements on Websites or social media) must comply with the requirements set forth in rule 1-400. The rule contains a general prohibition on false, deceptive, or misleading statements. It also requires that a copy of any communication be retained for two years (presumably to enable the Bar to verify compliance). The rule incorporates a long list of "standards" governing the contents of written solicitations. Before sending any written communication to a prospective client, an attorney should re-read rule 1-400 and its standards. Among other things, communications that are "transmitted by mail or equivalent means" must "bear the word 'Advertisement,' 'Newsletter' or words of similar import in 12 point print on the first page," and if the communication is transmitted in an envelope, the same word(s) must appear on the envelope. The standards forbid giving "guarantees, warranties, or predictions regarding the result of the representation," conveying any "testimonials" about the attorney (unless accompanied by a specific disclaimer), and stating or implying "no fee without recovery" absent an express disclosure of whether the client will be liable for costs.

Whenever an attorney makes a written statement about his or her law practice, he or she should consider whether the advertising rules apply. For an

instructive discussion of whether certain Facebook posts constitute "communications" subject to the advertising rule, see Cal. Bar Formal Opin. 2012-186 (concluding, for example, that a Facebook post stating "Another great victory in court today!" is not a communication, but the addition of the phrase "Who wants to be next?" would bring the post within the advertising rules).

Geography and the rules

Does the answer change depending on where the potential clients are located?

Yes. If you plan to contact potential plaintiffs in another state, as is often necessary in large class or collective actions, the ethical rules of the state where the recipient is located will likely apply. This is in addition to the California Rules, which govern California lawyers' activities "in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow Rules of Professional Conduct different from these rules." (See CRPC Rule 1-100(D)(1).) Note: the State Bar's Rules Commission has proposed a revision to this rule which, if adopted, states conduct connected to a pending matter before a tribunal would be governed by the rules where the tribunal is located, while other conduct will be governed either by the rules where the conduct occurred or where the conduct had its predominant effect.

(See http://ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx. Even under the proposed new rule, a lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct. (*Ibid.*).)

The solicitation rules of other states have significant differences from California's. Many states have adopted variations of the ABA Model Rule governing advertising and solicitation. Model Rule 7.3(a) states that a "lawyer shall not by in-person, live telephone or real-time electronic [i.e., live chatting, not email – see rule 7.3 cmt. 2] contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain," unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Similar to the California Rule, Model Rule 7.3(c) states: "Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words, 'Advertising Material,' on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication…." The comment to rule 7.3 explains that "[a] solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public…, or if it is in response to a request for information or is automatically generated in response to Internet searches."

It is important to review the ethics rules of each state to which you plan to send a solicitation letter. Certain states impose unusual burdens. For example, the New York Rules require that when an out-of-state attorney sends a solicitation to someone in New York, "[a] copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial department where the solicitation is targeted." (N.Y. Rule of Prof. Conduct.) Other states include surprising requirements, with a few states making it quite difficult to send solicitations. (See, e.g., Texas Discipl. Rule of Prof. Conduct 7.07 (requiring attorney to send copy of written solicitation to the Advertising Review Committee of the Texas Bar, along with a "completed lawyer advertising and solicitation communication application form" and a check or money order payable to the State Bar of Texas).)

Can I call potential class members with questions?

Can I call potential class members or opt-in plaintiffs to ask them questions about the case? Lawyers have a duty to represent their clients competently and zealously, and contacting potential witnesses to investigate and develop a case is often necessary to fulfill that duty.

In many cases, witnesses are not potential clients, so it will be clear that an investigatory communication to them does not "concern[] the availability [of the attorney] for professional employment." However, when the potential witnesses are also potential plaintiffs in the case, caution is warranted to avoid the possibility of engaging in solicitation. For example, in a collective action under the FLSA, an attorney who has just filed a case and is preparing a motion for "conditional certification" may be more likely to succeed if a number of other employees opt into the case. (See, e.g., *Harris v. Vector Mkt'g Corp.* (N.D. Cal. 2010) 716 F. Supp. 2d 835.) Therefore, if an attorney calls potential class members in an effort to identify supportive witnesses and obtain declarations, the attorney may wish to guard against a suggestion that he or she solicited the potential class member during the call. Attorneys should also note that once a Court takes steps to exercise control over the FLSA notice process under 29 U.S.C. § 216(b), the Court may look unfavorably on certain further communications with potential opt-in class members during the opt-in process.

One option that some plaintiffs' firms use when there is a potential for unethical solicitation in the context of outreach to potential class members is to create a script that will be used for any telephone contacts. Doing this enables the attorney to plan his or her (and his or her subordinates') statements in advance to ensure that they are accurate and ethically compliant, and also to demonstrate after the fact, should the need arise, that

the communications were proper. (See, e.g., *Piper v. RGIS Inventory Specialists, Inc.*, 2007 WL 1690887 (N.D. Cal. June 11, 2007) (evaluating such a script and concluding based upon it that plaintiffs' counsel did not act improperly). A script can include the answer that the lawyer will give if the potential witness expresses an interest in opting into the case – for example, the lawyer might state that the present call is for investigative purposes only, but if the potential witness is interested in opting into the case, he or she is free to call back at another time to discuss the possibility of joining the case, or the attorney may offer to send something to the potential witness in writing, at which point the attorney can assess whether the written communication needs to comply with the solicitation rules. (See, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646, 659 (finding that an attorney who directly contacts individuals for legitimate investigative reasons is not barred from representing those individuals if requested to do so, but "it is misconduct to directly solicit such employment" (citing additional cases).)

Interesting questions can arise concerning whether particular communications have as a "significant motive" the attorney's "pecuniary gain" such that they are solicitations under rule 1-400. Such motives are presumably lacking in the context of non-profit legal work. In addition, there is little guidance about when communications that are otherwise forbidden by the Rule are nonetheless protected by the California and U.S. Constitutions. (See, e.g., *Shapero v. Ky. Bar Assoc.* (1988) 486 U.S. 466. Such questions are beyond the scope of this article.

Confidentiality

What *can* or *should* I tell such employees about whether the things they tell me will be kept confidential?

Lawyers have an ethical duty not to reveal confidential client information without informed consent. (See CRPC 3-100.) The same applies to potential clients. (See State Bar Ethics Op. 2003-161.) "This duty is broader than the attorney-client privilege, and extends to "virtually everything the lawyer knows about the client's matter regardless of the source of the information." (*Elijah W. v. Super. Court* (2013) 216 Cal.App.4th 140, 151); see also State Bar Ethics Op. 2003-161. An attorney can inform a client or potential client about these rules, although an attorney should be careful not to mislead a potential client about whether certain information provided to the attorney might ultimately be discoverable.

Plaintiffs' class-action attorneys are often separately representing, and receiving confidential information from, a number of different clients in a single case. Without the client's consent, the rules indicate that such confidential information may not be disclosed to other clients. To ensure that attorneys can freely discuss the facts of a case with their various clients, attorneys sometimes include a provision in their representation agreements in which the client agrees to permit the sharing of confidential information with other clients of the firm in the same case, with any exceptions to that general permission to be stated in writing by the client.

When a potential client contacts an attorney about the possibility of representation or to seek legal advice but does not ultimately become a client, the attorney should be careful to consider the ethical rules before disclosing any information learned from the client, or sharing the fact that the potential client contacted the attorney. Thus, in a collective action, if a potential class member calls and provides information that would be useful to the case, the attorney may need to consider whether to seek the potential class member's informed consent before using the information.

Ethics and limited representation agreements

Are there any ethical issues to be aware of when using a limited representation agreement (e.g., for investigation only)?

Yes. As limited-scope representation has become more prevalent in recent years, the State Bar's Committee on Professional Responsibility and Conduct has sought to shed light on ethical issues relating to it. See *An Ethics Primer on Limited Scope Representation* (2004) (available on State Bar's Website). A "limited scope" agreement may refer to investigating or negotiating on the client's behalf without agreeing to file a lawsuit; it may refer to performing only a particular task within an existing case; and it may refer to filing a suit advancing specified claims without filing or investigating other potential claims. Several ethical (and other) rules come into play when ensuring that your limited scope representation is proper.

First, as a statutory requirement, most representation agreements in California must be in writing. (See Bus. & Prof. Code, § 6147 (contingency fee agreements) and § 6148 (non-contingency fee agreements).)

Second, when an attorney is agreeing to perform only limited tasks, it is important to describe in the representation agreement the services that he or she is – and is not – agreeing to perform. In part, this is important because an attorney has an ethical duty to perform competently under CRPC 3-110, so the parameters of what the attorney is agreeing to do must be precisely stated. In addition, the attorney owes a legal duty of care to the client, which may be violated if the attorney fails adequately to describe the limited nature of the representation and to advise the client to guard against certain risks arising from that limitation.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1686-87, a former client with a limited representation agreement sued his worker's compensation attorney for malpractice, claiming that the attorney should have informed him of the possibility of seeking civil damages from a third-party general contractor with potential liability. The Court held that the attorney could be found liable because the limited representation agreement failed to advise the client that (i) there might be other

remedies which the attorney would not investigate, and (ii) other counsel should be consulted. The Court further stated that "even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention." The Court explained that attorneys have greater legal knowledge than lay clients, and thus may have a duty to advise of certain apparent potentially adverse consequences of the limited representation. (*Id*. at 1684-86; see also *Janik v. Rudy, Exelrod & Zieff* (July 22, 2004) 119 Cal.App.4th 930, *as modified on denial of reh'g* (attorneys have a duty of care to consider and assert, as appropriate, all related class claims arising from the facts at issue). For additional discussion of limited representation agreements, see Los Angeles Bar Association Formal Opinion 502 (Nov. 4, 1999).

Third, just as in full scope representation, an attorney seeking to withdraw from a limited scope representation should determine what steps may be necessary to comply with California Rule of Professional Conduct 3-700. That rule requires withdrawing attorneys to take:

> …reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) [i.e., returning client papers and unearned fees], and complying with all applicable laws and rules.

(Cal. Rule of Prof. Conduct 3-700 (A)(2).) The steps an attorney must take will likely depend on the specific circumstances and the nature of representation agreement.

The duties of loyalty (CRPC 3-310, *Flatt v. Super. Ct.* (1994) 9 Cal.4th 275, 282), and confidentiality (CRPC 3-100) also attach to limited scope representation, requiring attorneys to ensure that such representations do not create a conflict of interest or otherwise violate the rules. Note: for limited representations in the context of legal services programs, see CRPC 1-650; see also General Civil Limited Scope Representation – Risk Management Materials, *available at* http://www.courts.ca.gov/partners/documents/Risk_Management_Materials_Civil.pdf. It is important to establish procedures to make sure you are ethically representing clients when using a limited scope representation model.

Speaking to defendants' managers

In developing the case, can I speak to managers (current or former) at the Company to identify potential witnesses?

An important rule to keep in mind when communicating with managers is CRPC 2-100, which restricts attorney communications with "represented parties." For purposes of the rule, a "party" includes:

> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
>
> (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(Cal. Rule of Prof. Conduct 2-100(b).)

Critically, the foregoing portion of the rule applies only to *current* employees, not former, as the commentary to the rule explicitly states. (A proposed revision to the rule, if adopted, would make this distinction part of the language of the rule itself. (See http:// ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx.) The ABA Model Rules likewise provide that communications with former employees do not constitute communications with a represented organization. (See Model Rule 4.2 cmt. 7.) Thus, attorneys should first ask themselves whether the employee with whom they wish to speak is a current or former employee. If the latter, the employee is not deemed to be represented by the organization's attorneys. (See *United States v. Sierra Pac. Indus.* (E.D. Cal. 2011) 857 F.Supp. 2d 975, 981.) Federal courts have explained that a general rationale behind the current / former distinction is that statements by former employees are not generally considered corporate admissions under the Federal Rules of Evidence. (See, e.g., *Bryant v. Yorktowne Cabinetry, Inc*. (W.D. Va. 2008) 538 F.Supp. 2d 948, 955.)

If a potential witness is a current employee, an attorney deciding whether contact with the employee is permissible under rule 2-100 will have to determine whether the employee falls within one of the restricted categories quoted above. (The afore-mentioned proposed revisions to rule 2-100 would also define "managing agent" as someone with "substantial discretionary authority over decisions that determine organizational policy.") Interestingly, under the current rule, the outcome of that determination may differ depending on whether the case is pending in state or federal court, due to differences between state and federal evidence rules.

For example, in a California state case, a court held that an attorney did not violate rule 2-100 when contacting the defendant's manager, because the manager's statements would not constitute admissions on behalf of the defendant under California evidence rules. *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1193.) The Court held that rule 2-100 applied only to high-ranking company agents with actual authority to speak for the company.

A subsequent California federal case, however, distinguished *Snider*, noting that because the Federal Rules of Evidence make even lower-level managers' statements party admissions, communications with such employees were impermissible. (*Sierra Pac. Indus.*, 857 F. Supp. 2d at 981.)

Thus, attorneys should consider rule 2-100 carefully before communicating with current Company managers, and when relying on case law, should be sensitive to the difference between state and federal evidence rules. But whether one is in federal or state court, former employees do not count as "represented parties" under the rule.


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