

THE REVIEW OF  
**SECURITIES & COMMODITIES  
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 52 No. 16 September 25, 2019

## LEGAL ETHICS CONSIDERATIONS IN CLASS ACTION LITIGATION

*In this article, the authors discuss ethical issues surrounding communication with absent class members, settlements, and litigation funding.*

By Neal R. Marder and Kelly Handschumacher \*

Class actions implicate myriad ethical considerations. Some involve the rules of professional conduct as applied to the circumstances of class litigation. Other ethical considerations arise when courts decide whether to approve a class settlement as fair, reasonable, and adequate. This article will look closely at a few key areas that involve ethics issues in class action litigation: defendants' communications with absent class members, settlements, and litigation funding.

### COMMUNICATIONS WITH ABSENT CLASS MEMBERS

The scope of permissible communications between defendants and absent class members changes based on whether the class is certified. The permissible scope is large before class certification, and relatively limited thereafter. The operative professional rule is Rule 4.2 of the Model Rules of Professional Conduct, which is similar to Rules 4.2(a) of the California and New York Rules of Professional Conduct. Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order." The question for applying Rule 4.2 in a class action is whether absent class members are

represented by class counsel such that defendants' counsel cannot communicate with class members about the litigation without class counsel's consent.

### **Pre-certification**

Courts generally hold that before a class is certified, putative class members are not yet represented by plaintiffs' counsel.<sup>1</sup> Thus, defendants generally may communicate with putative class members pre-certification.<sup>2</sup> However, courts may restrict communications with putative class members in certain circumstances: where the defendants' communications are deceptive, coercive, or otherwise improper.<sup>3</sup> For example, in *Quezada v. Schneider Logistics Transloading & Distribution*,<sup>4</sup> the court held that the defendant's communications with its employees who

---

<sup>1</sup> See, e.g., *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) (listing authority).

<sup>2</sup> *Casey v. Home Depot*, No. EDCV142069JGBSPX, 2016 WL 7479347, at \*8 (C.D. Cal. Sept. 15, 2016) (citing *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 236 (C.D. Cal. 2007)).

<sup>3</sup> *Id.*

<sup>4</sup> 2013 WL 1296761 (C.D. Cal. Mar. 25, 2013).

---

\* NEAL R. MARDER is a partner and KELLY HANDSCHUMACHER is an associate at Akin Gump Strauss Hauer & Feld LLP. Their e-mail addresses are nmarder@akingump.com and khandschumacher@akingump.com.