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Ethical Considerations in Class Action Litigation

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Presenters:

Edmund W. Searby, *BakerHostetler*

Danyll W. Foix, *BakerHostetler*

Sarah Heckman Yardeni, *Practical Law Litigation*

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The screenshot shows the Practical Law website homepage. At the top, there is a navigation bar with 'US' and 'Change country' on the left, and 'Login' on the right. The main header features the 'Practical Law' logo with the tagline 'A THOMSON REUTERS LEGAL SOLUTION'. Below the logo are navigation links for 'Practice Areas', 'Resources', 'International', and 'My Practical Law'. A search bar is located below the navigation links, with 'SEARCH IN All US' and a search icon. A blue banner below the search bar contains the text 'New to Practical Law? We offer lawyers a better place to start.' and a green button that says 'Sign Up for a Free Trial'. Below the banner, there is a testimonial from Eric Lee, a Practical Law Intellectual Property & Technology expert, who says, 'I love being able to create the types of resources I wish I had while in practice.' To the right of the testimonial is a 'What Are You Working On?' section with a 'Get Started Now' button. Below the testimonial is a 'Browse our Content' section with a list of practice areas: Antitrust, Arbitration: International, Bankruptcy, Capital Markets & Securities, Commercial, Corporate and M&A, Employee Benefits & Executive Compensation, Finance, Intellectual Property & Technology, Labor & Employment, Litigation: Federal, Real Estate, and Tax. To the right of the 'Browse our Content' section is a 'Testimonials' section with a quote from Alan Berkeley, Partner, K&L Gates LLP, and a 'View More' button.

Notable Pre-certification Concerns

- Pre-certification settlement with the representative plaintiff only.
- Offers of judgment to the representative plaintiff.
- Communications with potential class members.

Pre-certification Settlement with Representative Plaintiff

- Court approval is required for settlement of a certified class (*Federal Rule of Civil Procedure (FRCP) 23(e)*).
- If a class has not yet been certified, the court may certify it for settlement purposes only and then approve the agreement, which will bind all class members.
- In this manner, the putative class members release their rights through the settlement class device.

Pre-certification Settlement with Representative Plaintiff

- What about settlement with the representative plaintiff only?
- The representative plaintiff is in effect agreeing to convert the case from a putative class action to an individual action and settle.
- Although this would not be settling a “certified class,” there nonetheless may be a judicial duty to inquire.
 - “Because of the potential for abuse, a district court has . . . the duty . . . to exercise control over a class action” (*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)).
- State rules may differ and, in some instances, be more stringent (see, for example, *Pirjada v. Superior Court*, 134 Cal. Rptr. 3d 74, 81-82 (Ct. App. 2011) (noting that California rules protect potential class members even before certification by requiring court approval of any dismissal and notice in certain circumstances)).

Pre-certification Settlement, Prohibition on No Further Representation Clauses

- The defendant may wish to settle with the representative plaintiff in exchange for counsel's agreement not to pursue similar claims.
- ✓ However, the American Bar Association's Model Rule of Professional Conduct (Model Rule) 5.6(b) prohibits "no further representation" clauses:

A lawyer shall not participate in offering or making . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a client controversy.

- Therefore, settling with the representative plaintiff cannot serve to prevent counsel from filing a similar putative class action with another representative plaintiff.
 - Defense counsel should consider whether the settlement will end one suit, only to have another filed later.

Pre-certification Settlement, Additional Ethical Concerns

- In addition, settling with the representative plaintiff also raises certain other concerns. For example, it:
 - Undermines the notion that the representative plaintiff is bringing the putative class action on behalf similarly situated individuals.
 - Could prejudice putative class members who suffered a similar injury but do not have the means to bring suit.
 - May permit the representative plaintiff to leverage the claims of the putative class.
 - Could result in excessive compensation to counsel or the class representative, with no protection for the putative class.

Offers of Judgment

- In addition to trying to settle with the representative plaintiff, defendants rely on FRCP 68 to make pre-certification offers of judgment in an effort to end the litigation before a class is certified.
 - FRCP 68 allows a defendant to make an offer to the plaintiff that will allow for judgment on specified terms.
- This practice is known as “picking off” the representative plaintiff to avoid broader liability and raises similar concerns as settling with the representative plaintiff.
- The rule is silent as to:
 - What happens if the plaintiff is offered full satisfaction of the claims under FRCP 68.
 - Whether the court is divested of jurisdiction because there is no actual controversy.

Offers of Judgment

- The circuit courts disagree about whether an unaccepted FRCP 68 offer of judgment that fully satisfies a representative plaintiff's individual claim before a class is certified is sufficient to moot the putative class claims.
- In some jurisdictions, plaintiffs may rush to file a motion for certification to head off a mootness argument.
- The Supreme Court recently granted *certiorari* on the issue (see *Campbell-Edwald Co. v. Gomez*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 2015 WL 246885 (May 18, 2015); see also *Tanasi v. New Alliance Bank*, No. 14-cv-1389, 2015 WL 2251472, at *3 (2d Cir. May 14, 2015)).

Offers of Judgment, Two Extremes

Seventh Circuit: “To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.” (*Damsco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011).)

Eleventh Circuit: “[A] motion to certify, without more, does nothing that is significant on this issue. The motion indicates that the named plaintiff intends to represent a class if allowed to do so, but the complaint itself announces that same intent A certification *order* confirms that the case will so proceed; a motion does not. The assertion that a motion fundamentally changes the legal landscape—indeed, that it impacts the constitutional prerequisites to jurisdiction under Article III—makes no sense.” (*Stein v. Buccaneers Ltd. P’Ship*, 772 F.3d 698, 707 (11th Cir. 2014).)

Communicating with Potential Class Members: Reasons to Communicate

Defense counsel may need to communicate with potential class members:

- To negotiate a settlement.
 - Putative class members may be offered consideration in exchange for releasing any potential claim.
- To investigate plaintiff's claims and explain or respond to allegations.
- To gather information to assist in defeating a class certification motion, raising defenses or bringing counterclaims.
- Because there is an ongoing business relationship between the defendant and potential class members.

Communicating with Potential Class Members: Reasons to Communicate

Plaintiff's counsel may need to communicate with potential class members to:

- Investigate class claims and gather supporting information.
- Gather information to establish the pre-requisites for class certification.
- Solicit qualified individuals to participate in the class (see, generally, *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 479-80 (1988)).

Ethical Restrictions on Communicating with Potential Class Members

- For whatever purpose, ethical rules inform and can limit communications with potential class members because these individuals are not necessarily parties to the suit before certification of the class.
- For example, communications with potential class members may violate the Model Rules and corresponding state ethical rules.

Communications with a “Represented” Party, Defense Concerns

- ✓ Model Rule 4.2 prohibits communications with a “represented” party.
- In the class action context, a question is whether, prior to certification, potential class members are considered “represented” by plaintiff’s counsel so that defense counsel cannot contact them.
- The weight of authority holds that potential class members are *not* akin to represented parties until a court certifies the class.
 - Rule 4.2 would not presumptively apply to defense counsel’s pre-certification communications with those individuals (see, for example, *Castaneda v. Burger King Corp.*, No. 08-cv-4262, 2009 WL 2382688, at *7 (N.D. Cal. July 31, 2009); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-cv-4182, 2008 WL 4401970, at *2-3 (E.D. La. Sept. 22, 2008); *The Kay Co. LLC v. Equitable Production Co.*, 246 F.R.D. 260, 263-64 (S.D.W. Va. 2007); see also *ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-445*, at 3 (2007)).

Communications with a “Represented” Party, Defense Concerns

- However, some jurisdictions have held that putative class members are parties and defense counsel may not contact them under Model Rule 4.2 (see *Gates v. Rohm & Haas Co.*, No. 06-cv-1743, 2006 WL 3420591, at *6 n.2 (E.D. Pa. Nov. 22, 2006)).
- As a result, counsel must be familiar with the standard in their jurisdiction before attempting to communicate with potential class members.

Communications with a “Represented” Party, Plaintiff-side Concerns

- Plaintiff’s counsel also must be cautious in certain situations, for example when engaging in pre-certification communications with employees of the defendant.
- Some jurisdictions have ethical rules prohibiting communications with a represented party’s employees who have the authority to bind the organization with respect to the matter, such as:
 - Senior employees.
 - Managers.

(See, for example, *New York Code of Professional Conduct Rule 4.2, cmt. 7*; *Hammond v. City of Junction City Ks.*, 126 F. App’x 886, 889 (10th Cir. 2005).)

False or Misleading Solicitation, Plaintiff-side concerns

Plaintiff's counsel wishing to communicate with potential class members to alert them to the class action should be aware of applicable ethical rules. For example:

- ✓ Model Rule 7.3 *prohibits* real time solicitation such as in-person, live telephone or real time electronic contact.
- ✓ Model Rule 7.2 *permits* advertising through written, recorded or electronic communication, including public media sources.

False or Misleading Solicitation

- A solicitation must not be deceptive or misleading (Model Rule 7.1). To avoid violating this rule, any solicitation should:
 - ✓ Make clear it is an advertisement.
 - ✓ Disclose all material facts.
 - ✓ Provide adequate disclosure of the costs and benefits of participating in a class action.

(Model Rule 7.1-7.3; In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1244-45 (N.D. Cal. 2000).)

- Note, however, these rules are not necessarily violated merely because plaintiff's counsel interviews potential class members to gather facts for purposes of the class action (see *Dupuy v. McEwen*, 648 F. Supp. 2d 1007, 1023 (N.D. Ill. 2009)).

Pre-certification communications, Court-ordered Restrictions

- Courts additionally may restrict communications between a party and potential class members (see *FRCP 23(d)*; *Gulf Oil Co.*, 452 US at 99-101).
- Even where communications with potential class members may be permitted, courts generally step in and limit, or even entirely prohibit, contact between parties where there is a specific showing of abuse or potential abuse (*Gulf Oil Co.*, 452 U.S. at 101-02).

Pre-certification communications, Court-ordered Restrictions

Pre-certification communications will be prohibited or limited if they:

- Are abusive, coercive or threatening.
- Are misleading or deceptive.
- Attempt to discourage participation in the suit.
- Remain silent about the class action resulting in an unknowing release of claims.
- Are based on an unequal business or employment relationship.

(See, for example, *Camp v. Alexander*, 300 F.R.D. 617, 621 (N.D. Cal. 2014); *Filby v. Windsor Mold USA, Inc.*, No. 13-cv-1582, 2014 WL 243961, at *3 (N.D. Ohio Jan. 22, 2014); *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 928-29 (N.D. Ill. 2013); *Law Offices of Leonard I. Dessler, P.C. v. Shamrock Comm., Inc.*, No. 12-cv-2600, 2013 WL 2552141, at *1-2 (D. Md. June 10, 2013); *Zamboni v. Pepe West 48th St LLC*, No. 12-cv-3157, 2013 WL 978935, at * 3 (S.D.N.Y. Mar. 12, 2013).)

Pre-certification communications, Court-ordered Restrictions

Where parties engage in abusive communications, courts have required them to:

- Seek leave before any further contact.
- Detail to the court or opposing counsel intended communications.
- No longer contact potential class members about the suit.
- Send a corrective communication to the potential class members.

Restricting Communications, First Amendment Concerns

- However, freedom of speech may be implicated when communications are limited by the court.
- Courts may limit communications, but such restrictions must be:
 - Based on a “clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”
 - “Carefully drawn” to restrict speech as little as possible.

(Gulf Oil Co., 452 U.S. at 101-02.)

Communications with Potential Class Members, Best Practices

Best practices for ethically communicating with potential class members.

- Ensure communications are:
 - ✓ Accurate.
 - ✓ Complete.
 - ✓ As balanced as possible.

- Specifically:
 - ✓ Identify the case, court and parties.
 - ✓ Identify the purpose for the communication and any conflicts.
 - ✓ Do not mischaracterize the claims or the parties' positions.
 - ✓ Do not attempt to undermine the class action.
 - ✓ Identify the consequences of any decision regarding taking any action or providing information.
 - ✓ Pay extra attention to employer/employee or supplier/customer relationships.

Communications with Potential Class Members, Strategy

- If considering offering a settlement/release to putative class members, make the offer as early as possible, before prolonged discovery has occurred, and include enough information for an informed decision.
- Courts seem more willing to sustain pre-certification settlement offers and other communications that are written, as opposed to unrecorded oral statements.
- When considering whether to inform opposing counsel of the communication, keep in mind that counsel will likely find out anyway either directly from the recipient or if the communication is later disclosed in discovery.

Post-certification communications

- Once a court certifies a case as a class action, all class members generally are considered clients of class counsel and the characteristics of the traditional attorney-client relationship apply.
- Even though an opt-out period follows FRCP 23(b)(3) certification, several courts have found that the attorney-client relationship arises at certification and not at the end of the opt-out phase (see, for example, *Dodona I LLC v. Goldman, Sachs & Co.*, 300 F.R.D. 182, 187 (S.D.N.Y. 2014) (noting a split on the issue and collecting cases)).
- As a result, once a court certifies the class, even if only conditionally for settlement purposes, defense counsel should no longer directly contact class members (see *Jackson v. Bloomberg L.P.*, No. 13-cv-2001, 2015 WL 1822695, at *2, 7 (S.D.N.Y. Apr. 22, 2015) (examining Rule 4.2 and noting that if the plaintiff “wishes to elicit information from class members, it must do so through depositions or other discovery”)).

Questions

Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

- *Ethical and Privilege Issues in Class Action Communications*
- *Class Actions: Class Certification Discovery*
- *Settling Class Actions: Process and Procedure*
- *Class Action Toolkit*

About the Speakers

Edmund W. Searby, Partner, *BakerHostetler*

Ned Searby is a partner in the Cleveland office of Baker Hostetler. He is a former federal prosecutor who focuses his practice on white collar criminal defense and complex civil litigation. In class action litigation, he has successfully represented clients in every stage from the motion to dismiss through to a jury trial and the resulting appeals. He has been invited to speak on class action litigation at the ABA National Class Action Institute and at law schools and other bar functions.

About the Speakers

Danyll W. Foix, Partner, *BakerHostetler*

Dan Foix represents clients in commercial disputes, with a particular focus on antitrust litigation, investigations, and class actions. Dan also advises on agricultural issues such as strategies for commodities procurement and marketing practices. Having represented both plaintiffs and defendants in large matters, Dan brings a comprehensive perspective to litigation. Dan is also the editor of BakerHostetler's Antitrust Advocate blog and the antitrust newsletter, providing information and commentary on the latest developments in the antitrust litigation sector.

About the Speakers

Sarah Heckman Yardeni, Editor, *Practical Law Litigation*

Sarah Heckman Yardeni joined Practical Law from Skadden, Arps, Slate, Meagher & Flom LLP, where she was a senior litigation associate representing clients on a wide range of matters. Prior to joining Skadden, she clerked for the Honorable Debra Freeman in the Southern District of New York. Before that, she was a litigation associate at Moses & Singer LLP. She is also an Adjunct Professor of Legal Writing at Fordham Law School.