

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-1
(April 2009)

The inquirer's client is a defendant to a class action lawsuit pending in Pennsylvania federal court. In that case, the plaintiffs seek certification of a nationwide class of a certain position of the defendant's employees. If certified, the class would include thousands of employees nationwide. Discovery is still pending, and the plaintiffs have not yet moved for class certification.

In a separate lawsuit pending in federal court in New Jersey, the same defendant is defending a class action that raises identical substantive claims as those raised in the Pennsylvania federal court case. In the New Jersey action however, the plaintiffs (who are not the same named plaintiffs in the Pennsylvania action) seek to certify a New Jersey statewide class of the same employee position at issue in the Pennsylvania federal court case. Thus, the employees who are putative members of the New Jersey statewide class also fall within the nationwide class proposed in the Pennsylvania action since the proposed class in the Pennsylvania action includes employees in all states including New Jersey. Discovery is still pending in the New Jersey case, and the deadline for filing motions for class certification has not expired.

The defendant is represented by in-house counsel in both causes of action. These attorneys are not barred in Pennsylvania or New Jersey but have been admitted *pro hac vice*. In-house counsel has a substantive role in the litigation and conducts all discovery and trial work. The in-house lawyers defending the Pennsylvania case are not the same in-house lawyers working on the New Jersey case; however all attorneys involved in these cases work together in the same legal department and are fully aware of the allegations, procedural status, and litigation strategy of each case.

To summarize, the inquirer is seeking guidance as to whether a nationwide class action pending in Pennsylvania precludes the defendant's attorneys from discussing the substance of the claims with putative class member employees who reside outside of Pennsylvania, as well as whether counsel associated with attorneys defending a nationwide class action in Pennsylvania (but who have not made an appearance in the Pennsylvania action) may have *ex parte* contact with employees related to a different but similar matter, pending in New Jersey, who are also members of the putative nationwide class in the Pennsylvania matter.

The inquiry has four specific questions:

1. Can the defendant's counsel in the New Jersey action have *ex parte* contact with members of the putative class proposed in the New Jersey case (i.e. New Jersey employees) concerning the allegations raised in the New Jersey matter when those employees are also members of a proposed nationwide class of employees alleged in

the Pennsylvania federal court action which raises the same substantive claims as those alleged in the New Jersey matter?

2. Can the defendant's counsel in the Pennsylvania action have *ex parte* contact with members of the putative class proposed in the Pennsylvania case concerning the allegations raised in that matter if those employees reside outside of Pennsylvania?
3. Is the result of Issues #1 and #2 different if the defendant's counsel in the Pennsylvania action is licensed in Pennsylvania (rather than admitted *pro hac vice*)?
4. If the defendant's counsel in the New Jersey matter are permitted to have *ex parte* contact with members of the putative nationwide class in relation to the New Jersey matter, can the attorneys defending the Pennsylvania action use this information in defending the Pennsylvania case?

Rule 4.2 of the Pennsylvania Rules of Professional Conduct (the "Rules") provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

The majority rule in most jurisdictions is that after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of a putative class is permitted, because prior to class certification only those class members with whom plaintiffs' counsel maintains a personal attorney-client relationship are considered clients. The Restatement 3d, Law Governing Lawyers, § 99, comment I (2003) provides:

I. *A communication with class member.* A lawyer who represents a client opposing a class and a class action is subject to the anti-contact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions, a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyers.

However, Pennsylvania courts have not followed this majority rule. Rather, Pennsylvania courts have interpreted Rule 4.2 as barring defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via

deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel). See Gates v. Rohm and Haas Co., 2006 U.S. Dist. LEXIS 85562 *7 n.2 (E.D. Pa. Nov. 22, 2006) (prior to denial of certification, defense counsel is prohibited from contacting and interviewing potential witnesses who are putative class members); Braun v. Wal-Mart Stores, Inc., 2003 Pa. Dist. & Cnty. Dec. LEXIS 219 *6 & 7 (Phila. Ct. Com. Pl. Jan. 15, 2003) (in Pennsylvania statewide class action, putative class members are represented parties and therefore, defendant's counsel cannot interview or obtain affidavits from them); Lewis v. Bayer A.G., 2002 Phila. Ct. Com. Pl. LEXIS 87 (Phila. Ct. Com. Pl. June 12, 2002) (although question of whether defendant's counsel could contact putative members of nationwide class was at issue, court declined to decide it); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) ("If defense counsel or counsel otherwise adverse to [the putative class members' interests] is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the actions, the benefits of class action litigation could be seriously undermined."); Haffer v. Temple University, 115 F.R.D. 506, 510 (E.D. Pa. 1987) (defense attorney's phone calls and memorandum sent to class members violated applicable Pennsylvania ethics rules).

As such, the Committee finds as follows with regard to the inquirer's specific questions.

Question #1:

The answer is clearly governed by New Jersey law. If such contact is permitted in New Jersey, then the New Jersey counsel in the New Jersey case should be permitted to contact New Jersey putative class members, regardless of the fact that they may also be putative members of the proposed nationwide class in the Pennsylvania case

Question #2:

This issue does not turn on where the putative class members reside, it depends on the jurisdiction where the relevant case is pending. If relevant Pennsylvania authority prohibits contact, then it does not matter where the putative class members reside; contact with them relating to the Pennsylvania case is prohibited. The possible exception is that of putative class members who may also be putative class members in another case where *ex parte* communication is permitted (see #1 above).

However, the Pennsylvania courts' reasoning in prohibiting contact even with putative class members prior to class certification is that there is a possibility of undue influence by defense counsel on unsophisticated and unrepresented putative class members when they are interviewed by defense counsel. Therefore, it may be wise to raise the issue with the Pennsylvania court prior to interviewing those New Jersey putative class members who are also members of the national class in the case pending in Pennsylvania, indicating to the Pennsylvania court that such contact with putative class

members is permitted in the New Jersey case. **However, please see answer to #4 below.**

Question #3:

Is the answer to questions #1 and #2 different if the defendant's counsel in the Pennsylvania action is licensed in Pennsylvania (rather than admitted *pro hac vice*)?

No, there is no difference.

Question #4:

The Committee believes that this question is the crux of the issue posed by the inquiry. The direct answer is probably not. Again, it would be wise to address the issue of the *ex parte* contact with the New Jersey putative class members with the Pennsylvania court prior to introducing information obtained from the New Jersey interviews in the Pennsylvania case. Relying on information obtained from the New Jersey putative class members who are also members of the national class in the case pending in Pennsylvania without prior discussion with or approval of the Pennsylvania court could result in disqualification of counsel in the Pennsylvania case.

The Committee is of the strong opinion that the ideal way to proceed would be to retain independent counsel admitted in New Jersey to conduct the New Jersey interviews to obtain the information, and then avoid having this information transmitted in any fashion to those attorneys working on the Pennsylvania case until and if the Pennsylvania court is notified of and grants permission for its use. In this fashion, in the New Jersey matter the client is allowed full access to information available under New Jersey law, while the attorneys working on the Pennsylvania case are protected from disqualification, and thus the adverse consequences of being forced to change counsel during the course of the litigation.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any court. It carries only such weight as an appropriate reviewing authority may choose to give it.