Navigating Ethical Issues in Class Actions:
A Defense Perspective

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I. Introduction

From an ethical standpoint, class actions are like other lawsuits because they both generally involve the same set of ethical considerations. However, there are certain aspects of class actions that trigger unique issues not found in typical cases. While the Model Rules of Professional Conduct (and various state Rules of Professional Conduct) do not speak directly to class actions, the Rules nonetheless offer important guideposts for navigating many ethical considerations that can arise. Moreover, case law from across the country is instructive on how to deal with the various issues that may come up in class action cases. This article discusses the ethical parameters of communications with putative class members from the defense perspective and addresses some of the many issues that can arise in class action settlements.

II. Communications with Class and Putative Class Members

A. Defense Counsel’s Communications with Putative Class Members Is Not Prohibited Prior to Class Certification

Under the general rule, which is embodied in ABA Model Rule of Professional Conduct (“Model Rule”) 4.2, attorneys cannot communicate with represented parties, absent consent from the other party’s lawyer or some other order or legal authorization. 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.”

But what does that mean in the context of class actions? May a lawyer for a defendant in a class action (or a defendant acting on its lawyer’s advice) communicate directly with members of the class or putative class for the purposes of settling potential claims? The answer to this question depends on when the communications occur. More specifically, the answer depends on whether or not a class has been certified.

Prior to class certification, attorneys for defendants in a class action case generally may communicate with putative class members. This is permissible because until a class is certified, putative class members do not have an attorney-client relationship with class counsel. The ABA addressed this issue in Formal Ethics Opinion 07-445, which states:

Before a class action has been certified, counsel for plaintiff and defense have interests in contacting putative members of the class. Model Rules of Professional Conduct 4.2 and 7.3 do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class. Both plaintiff’s and defense counsel must nevertheless comply with Model Rule 4.3.1


The formation of an attorney-client relationship is “different in the class context than it is in a traditional, nonclass situation.” In re Chicago Flood Litigation, 682 N.E.2d 421, 425 (Ill. App. Ct. 1997) (collecting cases). “The relationship between the class representative plaintiff and class counsel is one of private contract, whereas the relationship between absent class members and class counsel is one of court creation.” Id. Class counsel will be deemed to represent all class members only after a class has been certified and the opt-out
time period has expired. Id. at 426. Courts across the country have overwhelmingly adhered to this bright-line rule holding that there is no attorney-client relationship prior to class certification.2

Because there is no attorney-client relationship prior to class certification, courts generally will not categorically prohibit defense counsel from communicating with putative class members absent evidence of coercion or misleading statements. See Jackson v. Papa John’s USA, Inc., No. 1:08-CV-2791, 2009 WL 650181, at *2 (N.D. Ohio Mar. 10, 2009) (denying plaintiff’s motion for protective order, which would have prevented defendant from communicating with putative collective action members during the notice period, where there was no evidence that the six pre-certification interviews that the defendant employer conducted were coercive, misleading, or improper); In re Se. Milk Antitrust Litig., No. MDL 1899, 2008-MD-1000, 2009 WL 3747130, at *3 (E.D. Tenn. Nov. 3, 2009) (“[I]t is clear then that the defendants may discuss settlement offers with putative class members prior to class certification, as a general rule.”); The Kay Co., LLC v. Equitable Prod. Co., 246 F.R.D. 260, 263 (S.D. W.Va. 2007) (“Claims that the defendant merely communicated a settlement offer to a putative plaintiff will not provide the basis for a limitation. Absent any specific evidence that the communication is abusive, a limitation is inappropriate.”); Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc., 214 F.R.D. 696, 699 (S.D. Ala. 2003) (“A defendant . . . has the right to communicate settlement offers directly to putative class member[s].” (internal citation and quotation marks omitted)); 3 William B. Rubenstein, Newberg on Class Actions §9:7 (5th ed. 2016) (observing that defendants and defendants’ counsel may generally communicate directly with absent putative class members prior to certification unless communications are misleading, deceptive, or coercive, or unless they undermine the class action by convincing potential members to avoid the suit).

In Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981), the Supreme Court considered whether an order restricting communications between a defendant and members of a putative class was Constitutional under the First Amendment. The Court observed that an order restricting such communications may involve “serious restraints” on expression protected by the First Amendment. Id. at 104. Although a court may limit communications only to prevent serious misconduct, the Court cautioned that “an order limiting communications between parties and potential class members should 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.” Id. at 101. Thus, limitations on communications should be drawn as narrowly as possible so as not to impinge on the parties’ right to free speech. Id. at 101, 104.

**B. Defense Counsel’s Settlement Communications with Putative Class Members Cannot Be Coercive, Misleading, or Improper**

Although defense counsel are not categorically prohibited from communicating with members of a putative class, attorneys should nonetheless be mindful of their ethical obligations when communicating with putative class members. For example, Model Rule 4.3 addresses communications with unrepresented parties. Model Rule 4.3 requires that a lawyer not state or imply to an unrepresented party that he or she is disinterested, must make a reasonable effort to correct an unrepresented party who misunderstands the lawyer’s role, and shall not give legal advice to an unrepresented party if the unrepresented party’s interests are adverse (other than advice to secure counsel). In addition, Model Rule 4.1(a) provides that a lawyer shall not “make a false statement of material fact or law to a third person.” Similarly, Model Rule 8.4(c) states that “[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Courts have also recognized “the possibility of abuses in class-action litigation” and that “such abuses may implicate communications with potential class members.” Gulf Oil, 452 U.S. at 104. Such abuses
may come in the form of settlement communications that are coercive, misleading, or otherwise improper. See *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (“A unilateral communications scheme [from a defendant to putative class members] ... is rife with potential for coercion.”); *Kay*, 246 F.R.D. at 263 (“Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel.” (citing *Cox*, 214 F.R.D. at 698)); *Keystone Tobacco Co. v. Inc. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002) (noting that courts generally favor settlement but that “the distribution of misleading information in order to exact early settlement agreements from putative class members or the use of coercive tactics is just the kind of wrongful conduct that undermines the class action”).

To establish that a limitation on communications with putative class members is necessary, a moving party must show that (1) a particular form of communication has occurred or is threatened to occur, and (2) the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation. *Cox*, 214 F.R.D. at 697-98. A court presented with a motion to limit the defense’s communications with putative class members must make a decision based on “a clear record” that weighs the need for a limitation with the interference of the rights of the parties to engage in free speech. *Gulf Oil*, 452 U.S. at 101-102.

Therefore, to survive such a motion and avoid any limitation on such communications, defense counsel’s settlement-related communications with putative class members should avoid any appearance of being coercive, misleading, or abusive. The Seventh Circuit adopted a three-step analysis to determine whether settlement communications with putative class members are misleading: “[A]n offer to settle [made to individual class members] should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle. . . . [J]udicial examination of the offer to settle individual claims largely entails only consideration of the accuracy and completeness of the disclosure.” *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139-40 (7th Cir. 1979).

The same test to determine whether settlement communications made prior to class certification has been adopted in other jurisdictions. For example, in *Keystone*, the day after oral argument on class certification, the defendants presented settlement proposal packets to putative class members. 238 F. Supp. 2d at 153. The settlement proposal packets included a cover letter signed by the defendant company’s president, a memorandum addressing the merits of the lawsuit, a settlement offer, and a proposed settlement agreement. *Id.* The letter also mentioned that the complaint was enclosed, which contained the contact information for class counsel. *Id.* The letter also advised the putative class members to consult with their own lawyers before deciding to settle the case or sign the releases. *Id.* at 157. Applying the Seventh Circuit’s three-pronged analysis, the court found that although the settlement packet contained “self-serving advocacy” in favor of accepting the settlement, it nonetheless ruled that “the defendants and their counsel took steps to avoid providing inaccurate or misleading information and to assure that they were in compliance with established law.” *Id.* Although the court found that it had the authority to limit communications between litigants and class members prior to class certification, the court concluded that the plaintiffs failed to present a “clear record,” as contemplated by *Gulf Oil*, of abuses that would justify restrictions on communications. *Id.* at 159. See also *Kay*, 246 F.R.D. at 263 (explaining that merely communicating a settlement offer to a putative class member, without specific evidence that the communication was abusive, is insufficient to warrant any limitation).
By contrast, in cases where courts have found that settlement communications were coercive or misleading, the communications failed to mention the class action lawsuit and/or what the putative class members were possibly giving up by settling. *Friedman v. Intervet Inc.*, 730 F. Supp. 2d 758, 762-63 (N.D. Ohio 2010); see also *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 492, 450-51 (Ohio 1998) (“[T]he letters sent by Ohio Savings failed to inform its customer that an action had been commenced on their behalf, let alone the allegations made.”). Interestingly, in *Cox*, the communications to putative class members did not reference the putative class action lawsuit that had been filed. 214 F.R.D. at 699. The court nonetheless held that because the class action lawsuit was for breach of contract, the damages were intended to provide class members with the benefit of their bargain. *Id.* Because plaintiff’s counsel had not offered any evidence that the defendant’s proposed settlement did not give putative class members the benefit of the bargain, the court found that the failure to reference the lawsuit was not abusive. *Id.*

**C. A Roadmap to Permissible Settlement Communications with Putative Class Members**

When attempting to contact putative class members about possible settlement, the best, and most ethically sound, strategy is to provide full, complete, and accurate disclosures. Any communications to potential class members should, at a minimum, (1) give sufficient information to allow them to decide whether to accept the settlement offer, (2) explain the effect and impact of settling, and (3) advise them as to how the putative class members may proceed if they choose not to settle.

To conform to the law that has developed on this issue, and in anticipation of a possible motion that will be filed by class counsel when he or she learns that the defendant is attempting to settle with putative class members, it is advisable that all settlement communications to potential class members include the following:

- A letter advising that there is a putative class action pending and that the recipient may be a putative member of the class.
- A copy of the class action complaint. The complaint will set forth the types of damages sought and what the putative class member might be entitled to.
- A settlement check along with a release that clearly explains to the putative class member that by cashing or depositing the enclosed check, they understand and agree that they have been fully compensated for any losses sustained and that they are fully releasing the defendant from all claims, losses, and damages related to the class action lawsuit.
- An explanation that by cashing or depositing the check, they will be precluded from participating in the class action lawsuit.
- A warning that they should not cash or deposit the check if they do not believe that the enclosed check fully compensates them.
- An invitation to submit a request for additional reimbursement if they do not believe that the enclosed check fully compensates them.
- A recommendation that they consult with class counsel or any other attorney before taking any action. The letter should include the contact information for class counsel.

A settlement package to putative class members containing these disclosures and this high level of detail may go a long way to convincing a judge that there has been full, complete, and accurate disclosure to putative class members, and that there has been no misleading or coercive communications with potential plaintiffs that would warrant limitations on such communications.
III. Other Ethical Questions in Class Action Settlements

A. Are Settlements that Preclude Class Counsel From Bringing Future Suits Against Your Client Permissible?

Consider a scenario where class counsel brings a class action with a single lead plaintiff. You, as defense counsel, settle the case with the lead plaintiff, and the case is dismissed. Can you, as part of the settlement with the lead plaintiff, include language in the settlement agreement precluding class counsel from bringing another lawsuit involving the same subject matter against your client with a different plaintiff?

The answer is no. While this scenario may present a tempting arrangement for defense counsel to prevent the filing of future, similar suits against the attorney’s client, it is an ethical violation. One attorney may not place a restriction on another attorney’s right to practice. Model Rule 5.6(b) provides that “[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 the settlement of a client controversy.” See In re Hager, 812 A.2d 904 (D.C. 2002) (finding that an attorney who represented clients in a potential class action, and who entered into a settlement under which defendant would pay attorney and co-counsel $225,000 in fees and expenses in return for agreeing, in part, not to represent present or future clients on similar claims against defendant, violated ethics rule prohibiting a lawyer from entering a settlement that restricts a lawyer’s right to practice); Adams v. BellSouth Telecomm., Inc., No. 96-2437-CIV, 2001 WL 34032759 (S.D. Fl. Jan. 29, 2001) (imposing sanctions against defense counsel who included a practice restriction for plaintiff’s counsel in the form of a consulting agreement in a class action settlement).

B. Can Defense Counsel Request that Class Counsel Indemnify the Defendant from Future Third-Party Claims?

As part of a settlement, defense counsel may wish to insulate their client from future claims that could be filed by third parties. One way to do this, of course, is to reach an agreement as part of the settlement that the plaintiff or plaintiffs will indemnify the defendant for any future claims. But can defense counsel also request that plaintiff’s counsel agree to indemnify for third-party claims as part of the settlement? While this issue does not often arise in class actions, it nonetheless presents an important ethical question.

A number of ethical rules are implicated by the issue of whether defense counsel can request that plaintiff’s counsel agree to indemnify the defendant as part of a settlement (or whether plaintiff’s counsel can agree to such a term). Model Rule 1.7 governs conflicts of interest, and Model Rule 1.8(e) provides that “a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation,” except to advance court costs and expenses or to pay court costs of an indigent client. Model Rule 2.1 is also implicated as it requires that “a lawyer shall exercise independent professional judgment and render candid advice.”

A number of state ethics opinions have examined this issue and concluded that it is an ethics violation for defense counsel to request (and for plaintiff’s counsel to agree) that plaintiff’s counsel will indemnify defendants for claims by third parties. In coming to this conclusion, the primary concern is that such an agreement by plaintiff’s counsel would violate Rule 1.7. Indeed, it could create a conflict by placing the attorney’s interests at odds with his client’s. Plaintiff’s counsel may to look to his client to provide indemnification so that he can avoid his similar obligations under the settlement agreement.

It could also violate Rule 1.8(e)’s limitations on providing financial assistance to clients and give the attorney a financial interest in the litigation. Such a provision could also affect plaintiff’s counsel’s ability to
render independent professional judgment to his client. See e.g., Me. Bd. of Overseers of the Bar, Prof’l Ethics Comm’n No. 204 (“The attorney’s potential responsibility for the client’s obligation to pay third parties who are strangers to the direct representation for which the attorney has been retained would constitute both a prohibited acquisition of a financial interest in the cause of action or subject matter of the litigation that the attorney is conducting, and an improper advance of financial assistance to the client.”).


Thus, although this scenario infrequently arises in class action cases, defense counsel should be aware that simply making a request that plaintiff’s counsel provide indemnification is a violation of the ethics rules.

C. Avoiding Any Appearance of Improper Conduct

Adams v. United States Auto. Ass’n, No. 2:14-cv-02013, 2016 WL 1465433 (W.D. Ark. April 14, 2016), presents a cautionary tale about class action settlements and how seriously federal courts view their roles in class action cases. In Adams, the plaintiffs filed a putative class action in Arkansas state court. Id. at *1. The defendants removed the case to the U.S. District Court for the Western District of Arkansas under the Class Action Fairness Act of 2005 (“CAFA”). Id. The federal case was stayed while the parties attempted to reach a settlement. Id. Although the parties were close to settlement, the court lifted the stay and required the submission of a Rule 26(f) report. Id. The parties filed a joint Rule 26(f) report and a scheduling order was entered shortly thereafter. Id.

The parties then reached a settlement. Id. Pursuant to its terms, the parties stipulated to the dismissal of the federal case and refiled the suit in state court along with a joint motion to certify a class and approve the class settlement. Id. at *1-2. The federal court learned of the settlement and issued a show cause order to all counsel of record on the same day that the state court entered a final order approving the settlement. Id. at *2.

The show cause order required all counsel “to show cause how their actions in making filings in the federal court (to include the original removal, requests for stay, and/or stipulation of dismissal, etc.) were not made for ‘any improper’ purpose.” Id. at *4. Specifically, the federal court cited “the improper purposes of mid-litigation forum shopping, wasting Government resources by using the court’s jurisdiction as leverage in settlement negotiations for a settlement that would be pursued before another court, and procedural gamesmanship.” Id.

Class counsel argued that the reason for refiling the case in state court was appropriate because federal courts are ineffective at addressing objections that class members raise to proposed class settlements. Id. at *5. Class counsel further argued that Arkansas state courts have developed the means to prevent objecting class members from being heard by requiring successful intervention at the trial court level Id. Class members who fail to intervene then lack standing to appeal a settlement. Id. The federal court noted that this rationale was an attempt to escape an adverse decision as to the settlement by precluding adverse positions from being heard. Id.
In explaining its reasons for agreeing to the dismissal from federal court and the refiling in state court, defense counsel addressed the barriers to objections and appeal as reasons a party might wish to seek approval of a class action settlement in state court. *Id.* Defense counsel also indicated that they sought a “claims made” settlement rather than a “claims paid” settlement and that dismissing and refiling in state court was the only way to achieve that result. *Id.* Specifically, defense counsel argued that there would be a significant administrative burden if the federal court required the defendants to attempt to pay individuals who had no interest claiming the payment. *Id.* Regardless of whether this was defense counsel's true rationale for dismissing the federal case and agreeing to the refiling in state court, the court noted that the conduct was nonetheless undertaken to seek a more favorable forum where the case could be settled through a less burdensome process and to escape a forum where class members would be permitted to object or appeal. *Id.*

The Western District of Arkansas also noted that Arkansas state courts do not undertake a rigorous analysis of whether the class certification requirements have been met. *Id.* at *6. The court suggested that this allowed counsel to certify a larger class that would justify plaintiffs' counsel large negotiated fee amount and allowed defense counsel to eliminate a greater amount of potential liability for their client. *Id.*

The federal court concluded that it was objectively unreasonable for counsel to dismiss the federal case for purposes of refiling in a more favorable forum or to escape an adverse decision and held that such conduct violated Rule 11. *Id.* The court further rejected counsel's arguments that the stipulation of dismissal was not subject to review and held that the court retains jurisdiction to enforce Rule 11. *Id.* at *7. The court similarly rejected counsel's arguments that CAFA condones dismissal of a federal class action for the purposes of refiling and settling in state court. *Id.* The court also rejected any argument that the federal court's orders directing the parties to file a status report or stipulation of dismissal by a certain date (standard language in orders in cases that have been stayed), somehow suggested that the court contemplated dismissal by stipulation so that the parties could refile and move to certify and settle in state court. *Id.* at *8. Finally, the court noted that it appeared that all counsel who had entered an appearance in the case were aware that a stipulation of dismissal would be filed for purposes of refiling and settling in state court, such that all counsel were responsible for violating Rule 11. *Id.*

The court initially found that the some of the attorneys’ conduct involved some degree of bad faith and set forth a list of proposed sanctions:

1. for each Respondent whose violation of Rule 11 was characterized by bad faith, in any class action in the federal courts of Arkansas in which the Respondent has entered an appearance or is otherwise representing an involved party with respect to the action, in which a motion for approval of a class settlement is filed, the requirement that the Respondent file a notice along with the motion for settlement that the Respondent has previously been sanctioned for improper conduct in connection with a class action settlement agreement;

2. for each Plaintiff’s counsel whose violation of Rule 11 was characterized by bad faith, in any putative class action in the federal courts of Arkansas in which that attorney files a motion to be appointed class counsel, or in any pending class action in which that attorney has already been appointed class counsel, the requirement that that Respondent file a notice that he has violated Rule 11 by dismissing a putative class action for the improper purposes of seeking a more favorable forum or escaping an adverse decision; and

3. for any Respondent whose violation is not characterized by bad faith, an admonition, reprimand, caution, censure, or similar sanction.

*Id.* at *10-11.
The court then set a hearing for purposes of allowing each attorney to address the factors relevant to the sanctions. Following the hearing and additional briefing, the court issued a detailed opinion and order discussing the involvement of each attorney. *Adams v. United States Auto. Ass’n*, No. 2:14-cv-02013, 2016 WL 4129115 (W.D. Ark. Aug. 3, 2016). The court concluded that the conduct of many of the attorneys was insufficient to warrant a finding of bad faith. *Id.* at *6-7. The court further held that absent bad faith, sanctions were unnecessary because the violation of Rule 11, alone, would be a sufficient deterrent. *Id.* at *7. With regard to the attorneys whose conduct was characterized by bad faith, however, the court found that a lesser sanction than the ones it initially proposed would be appropriate. *Id.* The court noted that the purpose of the previously proposed injunctive sanctions was to put other courts on notice of the misconduct. *Id.* The court concluded that based on further briefing and argument presented at the hearing, a lesser sanction in the form of a reprimand was sufficient to satisfy this purpose. *Id.*

Although the federal court ultimately backed away from the harsh sanctions it originally proposed, the court nonetheless found that counsel for both plaintiffs and defendants in the class action violated Rule 11 and further reprimanded five attorneys for the plaintiffs. Notably, all counsel who were found to be in violation of Rule 11 have appealed this case to the Eighth Circuit Court of Appeals. As of the date of this article’s submission, the Eighth Circuit had not issued a decision.

This case is a prime example of how seriously and aggressively federal courts take their responsibilities in class action cases. It also highlights the dangers of engaging in conduct that could have any appearance of impropriety. While the court’s actions in *Adams* may seem overreaching in some respects, federal courts take an active role in managing and overseeing class actions to ensure that the rights of unrepresented, absent class members can be fairly represented by the decisions of the class representatives. Federal Rule of Civil Procedure 23(e) sets forth the required role of courts in approving settlements and provides, among other things, that a settlement that binds absent class members may be approved only if the court finds that it is fair, reasonable, and adequate. See *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1090 (6th Cir. 2016) (pointing out that “Rule 23 was never designed to protect the interests of parties who were fairly represented throughout the class action litigation process.”); *Dick v. Sprint Commc’ns Co. L.P.*, 297 F.R.D. 283, 294 (W.D. Ky. 2014) (noting that the district court has an obligation to act as a fiduciary to safeguard the rights of absent class members).

**D. Ethical Considerations in Cy Pres Settlements**

The *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the “next best” class of beneficiaries. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). Although *cy pres* distributions in class action settlements most commonly present ethical issues for class counsel, defense counsel should be equally cognizant of their ethical obligations. Namely, counsel for defendants should be wary of a *cy pres* distribution to a beneficiary that counsel has an interest in or with which it has a personal or professional relationship.

Under Model Rule 1.8, which prohibits lawyers from entering into transactions or acquiring a pecuniary interest adverse to a client unless there is disclosure and/or consent from the client, defense counsel may have an obligation to advise his client of the relationship to the *cy pres* beneficiary and obtain his client’s consent. In addition, courts exercise close review of *cy pres* distributions as part of the settlement approval process to ensure that the settlement is fair, reasonable, and adequate. Therefore, under Model Rule 3.3, which directs attorneys to engage in candor toward the tribunal, attorneys with an interest or relationship with a *cy pres* beneficiary should also disclose this to the court so that the court is equipped with all relevant facts and knowledge needed to review and decide whether to approve the settlement.
IV. Conclusion

This article touches on just a few of the ethical issues that can arise in class action cases. While the context in which these ethical questions arise may differ from the typical, non-class action case, adherence to the Model Rules, applicable state rules of professional conduct and well-established case law will provide a useful guide for successfully navigating these ethical issues.

Endnotes

1 Model Rule 4.3 provides that: “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

2 Schick v. Berg, 430 F.3d 112, 117 (2d Cir. 2005) (“[C]ounsel for class does not, prior to certification of the class, owe a fiduciary duty to unnamed class members simply by virtue of their membership in the class.”); In re Cnty. Bank of N. Va., 418 F.3d 277, 313 (3d Cir. 2005) (“[C]ourts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members.”); In re Katrina Canal Breaches Consol. Litig., No. 05-4182, 2008 WL 4401970, at *2 (E.D. La. Sept. 22, 2008) (stating that plaintiff’s counsel had no attorney-client relationship with putative class members that would automatically preclude defendant’s attorneys from speaking with them); Hammond v. City of Junction City, Kansas, 167 F. Supp. 2d 1271, 1286 (D. Kan. 2001) (“It is fairly well-settled that prior to class certification, no attorney-client relationship exists between class counsel and the putative class members.”); In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) (“While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class.”); Morisky v. Pub. Serv. Elec. & Gas Co., 191 F.R.D. 419, 424 (D.N.J. 2000) (ruling that prior to class certification, “only named plaintiffs are clients of the [plaintiffs’ law] firm at this stage.”); Gillespie v. Scherr, 987 S.W.2d 129, 132 (Tex. App. 1998) (holding that plaintiffs’ attorneys did not owe unnamed class members any duties prior to class certification); In re Potash Antitrust Litig., 162 F.R.D. 559, 561 n.3 (D. Minn. 1995) (“We agree that a potential attorney-client relationship is formulated upon the certification of a class.”); Fulco v. Continental Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992) (recognizing the principle that an attorney-client relationship arises between class members and class counsel only after an order certifying the class); Resnick v. Am. Dental Ass’n, 95 F.R.D. 372, 377 n. 6 (N.D. Ill. 1982) (noting that there is no attorney-client relationship as proposed class members are not represented by counsel prior to class certification or denial thereof).

3 Although the complaint in Keystone was inadvertently not disclosed with the original letter, it was eventually provided to putative class members. Id.