ALASKA BAR ASSOCIATION ETHICS OPINION NO. 92-1

Failure to Disclose Representation By Class Counsel

The Committee has been asked by Bar Counsel whether it is proper for an attorney to solicit clients in a class action without disclosing to the potential clients that they are members of a class represented by class counsel.

As the Committee understands the facts involved in this matter, the potential clients were members of a certified class in a large, multi-party class action. These individuals were contacted by an attorney during the "opt-out" period after class certification, and entered into contingent fee agreements with the attorney for representation in the case as "individual" plaintiffs. The attorney not disclose to the clients that they were members of a class certified by the Superior Court, nor did the attorney disclose that the Superior Court had already approved representation of their class by another law firm.

During the "opt-out" period, class members may withdraw from the class and hire individual counsel. Civil Rule 23(c)(2). The decision on "opting-out" is important, and a class member may decide to seek legal advice from independent counsel before deciding one way or the other. The class member may want an opinion from an attorney other than class counsel, may not understand the options, may want to consult his or her usual attorney, or may be cautious about representation by class counsel for other reasons.¹

Given the class members' important interests in making a fully informed decision on "opting-out," the Committee firmly believes that an attorney contacted by a class member about individual representation in a class action must disclose the option of representation by class counsel with the prospective client.

The attorney must fully and candidly discuss the benefits and drawbacks of class representation as compared to those of proceeding independently. <u>See</u>, Comment, Model Rule 2.1, "Advisor," <u>ABA Annotated Rules of Professional Conduct</u>, (1984 ed.) at 187 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment").

The attorney's interests in obtaining a new client cannot override the obligation to fully disclose the merits of representation by class counsel. <u>See</u> EC 5-1 ("The professional

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¹The committee believes that a lawyer representing individual plaintiffs in a class action may communicate with other members of a certified class about the class action during the "opt-out" period without violating DR 7-104(A)(1). See ABA Model Rule 4.2. "Communication with Person Represented by Counsel," ABA Annotated Model Rules of Professional Conduct, (1984 ed.) at 268.69 ("Rule 4.2 is intended to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer) (emphasis added). The interests of class members who "opt-out" compared to those who "opt-out" are not, in the committee's view, "opposing" or "adverse" within the meaning of these rules. Compare, Impervious Paint Industries, Inc. v. Ashland Oil et al., 508 F.Supp. 720, 722 (W.D. Kentucky, 1981) ("defendants' counsel must treat plaintiff class members as represented by counsel, and must conduct themselves in accordance with both sections of DR 7-104").

judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties") and DR 1-102(A)(4) ("A lawyer shall not...[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").

The facts presented indicate that the attorney failed to disclose to the class members that they were represented by class counsel. The Committee understands that the attorney contacted the class members very shortly after the class was certified. They may have been unaware that the class had been certified, and equally unaware that class counsel had been appointed.

The Committee concludes that the attorney's failure to fully explain all the options available to the class members was improper. The attorney had an obligation to candidly disclose to these potential clients that their class had been certified, and to discuss whether their interests might be better protected by "opting-in," as opposed to choosing individual representation.

Approved by the Alaska Bar Association Ethics Committee on January 9, 1992. Adopted by the Board of Governors on January 17, 1992.

/1/The committee believes that a lawyer representing individual plaintiffs in a class action may communicate with other members of a certified class about the class action during the "opt-out" period without violating DR 7-104(A)(1). See ABA Model Rule 4.2. "Communication with Person Represented by Counsel," ABA Annotated Model Rules of Professional Conduct, (1984 ed.) at 268.69 ("Rule 4.2 is intended to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer) (emphasis added). The interests of class members who "opt-out" compared to those who "opt-out" are not, in the committee's view, "opposing" or "adverse" within the meaning of these rules. Compare, Impervious Paint Industries, Inc. v. Ashland Oil et al., 508 F.Supp. 720, 722 (W.D. Kentucky, 1981) ("defendants' counsel must treat plaintiff class members as represented by counsel, and must conduct themselves in accordance with both sections of DR 7-104").

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