



## Committee on Professional Ethics

Opinion #499 - 12/4/78 (55-78) Topic: Solicitation; class action; communication with potential members of class in suit

Digest: Lawyer may communicate with potential members of class in suit for purpose of obtaining information beneficial to his client, subject to applicable rules of law bearing upon such communications.

Code: EC 1-5;  
DR 1-102(A) (4),  
2-104(A) and (F),  
7-101(A) (1),  
7-102(A) (8)

### QUESTION

May a lawyer publish in a newspaper of general circulation a notice offering "to swap information of possible mutual benefit regarding [a specified] class action"?

### OPINION

While the subject notice is superficially no more than a proposed exchange of information, the reference to "mutual benefit" is obviously calculated to arouse the interest of potential members of the class in suit to the possibilities of gaining some form of redress. Hence, the question now before our Committee will ultimately require us to balance a lawyer's obligation to pursue his client's rights with diligence and zeal against the need to avoid improper solicitation.

To some extent, the Code of Professional Responsibility reflects the tension between these two, at times apparently conflicting, goals. Cf., e.g., DR 7-101(A)(1) with DR 2-104(A). Specifically, in the context of the question posed, we note DR 2-104(F) which states:

"If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."

Although DR 2-104(F) is far from determinative of the question, it implies approval of contacting potential members of a class in suit "for the purpose of obtaining their joinder" when "success in asserting rights ... of a client ... is dependent upon the joinder of others." It also serves to demonstrate that it is essential to a finding of ethical propriety that the contact be made for the purpose of advancing a legitimate interest of the lawyer's client and not for the purpose of gaining additional clients for the lawyer. Even then, the lawyer is permitted only to "accept, but [not to] seek, employment from those contacted."

The principle which underlies DR 2-104(F) has found repeated expression in the opinions of our Committee. As we observed in N.Y. State 124 (1970):

"When the interests of a client will be served by enlisting the cooperation of others similarly situated, an attorney may solicit or participate in soliciting such cooperation, provided his motive is not to benefit himself."

See also, N.Y. State 449 (1976), N.Y. County 632 (1974), N.Y. City 717 (1948), ABA Inf. 1283 (1973) and ABA Inf. 1280 (1973).

Where conduct containing an element of solicitation is necessary to advance the legitimate interests of a client, an exception to the general rule is said to exist. As was explained in N.Y. City 717, supra:

"[W]hen an attorney has been legitimately and properly retained by a litigant, and the needs of that litigant will be promoted by enlisting the cooperation of others who are actually interested in the outcome of the litigation, the attorney may solicit or participate in the solicitation of such cooperation \*\*\* [S]uch solicitation is an exception to the general rule, tolerated only in the interests of a client and not in a lawyer's own interest, and the lawyer is under the duty to see that the solicitation is conducted in a dignified manner without touting or high pressure salesmanship and in such a way as to negative the implication of the self-advancement of the lawyer." (Emphasis supplied)

Accord, Ore. Op. 232 (1972), Los Angeles Co. Op. 86 (1966) and D.C. Op. 3 (undated), respectively indexed at 9793, 7833 and 8033,

O. Maru, Digest of Bar Association Ethics Opinions (1975 Supp.) hereinafter "Maru's Digest".

Class actions are no different in principle than any other species of litigation to the extent that the ethics of our profession permit a lawyer to advance the legitimate interests of his client by soliciting the aid of others, including potential members of the class in suit. What has troubled some ethics committees is the relative scale and representational character of such actions, coupled with the amount of regulation that addresses the matter of communicating with potential members of the class in suit. See, e.g., Tex. Op. 376 (1974) and Fla. Op. 71-22 (1971), respectively indexed in Maru's Digest at 9899 and 8108. The relative scale and representational character of such actions has seemed to present the lawyer wishing to communicate with potential class members an opportunity to engage in advertising of a kind previously forbidden to the profession, as well as to create a substantial risk that he might engage in a form of solicitation or barratry which is most assuredly still proscribed. Cf., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and In re Primus, \_\_\_ U.S. \_\_\_, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) with Ohralik v. Ohio State Bar Association, \_\_\_ U.S. \_\_\_, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

Communication with potential members of a class in suit raises many complex issues of law, some of which issues may well be of constitutional proportions. See, e.g., In re Primus, *supra*, and Rodgers v. United States Steel Corporation, 508 F.2d 152, 162-165 (3rd Cir. 1975). To be sure, it is not the function of this Committee to resolve issues of law. We nevertheless wish to remind the Bar that there are many statutory and judge made rules bearing upon the subject matter of the question posed. See, e.g., Judiciary Law §§ 90(2), 479, 482 and 485; CPLR 1005(b); and, Fed.R.Civ.P. 23 (as well as local rules of court promulgated in connection therewith). See also, 22 NYCRR §§ 603.2 and 603.18 (1st Dept.); *id.*, §§ 691.2 and 691.15 (2nd Dept.); *id.*, § 806.2 (3rd Dept.); *id.*, § 1022.17 (4th Dept.). Herein, it should be remembered that generally conduct that is contrary to law is also considered to be unethical. See, EC 1-5, DR 1-102(A)(4), DR 2-104(A) and DR 7-102(A)(8); see also, N.Y. State 495 (1978), N.Y. State 493 (1978) and N.Y. State 328 (1974).

In the final analysis, absent any applicable rule of law to the contrary, the lawyer is at liberty to contact any person having information which may materially benefit his client's cause. But, a lawyer proposing to contact potential members of a class in suit bears an exceedingly heavy burden of complying with all applicable substantive or procedural rules of law. And, consonant with those rules of law, the ethics of our profession will not tolerate such communications for the purpose of generating a clientele.

For the reasons stated, subject to the qualifications herein-  
above set forth, the question posed is answered in the affirmative.

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