

## MINUTES

**COMMITTEE:** Ethics Committee

**DATE:** November 20, 1995

**4. CHAPTER 8, RULE 11; APPLICATION OF ANTI-CONTACT RULE TO CLASS PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT***

Chapter 8, Rule 11 of the *Professional Conduct Handbook* states:

A lawyer shall not approach or deal with an opposing party or with a potential witness in those proceedings who is represented by another lawyer, except through and with the consent of that party's or witness's counsel.

The Committee considered a request from counsel who has commenced an action on behalf of members of a class for an opinion on the applicability of this rule to class proceedings. The Committee reviewed representations made by lawyers on both sides of this particular proceeding.

The Committee noted that under the *Class Proceedings Act* one member of a class of persons may commence a proceeding on behalf of the members of that class, but the action does not become a "class proceeding" until it is certified by the court as such under Part 2 of the *Act*.

After certification, lawyers for the representative plaintiff to the proceeding effectively represent the interests of all members of the class who have not opted out of the proceeding. For this reason the Committee's view was that after certification Chapter 8, Rule 11 may prevent a lawyer for a defendant from approaching and dealing with a member of the class who has not opted out of the proceeding, unless the contact occurs in accordance with the rule.

Prior to certification of the proceedings, the Committee noted that:

- no mechanism exists for potential members of the class to opt out of the proceedings if they do not wish to be represented by the lawyer for the prospective representative plaintiff, or for other reasons, and
- it will be unclear what persons are members of the class until the identifying characteristics of the class have been described by the court in the certification order.

Moreover, the Committee was of the opinion that prior to certification the relationship between the lawyer for the prospective representative plaintiff and members of the class is too remote to consider that the lawyer is "representing" members of the class within the meaning of the rule.

For these reasons the Committee's view was that prior to certification of a proceeding Chapter 8, Rule 11 does not prevent a lawyer for a defendant from approaching and dealing with a person who is potentially a member of a class. The rule, of course, does prevent such contact if the person is personally represented by a lawyer.

Other rules of professional conduct, especially Chapter 4, Rule 1 on dealing with unrepresented persons, constrain the way in which a lawyer may deal with an unrepresented person during the pre certification stage of a proceeding under the *Class Proceedings Act*.

keywords: //anti-contact//class proceedings//class actions//unrepresented//  
//unrepresented person//unrepresented party//

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