

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION No. 481: March 20, 1995

SUMMARY

ETHICAL DUTIES TO OPT-OUT MEMBERS OF A CLASS -- A lawyer representing plaintiffs in a class action has no duty to turn over papers or property to a member of a putative class who opts out of the class after class certification, except for papers or property received from the individual who is opting out.

AUTHORITIES CITED

7A & 7B Charles A. Wright et al., Federal Practice and Procedure (2d ed. 1986 & Supp. 1994)
Fracasse v. Brent , 6 Cal. 3d 784, 786 (1972)
Fulco v. Continental Cablevision , Inc., 789 F.Supp. 45, 47 (D. Mass. 1992)
Kleiner v. First National Bank , 751 F.2d 1193 (11th Cir. 1985)
Manual for Complex Litigation § 30 (2d ed. 1985)
Herbert B. Newberg & Alba Conte, Newberg on Class Actions (3d ed. 1992 & Supp. 1994)
Rental Car v. Westinghouse Elec. Corp ., 496 F.Supp. 373, 383 (D. Mass. 1980)
Resnick v. American Dental Ass'n , 95 F.R.D. 372 (N.D. Ill. 1982)
Roper v. Conserve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978), aff'd sub nom. Deposit Guaranty Nat'l Bank v. Roper , 445 U.S. 326 (1980)
Rules of Professional Conduct , Rule 3-700
Van Gemert v. Boeing Co., 590 F.2d 433, 440 (2d Cir. 1978)

ISSUE PRESENTED

This opinion responds to the following inquiry: Is a class-action attorney bound by Rule 3-700(D) of the Rules of Professional Conduct to give the "papers and property" relating to the class action to a former member of the class (not a class representative) who has opted out of the class and hired her own attorney to litigate separately her case against the defendant?

DISCUSSION

A client has an absolute right to discharge his or her attorney and to substitute new counsel to complete the representation in a matter. Fracasse v. Brent, 6 Cal. 3d 784, 786 (1972). This right is qualified in litigation, if permission of the court for substitution of counsel is required. Rule 3-700(A)(1). Once substitute counsel is retained (and court permission is granted, if it is required), previous counsel has a duty to turn over to the client or successor counsel all of the client's files in the matter. Rule 3-700(D)(1). This includes confidential documents and work product for which the client has been billed or is to be billed. *Id.* The attorney may make and keep a copy of such documents at the attorney's own expense. *Id.*, Discussion.

The question for this inquiry is whether an opt-out class member of a certified class^[1] qualifies as a client for the purposes of the foregoing rule.^[2]

To begin a class action, an attorney files a lawsuit on behalf of one or more specific clients, the "named" plaintiffs in the action. In addition to seeking relief on their own behalf, the plaintiffs describe a class of similarly situated individuals (or entities), for whom the named plaintiffs seek similar relief. At an early stage in the litigation^[3] the court typically makes a determination whether to "certify" the class. If the class is certified, counsel for the named plaintiffs thereafter represents the certified class in the litigation.

In the most common form of federal class action, governed by Federal Rule of Civil Procedure 23(b)(3), any member of the class is given an opportunity, immediately after class certification, to "opt out" of the class.^[4] A class member who opts out is not eligible to receive any relief in the lawsuit. The opting out individual may pursue his or her own independent relief against the defendant, or may choose not to seek relief at all.

Until certification of the class, the class members are not actual parties to the litigation. For this reason they are frequently described as "putative" class members while the issue of class certification is pending.

Before class certification (or denial), the potential class members are not yet represented by class counsel.^[5] Resnick v. American Dental Ass'n, 95 F.R.D. 372, 377 n.6 (N.D. Ill. 1982)(dictum). After class certification, in contrast, the members of the class are clients of class counsel in the full sense. *Id.* at 376; Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985)(dictum); Van Gemert v. Boeing Co., 590 F.2d 433, 440 (2d Cir. 1978); Fulco v. Continental Cablevision, Inc., 789 F.Supp. 45, 47 (D. Mass. 1992); Rental Car v. Westinghouse Elec. Corp., 496 F.Supp. 373, 383 (D. Mass. 1980)(dictum). In addition, named class representatives are clients of class counsel in the full sense from the outset of the litigation.

This lack of an attorney-client relationship for a putative class member is especially true for a class member who decides to opt out of the class representation after class certification. The class member who opts out in effect tells the lawyer that class member does not want the lawyer to represent him or her in the action, and declines such representation. While a period of time typically passes between the certification of the class and the exercise of the opt-out right, during which the opting out class member is technically a full member of the certified class, this is not a sufficient basis to give the opting out class member a right to obtain copies of papers or documents collected by class counsel, and especially not those that are protected by the attorney-client privilege or that are otherwise confidential.

For any documents or papers that class counsel has received from the opting out class member, of course, the result is different. Class counsel has a duty to turn these papers over to the opting out class member (or to that person's new counsel). See Rule 3-700(D).

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the inquiry submitted.

^[1] Class actions in federal court are governed by Rule 23 of the Federal Rules of Civil Procedure. See generally, 7A & 7B Charles A. Wright et al., Federal Practice and Procedure (2d ed. 1986 & Supp. 1994); Herbert B. Newberg & Alba Conte, Newberg on Class Actions (3d ed. 1992 & Supp. 1994); Manual for Complex Litigation § 30 (2d ed. 1985). Most states, including California, have analogous procedures.

^[2] This opinion does not apply to a named plaintiff in a class action. Such a party is a client in all respects by counsel of record.

^[3] Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that the determination of class certification is to be made "as soon as practicable" after the filing of the complaint.

^[4] Fed. R. Civ. P. 23(c)(2).

^[5] Class counsel does, however, have certain duties respecting putative class members while class certification is pending. See, e.g., Roper v. Conserve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978) (class counsel may not settle a case on behalf of named plaintiffs alone while class certification is pending, absent court approval after notice to the putative class), aff'd sub nom. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980)