

Applying Rule 4.2 in Class Action Litigation

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Rule 4.2 of the Minnesota Rules of Professional Conduct (MRPC) prohibits an attorney from communicating directly with a party known to be represented by counsel. In the context of a class action suit, or potential class action litigation, when do members or prospective members of the class become parties subject to the protection of the rule? Put another way, at what point in the proceeding is counsel for the targeted defendant precluded from contacting potential class members without going through their lawyer?

The majority position on this issue, as expressed in the Restatement (Third) of the Law Governing Lawyers,[Ftn 1](#) is that once the case has been certified as a class action, all members of the class, presumably excluding any individual who has formally opted out of the class, are considered clients of the lawyer for the class. Prior to certification, however, only those individuals with whom the lawyer has a personal attorney-client relationship are considered clients. Presently, for enforcement purposes in Minnesota, the Director would apply this distinction.

Thus, prior to class certification, in general, defense counsel may contact individuals who may become class members and interview them.[Ftn 2](#) While such a clear-sounding rule should be relatively easy to understand or enforce, it may lead to overreaching in some unique circumstances. For example, what happens during the period when class certification has been sought but not yet ruled upon?

Earlier this year, in *Dondore v. NGK Metals Corp.*,[Ftn 3](#) a federal District Court in Pennsylvania indirectly answered that question, albeit not in a class action matter. In *Dondore*, the court prohibited a defense attorney from interviewing witnesses identified in a personal injury action filed in the federal court, if those witnesses were also putative class members of a proposed state court class action arising out of the same conduct.

The related cases arose out of tort claims against a beryllium metal manufacturing plant. The plaintiffs filed a federal diversity action on their own behalf against NGK and Cabot Corporation; their counsel also instituted a proposed state court class action against the companies on behalf of all residents within a six-mile radius of the plant. In discovery in the federal action, the plaintiffs identified many neighbors and relatives as witnesses. The state court class certification was still pending. Defense counsel began to contact these individuals to interview them, apparently in part to ascertain information related to a potential statute of limitations defense in the proposed class action matter. The plaintiffs' counsel sought emergency relief from the federal court judge.

The judge ruled that defense counsel's interview attempts must cease. The court reasoned that the putative state class members have certain rights and protections, and that in this instance, those protections would include Rule 4.2. Since it was unreasonable to presume that the state court could rule on a certification request immediately upon the filing of a complaint, allowing defense counsel to interview the putative class members in the interim period would undermine the purposes of class action litigation. If class certification

were denied, then counsel could resume informal attempts to contact witnesses, or counsel could formally depose the individuals.[Ftn 4](#)

While the result may have been fair in this particular instance, the judge's underlying position on contacting putative class members ran contrary to the majority rule. If such situations arise locally, court guidance may prove equally necessary.

For plaintiffs' lawyers, class action litigation does not offer the same problems as it does for defense counsel. The principal application of Rule 4.2 to plaintiffs' counsel arises in the desire to contact current and former employees of a corporate defendant. Here the Director continues to follow the positions set out in the comment to Rule 4.2[Ftn 5](#) and in the ABA's Formal Opinion 91-359.[Ftn 6](#)

1 Sec. 99, comment l.

2 These individuals may have their own lawyers, however, in which case defense counsel could not proceed further without that lawyer's consent. If the contacted individual is unrepresented, the contact may be proper, but the content of the contact is still subject to the requirements of the MRPC.

3 2001 WL 360151 (E.D.Pa. Apr. 9, 2001).

4 Id.

5 "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

6 "[A] lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."