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The Ethics of Communicating with Putative Class Members

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I. The Rule Against Contact with Represented Persons

The rule against attorney contact with a represented person is deeply entrenched in the law of lawyering.[1] Its origins date back to the early 1800s,[2] and today the rule is enforced through a broad

1. *See In re* Doe, 801 F. Supp. 478, 485 (D.N.M. 1992) (stating that "the ban on communicating with a represented party is a fundamental principle of both state and federal law, is incorporated into federal law through the local rules, and has its roots in our common law tradition.").

2. *See* John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 684 n.6 (1979) (tracing the origins of the rule to a statement in David Hoffman's treatise, which stated, "I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent, *and* in the presence of his counsel.").

variety of mechanisms, including discipline,[3] disqualification,[4] evidentiary rulings,[5] and equitable relief.[6] As embodied in Rule 4.2

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3. *See, e.g.*, People v. McCray, 926 P.2d 578, 579 (Colo. 1996) (censuring lawyer publicly); *see also* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 6.3 (1991). Standard 6.3, Improper Communications with Individuals in the Legal System, states in relevant part:

> 6.31 Disbarment is generally appropriate when a lawyer . . .
>
> (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.
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> 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
>
> 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.
>
> 6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

4. *See, e.g.*, *In re* News Am. Publ'g, Inc., 1998 WL 105451, at *1 (Tex. App.—San Antonio, March 11, 1998) (granting disqualification based on contact by plaintiffs' counsel with individual defendant who was later non-suited from action); Shoney's, Inc. v. Lewis, 875 S.W.2d 514, 516 (Ky. 1994) (disqualifying attorney for interviewing general manager of corporation targeted for suit, and suppressing statements).

5. *See, e.g.*, Camden v. Maryland, 910 F. Supp. 1115, 1123-24 (D. Md. 1996) (barring the opposing party, based on improper contact with a respresented person, from using the represented person's testimony and disqualifying the firm that committed the infraction); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723-24 (W.D. Ky. 1991) *appeal dism'd*, 659 F.2d 1081 (6th Cir. 1981) (restoring to class, pending new decision on opting out, persons who opted out of class after being improperly contacted). *See also* Leonard E. Gross, *Suppression of Evidence as a Remedy for Attorney Misconduct: Shall the Sins of the Attorney Be Visited upon the Client?*, 54 ALBANY L. REV. 437, 446-48 (1990) (arguing that the suppression of evidence that is obtained in violation of legal ethics is a legitimate mechanism for enforcing the rules of professional conduct).

6. *See, e.g.*, *Impervious Paint Indus.*, 508 F. Supp. at 724.

of the American Bar Association Model Rules of Professional Conduct, this anti-contact standard provides that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[7]

A version of the rule exists in every American jurisdiction.[8] Although the language of state standards often differs from the ABA model,[9] in important substantive respects, local variations are

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7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1997). The legislative history of Rule 4.2 is recounted in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 264-68 (1997).

8. *See* United States v. Lopez, 765 F. Supp. 1433, 1448-49 (N.D. Cal. 1991) (stating that "the rule or its equivalent is now in effect in every state"), *vacated and remanded on other grounds*, 4 F.3d 1455 (9th Cir. 1993).

9. *See, e.g.*, CAL. R. OF PROF'L CONDUCT Rule 2-100 (1998):

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer . . . .
>
> (C) This rule shall not prohibit:
>
> (1) Communications with a public officer, board, committee, or body;
>
> (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
>
> (3) Communications otherwise authorized by law.

FLA. BAR R. OF PROF'L CONDUCT Rule 4-4.2 (1997):

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104 (1997):

> A. During the course of the representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer

normally indistinguishable from the Model Rule or its nearly identical predecessor in the now-superseded ABA Model Code of Professional Responsibility.[10] A more detailed, but not significantly different, version of the rule also appears in the emerging *Restatement (Third) of the Law Governing Lawyers*.[11]

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representing such other party or is authorized by law to do so.

TEX. DISCIPLINARY R. PROF'L CONDUCT Rule 4.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9):

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Some differences between state codes and the ABA model result from the fact that, at its annual meeting in 1995, the ABA House of Delegates amended the text of Rule 4.2. As originally written, the Rule spoke of a "party" (rather than a "person") who was represented. That choice of phraseology engendered debate about whether the Rule applied in the non-litigation context. As a result, "[t]he amendment changed the word 'party' to 'person' in the text of the Rule and extensively revised the Comment to the Rule." GILLERS & SIMON, *supra* note 7, at 262.

10. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 and DR 7-104(A) (1980). Ethical Consideration 7-18 stated in part:

> The legal system in its broadest sense functions best when persons in need of legal service or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.

Disciplinary Rule 7-104 provided in relevant part:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 8, 1997):

> Section 158. Represented Non-Client—General Anti-Contact Rule
>
> (1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a non-client whom the lawyer knows to be represented in the matter by another lawyer, or with a representative of an organizational non-client so represented as defined in § 159, unless:
>
> (a) the communication is with a public officer or agency to the extent

Two facets of the ABA Model Rule on communication with a represented person are striking. First, within its scope, the Rule states an absolute prohibition, rather than a restriction on time, place, or manner. Second, the demands of the Rule cannot be waived by the represented person whose interests are at stake.[12] If one were addressing the subject *tabula rasa*, it would be possible to articulate a less stringent standard that might adequately serve the purposes of the Rule. A standard seeking to protect represented persons from overreaching by lawyers who represent adverse interests might do that by banning conduct that overreaches, rather than by prohibiting all contact entirely. For example, a rule might prohibit communications with a represented person about the subject matter of the representation if those communications involve fraud or other forms of misrepresentation,[13] or amount to undue influence.[14] Alternatively, to address concerns about the possibly improper content of communi-

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stated in § 161;

(b) the lawyer is a party and represents no other client in the matter;

(c) the communication is authorized by law;

(d) the communication reasonably responds to an emergency; or

(e) the other lawyer consents.

(2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented non-client, unless the lawyer thereby seeks to deceive or overreach the non-client.

12. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (stating that "[w]hile the Committee recognizes that not allowing the represented person to waive the Rule's protection may be seen as paternalistic, it believes that Rule 4.2 requires that result."); *see also Lopez*, 4 F.3d at 1462 (noting that "it would be a mistake to speak in terms of a party 'waiving' her 'rights.'. . . The rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties.").

13. Such an approach frequently is followed by rules applicable to communications about the terms and availability of legal services. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1997). Rule 7.1 provides in part, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

14. A variation of this form of regulation is employed by Rule 7.3 of the MODEL RULES OF PROFESSIONAL CONDUCT (1997) with respect to solicitation of employment by targeted mail. The Rule provides in relevant part: "(b) A lawyer shall not solicit professional employment from a prospective client by written . . . communication . . . if: . . . (2) the solicitation involves coercion, duress or harassment."

cations occurring outside the presence of the represented person's lawyer, a rule might require that all communications with a represented person be in writing and that copies of such writings be retained by their originator or provided to an appropriate party.[15] Also, a rule intended to protect represented persons could, as many rules do,[16] condition the permissibility of the lawyer's conduct on consent by the represented person. Another alternative to a total prohibition of contact would be to require opposing counsel to notify the attorney for the represented person of each communication, either before it occurs or after it takes place. However, these and other moderate approaches to protecting persons represented by counsel have been eschewed. It makes no difference whether the opposing lawyer treated the represented party unfairly[17] or even whether the represented person, rather than the adverse lawyer, initiated the exchange.[18] Any communication about the subject matter of the representation is wholly banned, except as allowed by law or by consent of the represented person's counsel. Thus, as presently formulated in American jurisprudence, the rule against contact with represented persons is both sweeping and inflexible.

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15. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(b) ("A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used."); TEX. DISCIPLINARY R. PROF'L CONDUCT Rule 7.07 ("[A] lawyer shall file with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or currently with the mailing or sending of a written solicitation communication . . . a copy of the written solicitation communication.").

16. For example, several conflict of interest rules condition the permissibility of lawyer conduct on consent by the affected layperson. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(a)(2) and (b)(2), 1.8(a)(3), 1.9(a) and (b), and 1.12(a).

17. *Cf. In re* News Am. Publ'g, Inc., 1998 WL 105451, at *6 (Tex. App.—San Antonio, March 11, 1998) (finding represented person rule violation even though person with whom plaintiffs' counsel communicated was shortly thereafter non-suited from action); *In re* McCaffrey, 549 P.2d 666, 668 (Or. 1976) (reprimanding lawyer who unknowingly communicated improperly with a party represented by a lawyer and finding it "immaterial whether the direct communication is an intentional or a negligent violation of the rule.").

18. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (stating that "[t]he fact that the represented person is the one who initiates a communication does not render inapplicable the prohibition on communicating about the subject matter of the representation.").

A sense of the exacting demands of the "represented person" rule can be gained by contrasting this standard with the rules that govern what many persons view as the most odious ethical violation by lawyers—"ambulance chasing."[19] With limited exceptions,[20] written solicitation of an accident victim is ethically permissible if the statements made are truthful and not misleading.[21] Oral communication with an accident victim is also allowed if the injured person initiates the conversation.[22] In contrast, under the rule against communicating with represented persons, neither written communications nor communications initiated by a represented person are ethically permissible.

II. Contact with Class Members

As a codified standard, the application of the represented person rule is definitionally driven. Among the key questions are: who is a "person" within the meaning of the rule; when does "representation" begin and end; what "matters" are within the scope of a representa-

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19. *See* Gerald S. Reamey, *The Crime of Barratry: Criminal Responsibility for a Breach of Professional Responsibility*, 53 TEX. B.J. 1011, 1011 (1990) (noting that "[s]uch misconduct is not . . . merely a breach of professional etiquette or a violation of disciplinary rules. It is also a crime.").

20. *See* Florida Bar v. Went for It, Inc., 515 U.S. 618, 633 (1995) (finding that on appropriate facts, a state may impose a thirty day waiting period on written communications by lawyers with accident victims).

21. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988) (finding that non-misleading targeted mail is constitutionally protected).

22. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 95 (1988) (commenting that "an attorney may not be disciplined for responding to communications initiated by a prospective client."); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 14.2.5, at 788 n.6 (1986) (stating that "the Code does not prohibit solicitation of a client so long as the person solicited has initiated the contact with the lawyer."); Rhoades v. Norfolk & W. Ry. Co., 399 N.E.2d 969, 972 (Ill. 1979) (finding that "the cases generally condemn as unlawful solicitation the drumming up or procurement of legal business . . . [from] potential clients who have not initiated contact with the attorney."). *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 cmt. 7 (1997) (noting that labeling requirements ordinarily applicable to written communications about legal services do not apply to communications sent in response to requests of potential clients).

tion; and when does a lawyer "know" that a person is represented by another lawyer in a matter?[23] Although there is considerable authority bearing upon these and related issues,[24] there are still important unresolved questions relating to the interpretation of the rule,[25] including its proper operation in class action litigation.

In the context of class actions, it is now generally agreed that the lawyer for a *certified* class represents all putative members of the class,[26] at least until they elect to opt out of the class.[27] This is true even though putative members of the class may never have communicated with the class attorney or may not even know that the class action exists. The court's certification of the class, at least for purposes of this rule, is deemed to create a lawyer-client relationship

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23. *See generally* ABA/BNA Lawyers' Manual on Professional Conduct § 71:301 *et seq.* (1997) (detailing obligations to third parties and communications involving persons represented by counsel).

24. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (providing an extensive discussion of "Communications with Represented Persons"); *see also* Barbara Hanson Nellermoe & Fidel Rodriguez, *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 491-95 (1997) (discussing Texas precedent).

25. One such question having great importance is whether, in the context of litigation, a discharged attorney ceases to "represent" a client before a formal change in counsel of record. In In re *News American Publishing, Inc.*, 1998 WL 105451 (Tex. App.—San Antonio, March 11, 1998), the court, following the lead of an earlier ABA ethics opinion, held that representation does not cease merely because the client states that the lawyer has been terminated and that "'if retained counsel has entered an appearance in a matter . . . and remains counsel of record, . . . the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance.'" In re *News Am. Publ'g, Inc.*, 1998 WL 105451, at *6 (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995)).

26. *See, e.g.*, Haffer v. Temple Univ., 115 F.R.D. 506, 510 (E.D. Pa. 1987) (citing DR 7-104(A) and finding that defense counsel's conduct was a "flagrant and inexcusable violation of professional standards"); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (finding that "once the court certified the class . . . a limited attorney-client relationship existed between plaintiffs' attorney and absent class members"); *In re* Federal Skywalk Cases, 97 F.R.D. 370, 377 (W.D. Mo. 1983) (stating that "the disciplinary rule clearly applies in suits which proceed as a class action").

27. *See* Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 722-23 (W.D. Ky. 1991) (finding that contact during opt-out period violated the rule against communication with represented persons).

between class counsel and putative class members.[28] This view is consistent with language in the *Restatement of the Law Governing Lawyers*, which provides that the relationship of client and lawyer is established not only when a person manifests to a lawyer the person's intent for the lawyer to provide legal services, but also when "a tribunal with power to do so appoints the lawyer to provide the services."[29] The members of a certified class are "represented" by reason of the court's certification of the class and designation of class counsel; because they are represented, they come within the scope of the rule and normally may not be contacted by opposing counsel.[30] Thus, in the context of mass tort litigation, defense counsel may not communicate with potential members of the plaintiff class except with the consent of counsel for the class or as authorized by law, including authorization by an order of the court.[31] Moreover, because a lawyer

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28. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §158 cmt. 1 (Tentative Draft No. 8, 1997) (commenting that "according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class.").

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. f (Proposed Final Draft No. 1, 1996). Comment f to Section 26 elaborates:

> Class actions may pose difficult questions of client identification. For many purposes, the named class representatives are the clients of the lawyer for the class . . . . [C]lass members who are not named representatives also have some characteristics of clients. For example, their confidential communications directly to the class lawyer may be privileged . . . and opposing counsel may not be free to communicate with them directly . . . . Members of the class often lack the incentive or knowledge to monitor the performance of the class representatives. Although members may sometimes opt out of the class, they may have no practical alternative other than remaining in the class if they wish to enforce their rights. Lawyers in class actions thus have duties to the class as well as to the class representatives.

30. *See* Fulco v. Continental Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992) (stating that after certification, "defendants' counsel must treat the unnamed class members as 'represented by' the class counsel for purposes of DR 7-104").

31. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §158 cmt. g (Tentative Draft No. 8, 1997):

> A tribunal, in the exercise of its authority over advocates appearing before it . . . and over proceedings generally, may expand the right of a lawyer to make ex parte contact with a non-client represented by opposing counsel. Such a court order is usually entered after notice and hearing. For example, although a lawyer for plaintiffs in a certified class action is considered to represent all members of the class, . . . the court may permit defense counsel

may not "violate . . . the rules of professional conduct . . . through the acts of another,"[32] a lawyer may not induce or assist a client or others to engage in types of communication with putative class members that the lawyer may not undertake directly.[33]

Application of the represented person rule to the *pre-certification* period in class action litigation requires a different analysis. Absent a judicial determination that a class should be certified, there is no basis for concluding that an unnamed potential member of a class, who has never been in contact with the lawyer seeking to certify the class, should be treated as having a lawyer.[34] The unnamed putative class member has not sought legal services, nor has a court ordered that they should be rendered to that person. Accordingly, a number of courts hold that the represented person rule does not prohibit communications between defense counsel and potential members of

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to approach class members directly if in the circumstances the court concludes that such persons will not be subjected to overreaching and that direct contact would otherwise be appropriate.

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) (1997).

33. *See* Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 722-23 (W.D. Ky. 1991) (finding that even though it was "undisputed that [defense] counsel did not personally contact any class member," the evidence showed that the defendant's representatives contacted class members "after consulting with counsel" and that "counsel had full knowledge of their client's intention to attempt to sabotage the class notice, and, in derogation of their duty as officers of the Court, they did not advise against the course of action").

34. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §158 cmt. l (Tentative Draft No. 8, 1997) ("prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients"); MANUAL FOR COMPLEX LITIGATION § 30.24, at 233 (3d ed. 1995) (noting that "no formal attorney-client relationship exists between class counsel and the putative members of the class prior to certification.").

an uncertified class.[35] Despite these rulings, the issue has not been fully settled.

First, statements in what many regard as the leading treatise on legal ethics can be fairly read to suggest that the issue is unresolved and that the represented person rule applies to the pre-certification context—at least in the case of certain forms of communication, such as offers to settle on stated terms or attempts to elicit statements concerning the matter in controversy that might be disadvantageous to the makers of the statements.[36] In addition, the Reporter's Note to

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35. *See* Babbitt v. Albertson's, Inc., 1993 WL 150300, at *1 (N.D. Cal., March 21, 1993) (finding that defense attorney's pre-certification communication with putative class members did not violate anti-contact rule); Gibbons v. CIT Group/Sales Fin., Inc., 400 S.E.2d 104, 107 (N.C. Ct. App. 1991) (affirming order requiring attorneys on both sides to notify each other in writing within twenty-four hours of name and address of putative class member contacted, but otherwise permitting communication); Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867, 871 (Ct. Cal. App. 1985) ("We cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party . . . represented by counsel' even before the class is certified."). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §158 cmt. l (Tentative Draft No. 8, 1997) (commenting that "[p]rior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.").

36. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 4.2: 102, at 734-36 (2d ed. 1997 & 1998 Supp.):

> Members of a class other than the designated class representatives have an indeterminate status as participants in the litigation, at least until they affirmatively "opt out" of the class, where that option is available under governing rules of civil procedure. *For certain purposes . . . unnamed class members should be regarded as clients of the lawyer representing the class from the inception of the suit, even before its certification* by the court as a proper class action. For example, most authorities rightly assume that the lawyer acts in a fiduciary capacity toward these people, and thus owes them duties of loyalty and care, even though he is still seeking formal authority to proceed on their behalf . . . .
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> In light of this indeterminacy of the status of class members, it is not obvious whether they should be regarded as "represented" persons for purposes of Rule 4.2. Where there is already an ongoing relationship between class members and the party opposing the class, such as between a group of employees and their employer, direct independent communication between the parties is inevitable, and additional communications through counsel ought not to be prohibited as long as courtesy copies of

the *Restatement of the Law Governing Lawyers* indicates that there is support for a minority view that the anti-contact provision relating to represented persons applies to pre-certification communications.[37] Finally, it is the personal knowledge of the author of this Article that attorneys engaged in litigation still contest this issue and, with the hope of securing favorable court rulings, obtain affidavits from experts bearing upon the question.[38]

Whatever uncertainty there is regarding the inapplicability of the represented person rule to the pre-certification context of class litigation can be dispelled through an exploration of the policies underlying the rule.

III. The Policy Basis of the Represented Person Rule

Various rationales have been invoked to justify the sweeping prohibitions of the rule against attorney communication with represented persons. In terms of their number and breadth and the

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> communications are provided to counsel. On the other hand, the lawyer for the opponent of the class should not be allowed to take statements concerning the matter in controversy from individual class members through *ex parte* interviews, for that could impose the very disadvantages that the rule is designed to prevent.
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> Intermediate situations should be resolved by reasoning from the purpose of the Rule 4.2, which is primarily to protect opposing clients and only incidentally to protect opposing lawyers.

(Footnotes omitted) (emphasis added).

37. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 158 cmt. l (Tentative Draft No. 8, 1997). Citing *Impervious Paint Industries, Inc.*, 508 F. Supp. at 720, the Reporter's Note on comment l states, "[P]re-certification contact—during opt-out period—violates anti-contact rule." The description of the *Impervious Paint* ruling may be incorrect, for it is not clear whether the contact by defense counsel with putative class members occurred before or after certification. However, it is reasonable to interpret the case as stating, at least in dicta, that putative class members are represented even before certification for purposes of the anti-contact rule.

38. I gave such an affidavit on October 28, 1997, in *City of Mercedes v. Reata Indus. Gas, L.P., et al.* (No. C-2262-97-A, 92nd District Court, Hidalgo County, Texas), in which I opined that certain pre-certification contacts were not prohibited by Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct. I understand that the issue to which that affidavit related is no longer part of the case because a temporary restraining order, prohibiting contact between defense counsel and putative class members, has been lifted.

certainty with which they are asserted, these reasons appear so formidable that a foreign visitor initially encountering the rule might easily conclude that it is no less than a fundamental precept of American law, without which the entire legal system might collapse.[39] While full precision in classifying these rationales is not possible, the arguments generally fall into four categories which suggest that the purposes of the rule are: (1) to protect a represented person from overreaching by opposing counsel;[40] (2) to promote the proper functioning of the legal system;[41] (3) to protect the attorney-client

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39. *See In re* News Am. Publ'g, Inc., 1998 WL 268540, at *6 (Tex. App.—San Antonio, March 11, 1998) ("The anticontact rule is . . . imposed to protect . . . the very integrity of the adversary system."); *In re* Doe, 801 F. Supp. 478, 485 (D.N.M. 1992) ("[T]he ban on communicating with a represented party is a fundamental principle of both state and federal law . . . and has its roots in our common law tradition.").

40. *See, e.g.*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 392 (3d ed. 1996) (commenting that "[t]he purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounselled laypersons.") (citations omitted); 2 HAZARD & HODES, *supra* note 36, at 730 (noting that "Rule 4.2 prevents a lawyer from taking advantage of a lay person to secure admissions against interest or to achieve an unconscionable settlement of a dispute."); *id.* at 731-32 (commenting that "[t]he purpose of the rule is . . . to prevent clients from being overreached by opposing lawyers."); Report of the ABA Standing Comm. on Ethics and Professional Responsibility, *reprinted in* GILLERS & SIMON, *supra* note 7, at 266 (noting the "need to protect uncounselled persons against being taken advantage of by opposing counsel" and "need to protect uncounselled persons against the wiles of opposing counsel"); Leubsdorf, *supra* note 2, at 686 (stating: "Authorities . . . usually base the rule on the danger that lawyers will bamboozle parties unprotected by their own counsel."); Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (noting that the rule prevents lawyers from using superior skills and training to obtain "unwise settlements").

41. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1980):

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented.

See also Polycast Tech. Corp., 129 F.R.D. at 625 (noting that the rule protects privileged information and facilitates settlements by allowing lawyers skilled in negotiating to conduct discussions); United States v. Batchelor, 484 F. Supp. 812, 813 (E.D. Pa. 1980) (stating that there is a societal interest in laypersons not making decisions with major legal implications without the advice of counsel); Leubsdorf, *supra* note 2, at 686 (noting that "[a] less dramatic possibility [of harm] is that conversations between a nonlawyer and an adverse lawyer will lead to disputes about what was said, which may force the lawyer to become a witness.").

relationship;[42] and (4) to protect the interests of the attorney for the represented person.[43]

None of these arguments is sufficient to extend the anti-contact rule to unnamed putative class members during the pre-certification period.

A. *Prevention of Overreaching*

The prevention of overreaching of laypersons by attorneys representing adverse parties is the justification most frequently urged in defense of the no-contact rule. This rationale has an aura of altruistic consumer protection, and also a ring of truth. The represented person rule does indeed prevent overreaching of laypersons, for it bans all forms of contact entirely, whether they involve overreaching or not. Of course, whether such a drastic prohibition is necessary to prevent overreaching is open to challenge. As suggested above,[44] there are many more moderate alternative forms of regulation that might prove to be adequate substitutes.

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42. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 40, at 392 (stating that "[t]he purpose of Rule 4.2 is . . . to preserve the integrity of the lawyer-client relationship."); Report of the ABA Standing Comm. on Ethics and Professional Responsibility, *reprinted in* GILLERS & SIMON, *supra* note 7, at 266 (noting "importance of preserving the client-attorney relationship"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (stating that anti-contact rule "safeguard[s] the client-lawyer relationship from interference by adverse counsel"). *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT Rule 4.02 cmt.1 (stating that the "Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel"); WOLFRAM, *supra* note 22, § 11.6.2, at 612 (noting that both DR 7-104(A)(1) and Rule 4.2 "strongly imply that their prohibitions are limited to attempts by the offending lawyer, in representing his or her own client, to drive wedges between other lawyers and clients.").

43. *See, e.g.*, 2 HAZARD & HODES, *supra* note 36, at 731-32 (stating that "[t]he purpose of the rule is to protect lawyers' agency relationships with their respective clients"); *id.* at 736 (noting that "the purpose of the Rule . . . [is] only incidentally to protect opposing lawyers."). *See also* Lewis Kurlantzick, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 138-52 (1977) (offering as a possible justification for the rule the argument that it rescues lawyers from a painful conflict between their duty to advance their client's interests and their duty not to overreach an unprotected opposing party).

44. *See supra* notes 13-16 and accompanying text.

In the class action context, a decision not to extend the represented person rule to the pre-certification period would not mean that opposing counsel would be unregulated and free to overreach. Communication with a person who does not have counsel must be consistent with standards applicable to communications with *unrepresented* persons. As embodied in Model Rule 4.3,[45] those standards prohibit a lawyer from stating or implying "that the lawyer is disinterested"[46] or from giving "advice to an unrepresented person other than the advice to obtain counsel."[47] A lawyer's communications with an unrepresented person also must not run afoul of the general rule that provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[48] A lawyer who makes a fraudulent statement to a non-client not only is subject to discipline, but also may be sued for damages.[49] In addition, a court may enter an order limiting communications between a defendant and potential class members based upon a specific showing of actual threatened abuse.[50] A court may also create procedures for monitor

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45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1997).

46. *Id.*

47. *Id.* cmt. 1 (1997).

48. *Id.* Rule 8.4(c).

49. *See, e.g.*, Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex.App.—Houston [1st Dist.] 1985, n.w.h.) ("An attorney has no general duty to the opposing party, but he is liable for injuries to third parties when his conduct is fraudulent or malicious. He is not liable for breach of a duty to the third party, but he is liable for fraud.") (citing Wilbourn v. Mostek Corp., 537 F. Supp. 302 (D. Colo. 1982)).

50. *See* Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867, 871 (Ct. App. 1985). The *Atari* court denied such relief in a state action involving potential members of an uncertified class, based on the guidance provided by the United States Supreme Court in *Gulf Oil v. Bernard*, 452 U.S. 89 (1981), a certified class action arising under federal law:

> In *Gulf Oil* a federal district court had imposed "a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court" . . . and the United States Supreme Court granted certiorari to determine the scope of the court's authority to limit communications from named plaintiffs to prospective class members. The United States Supreme Court concluded that the federal district court had exceeded the scope of its authority, quoting from Coles v. Marsh (3d Cir. 1977) 560 F.2d 186, 189: "[T]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without

ing whether abuse occurs, such as a requirement that copies of all written communications be filed with the court and provided to opposing counsel.[51] The availability of this diverse array of safeguards for preventing overreaching of unnamed putative class members, by itself, is good reason for not extending the absolute and inflexible terms of the represented person rule to the pre-certification period of class action litigation.

From a different perspective, in terms of the need for protection from overreaching, there is no basis for distinguishing putative members of an uncertified class from other unrepresented persons who might bring suit. In the tort context, if a person is injured in an accident, that person, before engaging counsel, may be contacted by an attorney for the defendant with an offer to settle potential claims.[52] This is true, even though there may be a risk of overreaching because the amount of the offer is inadequate, there is pressure to make a quick decision, or for some other reason.[53] Although certain members of the bar have decried such settlement practices,[54] they tend

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> a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."

166 Cal. App. 3d at 871 (citing *Gulf Oil*, 452 U.S. at 102); *see also* Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630, 635 (N.D. Tex. 1994) (holding that a lawyer who had on three occasions contacted potential class members, warning them not to join a class action, was prohibited from further contact with potential class members regarding the action until the date of trial or the date of an order denying certification).

51. *See In Re* Potash Antitrust Litigation, 896 F. Supp. 916, 919 n.5 (D. Minn. 1995) (declining to "assess the compliance" of counsel with Model Rule 4.2 and noting that if a breach of the rule occurred it was *de minimis*).

52. *See* 2 HAZARD & HODES, *supra* note 36, at 747 (stating that "lawyers for insurance companies have been permitted to negotiate settlements with unrepresented tort victims and workers' compensation claimants").

53. *Cf. id.* at 748-749 (discussing the "potential for overreaching" that is present when a lawyer seeks to obtain a release from an unrepresented person and criticizing Model Rule 4.3 for not adequately dealing with that subject).

54. *See* Richard Connelly, *Billboard War Heats Up Amid Big Suits, Barratry Allegations*, TEX. LAW., Aug. 18, 1997, at 19 (quoting David Bright, a Texas attorney, as stating, with regard to the legal issues arising from refinery explosions, "I don't see [barratry in Corpus Christi] as being as big a problem as the refineries signing releases . . . . I'm sure there are people out there ambulance chasin [sic]—but signing releases is a greater evil.").

to be lone voices. Thus, while personal contact with unrepresented persons in the form of client solicitation continues to be vigorously condemned,[55] there is no significant movement in the legal profession to ban contacts between defense attorneys, or persons acting on their behalf, and unrepresented accident victims. The lack of any such call for reform may simply reflect the power of the defense bar and the clients it represents. Or it may reflect a general consensus that the usual rules (which, as mentioned above, prohibit giving advice to an unrepresented person and making false statements) are adequate for dealing with the risk of overreaching that accompanies such contacts. If the latter is true, those same safeguards should also adequately protect unnamed putative members of an uncertified class action arising from an accident.

A variation of the view that the anti-contact rule prevents overreaching is the argument that the rule saves a represented person from being deprived of the protection that he or she attempted to secure by electing to engage counsel,[56] whether by reducing the likelihood of inadvertent harmful disclosures or otherwise.[57] The idea

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55. *See* Susan Borreson, *State Bar Lashes Out at O'Quinn*, TEX. LAW., Jan. 5, 1998, at 1, 18-19 (reporting barratry prosecution based on case-running allegations).

56. *See* Johnson, *supra* note 22, at 64-65 (arguing that the rule is "designed to prevent *an opposing lawyer* from gaining *an adversarial advantage* for [his or her] client by circumventing, through direct dealings with a layperson, the protections which that individual has sought to obtain by choosing to retain counsel"). *See also In re* Complaint of Korea Shipping Corp., 621 F. Supp. 164, 167 (D. Alaska 1985):

> The thrust of DR 7-104 "is to prevent situations in which a represented party may be taken advantage of by adverse counsel.". . . A related purpose of the rule is to "preserve the proper functioning of the legal profession" by ensuring that in making decisions relating to a dispute a client has the benefit of the advice of the legal expert he has employed to assist him.

(citations omitted); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (commenting that "[t]here is nothing more central to what it means to be a client in the American system of justice than to know that, having hired a lawyer, the client need not worry about being taken advantage of by lawyers, with special skills and training, who represent others.").

57. *See In re* News Am. Publ'g, Inc., 1998 WL 105451, at *5 (Tex. App.—San Antonio, March 11, 1998) (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995), which stated that "'the Rule operates to reduce the likelihood of the represented person engaging in communications that might ultimately prove harmful to her cause by imposing a strict ethical obligation on the communicating lawyer.'").

here is that a person should not be stripped of the fruits of his or her own diligent efforts, namely the advantages that are secured by obtaining counsel. Put differently: to encourage diligence, diligence should be rewarded.[58] Whatever force these arguments may have in the usual case, they have no application to unnamed putative class members. Such persons have not sought to engage an attorney. Permitting opposing counsel to communicate directly would therefore not take away any benefits that the unnamed putative class members had previously sought to obtain. The diligence rationale does not apply because there is no "diligence" to be rewarded.

B. Promotion of the Proper Functioning of the Legal System

It is sometimes asserted that the represented person rule promotes the proper functioning of the legal system.[59] Taken at a broad level of generality, the correctness of this statement is not obvious. To begin with, the rule exacts a high toll in transaction costs: "Requiring both lawyers to be present whenever one is present imposes inconvenience and expense."[60] In addition, there are many facets to the legal system aside from adversarial litigation, and it may not be useful to structure the ethics rules applicable to non-litigation fields, such as

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58. This rationale is similar to one that runs throughout tort law, namely that "tort law should encourage individuals to employ available resources to protect their own interests." VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 6 (1994).

59. *See* Carter v. Kamaras, 430 A.2d 1058, 1059 (R.I. 1981) (arguing that the rule preserves the proper functioning of the legal system); In re *News Am. Publ'g, Inc.*, 1998 WL 105451, at *6 ("The anti-contact rule is more than common courtesy; it is a professional requirement imposed to protect the client, other parties, and indeed, the very integrity of the adversary system."); *see also supra* note 41.

60. Leubsdorf, *supra* note 2, at 687; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 158 cmt. b (Tentative Draft No. 8, 1997) (noting that the rule has been criticized for requiring three-stage communications that are often more expensive, delayed, and inconvenient than direct communication).

transactional law practice, on an adversarial model.[61] Moreover, the idea that one lawyer must be present to neutralize the presence of another lawyer is not necessarily sound. Sophisticated business clients, for example, may be better able than their lawyers to conduct negotiations, and are perfectly capable of deciding whether they should communicate with opposing counsel directly. It is not clear that, outside of litigation, the inflexible formalities of the represented person rule optimize the proper functioning of the legal process.

With respect to the litigation arena, it has been argued that the anti-contact rule protects privileged information and facilitates settlements.[62] The first of these justifications has no application to unnamed putative class members, who, since they are unrepresented, have not engaged in communications with counsel that might be protected by the attorney-client privilege. Doubts can also be raised about the merits of the settlement-facilitation rationale. It is easy to think of situations where the involvement of an attorney has been an obstacle, rather than an aid, to the settlement of a dispute.[63] Admittedly, many lawyers can marshal the facts and the law in a way that compellingly presents a client's case, and such efforts tend to make settlement more likely. However, this line of reasoning is more justification for why laypersons should have lawyers than for why there should be a rule banning an opposing attorney from communicating with a represented person. To that extent, it is difficult to differentiate the unnamed putative class member in a mass tort case from the unrepresented victim of a non-mass tort. Both victims, under this view, would be better off with attorneys. There is no good

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61. Leubsdorf, *supra* note 2, at 689:

> In many instances—for example, when two small business firms are working out the details of a joint venture—there is not the slightest reason why every inquiry coming to or from one lawyer must travel by way of another. In such situations, it might be perfectly sensible for one party to do without a lawyer altogether . . . . Some clients may even be better suited than some lawyers to conduct some meetings.

62. *See, e.g.*, Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

63. *Cf.* WOLFRAM, *supra* note 22, § 11.6, at 613-14 ("A strict anticontact rule pinches with particular pain when an unreasonable, and possibly disloyal, opposing lawyer refuses to transmit settlement offers to his or her client. But the ABA ethics committee has refused to recognize an exception here.") (citations omitted).

reason for saying that the mass tort victim who is a putative class member should be protected by the anti-contact rule while the victim of the non-mass tort will not.

An interesting variation on systemic justifications for the anti-contact rule is a recent Texas case which appears to take the position that a purpose of the rule, as applied to jointly represented defendants, is to prevent one codefendant from being induced to switch sides to the disadvantage of the others.[64] An abhorrence for unprincipled side-switching has been a driving force behind many rulings in the tort field,[65] such as prohibitions against Mary Carter agreements[66]

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64. *See* In re *News Am. Publ'g, Inc.*, 1998 WL 105451, at *6 (granting disqualification based on contact by plaintiffs' counsel with individual defendant who was later non-suited from action). The opinion of the court stated in part:

> Clearly Frazier has changed sides in this case and, as a result, may avoid personal exposure in the suit. That will undoubtedly cause prejudice to the remaining defendants who shared the same attorney . . . . Although the improper communication of privileged information is difficult to prove without direct testimony from the client, it can reasonably be implied by virtue of the fact that plaintiffs have designated him as a testifying expert on their behalf . . . .
> The anti-contact rule is . . . imposed to protect the client, *other parties*, and indeed, the very integrity of the adversary system.

(emphasis added.)

65. *See* Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 66-70 (1997) (discussing Texas cases in which shifting positions of parties distorted litigation).

66. The Texas Supreme Court defined a Mary Carter agreement as follows:

> A Mary Carter agreement exists . . . when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial . . . . This creates a tremendous incentive for the settling defendant to ensure that the plaintiff succeeds in obtaining a sizeable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case.

Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992). Because of the tendency of such arrangements to distort the adversarial process, many courts allow evidence of a Mary Carter agreement to be introduced at trial, for the purpose of minimizing the chances that the jury will be misled. *See id.* at 248-49 (discussing cases and commentary that have "remove[d] the secrecy within which Mary Carter agreements have traditionally been shrouded."). Some courts have imposed greater limitations. *See id.* at 250 (declaring Mary Carter agreements void as against public policy, based in part on the tendency of

or the assignment of certain claims.[67] However, whether the risk that communications by opposing counsel may lead a represented person to "switch sides" is sufficiently great as to justify a total prophylactic ban on such communications is debatable. Other alternative safeguards are available, such as a bar against the use of testimony by the person who switched sides[68] or disqualification of counsel in cases where a communication with a represented person is followed by a change of sides.[69] In any event, the side-switching rationale has no application to the pre-certification context of class action litigation. During that time period, unnamed putative class members are not on anyone's side. They have neither opted into nor out of the class. An extension of the anti-contact rule to pre-certification communications cannot be justified by the risk-of-side-switching rationale.

C. *Protection of the Lawyer-Client Relationship*

A number of authorities take the position that the represented person rule is designed to preserve the integrity of the lawyer-client relationship.[70] Just what is meant by this argument is not clear. Perhaps the best elaboration of this view is the suggestion by one scholar that the prohibitions of the rule are "limited to attempts by the offending lawyer, in representing his or her client, to drive wedges between other lawyers and clients."[71] So construed, the rule serves the laudable goal of preserving whatever exists by way of a healthy, productive relationship between attorney and client. However, if understood in those terms, the rule has no application to unnamed putative class members. Those persons are not engaged in *any*

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such agreements to cause unprincipled side-switching).

67. *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 316 (Tex. App.—San Antonio 1994, writ ref'd) (holding assignment of cause of action for legal malpractice invalid).

68. *Cf. Elbaor*, 845 S.W.2d at 252 (declaring Mary Carter agreements void as against public policy and ruling that a settling defendant may not participate in a trial in which he or she retains a financial interest in the plaintiff's lawsuit).

69. *See* In re *News Am. Publ'g, Inc.*, 1998 WL 105451, at *5-*6 (granting disqualification based on contact by plaintiffs' counsel with individual defendant who switched sides).

70. *See supra* note 42.

71. WOLFRAM, *supra* note 22, § 11.6.2, at 612.

professional relationship with the attorney for the class, productive or not. Consequently, there is no relationship to be preserved from the divisive "wedges" of opposing counsel. This line of reasoning cannot justify an extension of the anti-contact provision to the pre-certification period.

Another possibility is that those who argue that the rule preserves the integrity of the lawyer-client relationship mean that it preserves the power and authority of the lawyer *vis-a-vis* the client. This construction is suggested by those terms of the rule that place the right to consent to communication solely within the hands of the lawyer and entirely beyond the reach of the client. Any such argument in favor of allocating all authority to the professional party to the relationship is markedly out of step with the times. A growing body of court decisions and other authority recognizes, in myriad contexts, the right of a client to be informed of all material matters[72] and to exercise control over important decisions.[73] Viewed against the trend toward client empowerment, the represented person rule stands out as a stark aberration. It is a better candidate for abrogation than for unnecessary extension to the pre-certification context of class action litigation.

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72. *See, e.g.*, Garris v. Severson, 252 Cal. Rptr. 204, 209 (Ct. App. 1988) (depublished opinion) (denying summary judgment motion filed by firm and attorney in case where both were being sued for failure to disclose fully and fairly to client facts on liability); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex.App.—Corpus Christi 1991, writ denied) (commenting that "the relationship between attorney and client has been described as one of *uberrima fides*, which means, 'most abundant good faith,' requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.") (citations omitted). *See generally* Robert F. Cochran, *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990) (discussing the extent of client control over legal representation).

73. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1997) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."); *id.* at Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* at Rule 1.14(a) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

A more palatable rationale is the argument that the anti-contact rule is designed "to ensure that the adverse party's attorney can function properly."[74] This may mean nothing more than that the rule places the attorney in a position to learn relevant facts and to control the flow of information about a client's case. Interpreted in that vein, the rule may go further than is necessary to advance those goals, but is otherwise unobjectionable. However, this rationale offers no justification for extending the anti-contact rule to communications involving unnamed putative class members before certification. The attorney for the class has no right to control the flow of information from such persons and no duty to gather facts about their claims. *Cessante rationae legis, cessat et ipsa lex.*[75]

D. Protection of the Attorney's Interests

One occasionally encounters arguments which tend to suggest that a purpose of the anti-contact rule is to protect interests of the attorney, rather than the interests of the client, the system, or the relationship. The personal interests of the attorney might be reputational, such as where an attorney fears that he or she may be embarrassed because uncounselled statements made by a client may compromise the lawyer's tactics.[76] Or the interests might be economic, where an uncounselled client, as the result of communications with opposing counsel, may discharge the attorney or settle for an inadequate amount, either of which may impair the attorney's ability to earn a fee.

Any defense of the anti-contact rule based on the personal interests of the attorney is typically made with timidity. The proponents of such views are apologetic or otherwise tend to suggest

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74. *In re* Doe, 801 F. Supp. 478, 485 (D.N.M. 1992) (quoting United States v. Lopez, 765 F. Supp. 1433, 1447-49 (N.D. Cal. 1991)).

75. "The reason of the law ceasing, the law itself also ceases." BLACK'S LAW DICTIONARY 238 (6th ed. 1990).

76. 2 HAZARD & HODES, *supra* note 36, at 731 (citing John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979)).

that such interests are entitled to only secondary protection.[77] However, it is indisputable that lawyers do have legally protectable interests in their relationships with clients.

With limited exceptions not pertinent here, a client has a right to discharge an attorney.[78] But if the discharge is made without cause, virtually all states hold that the client is liable to the discharged lawyer for unpaid hourly fees or for the *quantum meruit* value of services performed under a contingent-fee contract.[79] Indeed, Texas goes so far as to treat a discharge without cause as a breach of a contingent-fee contract by the client that entitles the lawyer to the full value of the contract, calculated as though services had been completely performed.[80] These rules on liability for fees are one indication that personal interests of an attorney in an attorney-client relationship are legally cognizable.

More important for present purposes, the law of tortious interference protects contractual relationships, even those such as attorney-client contracts, that are terminable at will.[81] The law of tortious interference safeguards interests in a relationship from unprivileged purposeful or knowing disruption by a person outside the relationship. According to the formulation found in the *Restatement (Second) of Torts*, under the law of tortious interference:

> [o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive and burdensome, is subject to liability to the other for the pecuniary loss resulting to him.[82]

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77. *Id.* at 736 (commenting that "the purpose of the Rule 4.2 . . . is primarily to protect opposing clients and only incidentally to protect opposing lawyers.").

78. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT Rule 1.15 cmt. 4 (explaining that in Texas, a client has the right "to discharge an attorney at any time, with or without cause").

79. *See generally* Vincent R. Johnson, *Client Liability for Fees of Discharged Counsel*, TRIAL, Apr. 1990, at 99 (explaining that a discharged attorney may recover the *quantum meruit* value of services performed).

80. *See* Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (explaining that in Texas "an attorney may recover on the contract for the amount of his compensation" when discharged without good cause).

81. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977) (explaining that until such contract is terminated, it is valid and subsisting).

82. *Id.* § 766A (1977).

In one sense, the represented person rule can be understood as an extension of the principles of tortious interference. That is, the rule's anti-contact ban imposes what in essence is a form of mandatory injunction against the type of interference with a relationship that might support an action for damages. So viewed, the ethical prohibition is seriously flawed, for it obviates any inquiry into the critical issues that determine under tort law whether interference *is*, rather than simply *may be*, actionable.

Interference resulting from the dissemination of truthful information is generally privileged.[83] The same is true of interference that is caused by conduct that is undertaken in furtherance of a duty to protect the interests of another, if that conduct does not involve "wrongful means" (such as threats, falsity, or violence).[84] These principles mean that under tort law, in many instances, a lawyer would have no cause of action for relational disruption resulting from opposing counsel's communication with his or her client. In addition, some courts decline to follow the *Restatement* formulation of tortious interference and hold that mere "burdening" of the performance of a contract is not actionable, even if destruction of a relationship will support a suit for damages.[85] Since many communications by

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83. *See id.* § 772(a) (1977) (stating that it is not tortious interference of contract to give truthful information to a third person); World Primates, Inc. v. McGreal, 26 F.3d 1089, 1092 (11th Cir. 1994) (stating that § 772 reflects the law of Florida); Liebe v. City Fin. Co., 295 N.W.2d 16, 18 (Wis. Ct. App. 1980) (stating that transmission of truthful information is privileged); Delloma v. Consol. Coal Co., 996 F.2d 168, 171 (7th Cir. 1993) (explaining that Illinois law provides a privilege "if the defendant acted in good faith to protect an interest or uphold a duty"). *But see* Pratt v. Prodata, Inc., 885 P.2d 786, 790 (Utah 1994) (rejecting *Restatement* section that provides a privilege for truthful information).

84. *See* RESTATEMENT (SECOND) OF TORTS § 770 (1977); *see also* Tarleton State Univ. v. Rosiere, 867 S.W.2d 948, 953 (Tex. App.—Eastland 1993, writ dism.'d by agr.) (explaining that vice-president for student services did not improperly interfere with tenure applicant's relationship with university by informing president of university about applicant's behavior at a school function).

85. *See* Price v. Sorrell, 784 P.2d 614, 615 (Wyo. 1989) (declining to adopt *Restatement (Second) of Torts* § 766A); *see also* Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 662-63 (3d Cir. 1993) (casting doubt on *Restatement (Second) of Torts* § 766A and declining to decide whether Pennsylvania would adopt it). *But see* Larouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1140 (4th Cir. 1986) (awarding damages for burdens entailed by false statement that interview, which later took place, had been cancelled).

opposing counsel with a represented person will not result in termination of the representation, but merely "burden" the representation in the sense of making it more difficult or time consuming, or less productive, such interference might not be actionable in tort. For these reasons, it is difficult, if not impossible, to defend the represented person rule as a legitimate device for protecting the personal interests of an attorney in a lawyer-client relationship. It makes no sense to "enjoin" conduct that would be legally insufficient to support an action for damages.

Furthermore, the principles of tortious interference are applicable only if a plaintiff has a legitimate expectation in the future relations that are the basis of the claim. What this means is that there must be an existing valid contract or a "reasonable probability" that one will be consummated.[86] The loss of a relationship that is merely hoped for will not support a cause of action.[87] If it is a matter of speculation whether a relationship will come to fruition, there is no cause of action for tortious interference with prospective advantage.

Counsel for an uncertified class has no more than a hope that a relationship will be consummated with unnamed putative class members, for it is entirely speculative whether the court (after considering the requirements of numerosity, typicality, commonality, and representativeness) will certify the class[88] and whether those putative members (after being apprised of the action and available opportunities) will elect to opt out of the class. For that reason alone, the attorney-interest-protection rationale fails to justify an extension of the anti-contact rationale to the pre-certification context of class action litigation.

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86. *See* Nathanson v. Medical College of Pa., 926 F.2d 1368, 1392 (3d Cir. 1991) (explaining that a medical school applicant failed to demonstrate "reasonable probability" of acceptance).

87. *See id.* (stating that although the applicant "had a 'satisfactory academic record and background,' she had 'not demonstrated more than a mere hope in securing a prospective relationship with a medical school'") (citations omitted).

88. All four prerequisites of Rule 23(a) must be met before certification of a class is appropriate. *See* Payne v. Travenol Labs., Inc., 673 F.2d 798, 810 (5th Cir. 1982).

IV. Conclusion

The ethical prohibition against contact with represented persons is an exacting rule that carries with it the threat of serious consequences, including, but not limited to, attorney discipline, disqualification of counsel, and inadmissibility of evidence obtained in violation of its terms. The rule is so deeply entrenched in American law practice that any attempts to change its fundamental contours are probably ill-fated. Nonetheless, extension of the rule to new settings should be undertaken with the greatest care, particularly because its anti-contact provisions often prove to be unnecessarily harsh and there are other regulatory alternatives available. The various rationales offered in support of the rule fail to justify an application of the contact ban to communications with unnamed putative class members during the pre-certification period of class action litigation. Consequently, before certification, unnamed putative class members should not be treated as "represented persons" for purposes of the rule.