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Between a Rock and a Hard Place: Communicating with Absent Class Members

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FOR DECADES, CLASS ACTION LAWYERS have grappled with myriad ethical issues surrounding the representation of absent class members. It is well known and often repeated that traditional ethical rules cannot be mechanically applied to class actions.[1] Therefore, it is not surprising that the rules governing communications with represented parties have proven especially tricky in the class action context. At the outset, it is important to understand who is "represented" and at what point that representation begins.[2] However, that is often easier said than done.

The basic rule as set forth by the ABA Rules of Professional Conduct, and most, if not all, state ethics codes,[3] prohibits ex-parte communications with individuals known to be represented by counsel. Thus, many courts have approached the issue of whether and how counsel can communicate with putative class members by asking a simple threshold question: are putative class members clients of class counsel? But when class counsel potentially represents thousands of putative class members, the majority of whom they likely have never spoken to, it is not clear whether putative class members are "represented" in the sense contemplated by the ethical rules.

It is therefore not surprising that courts have struggled to define the relationship between putative class members and class counsel, and, consequently, how counsel for either side may communicate with absent class members. While the vast majority of courts have held that absent class members become clients of class counsel when the class is certified, some courts have drawn the line elsewhere—finding that the attorney-client relationship is not formed until after the period for exclusion (opting-out) has expired under Federal Rule of Civil Procedure 23(c)(2)(3). Further complicating matters is the fact that prior to certification there are no clear rules for establishing when it is appropriate for either class or defense counsel to communicate with putative class members. This has often left courts and class action practitioners stumped.

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Furthermore, where traditional rules focus on when members of the class become clients of class counsel for purposes of communications, they often do so to the detriment of a separate, but related inquiry, which is whether and how class members' rights may be best protected. Indeed, the general concern about free-flowing communication with absent class members prior to class certification, and in some jurisdictions, prior to the opt-out deadline, stems from the notion that counsel for either side might be inclined to engage in coercive or misleading communications. This concern may be amplified during the period between certification and expiration of the opt-out deadline, when the stakes are heightened and safeguarding class members' rights is essential to ensuring fairness in class action litigation. In that sense, putative class members often benefit from the advice and guidance of counsel and would be better served by an analysis that focuses on how unrepresented class members are best protected, rather than when they are deemed to be "represented."

Rules Governing Communications with Putative Class Members

Communications with putative class members are governed by three related authorities. First, under Fed. R. Civ. P. 23(d), a district court has broad discretion to make appropriate orders governing the conduct of parties in class action litigation.[4] Specifically, Rule 23(d)(1)(C) authorizes district courts to issue orders imposing conditions on representative parties. Rule 23(d)(1)(E) further allows district courts to issue orders "dealing with similar procedural matters." These provisions recognize that class actions are an important litigation tool, but are also complex, protracted, and subject to abuse.[5] To prevent abuse, courts have at times issued orders restricting communications between counsel and class members under Rule 23.[6]

Second, communications between attorneys and class members are governed by the Model Rules of Professional Conduct and/or state ethical rules governing attorney conduct. Model Rule 4.2 provides that a lawyer shall not communicate with an individual the lawyer knows to be represented by counsel about the subject of the representation.[7] Model Rule 4.3 governs communications with individuals not represented by counsel and provides that a lawyer communicating with an unrepresented person must be very clear

about the lawyer's role in the case and must not give the impression that he or she is disinterested.[8] Finally, Rule 7.3 restricts an attorney's ability to solicit clients.[9] Generally, attorneys cannot directly solicit individuals in person, by telephone, or by real-time electronic contact unless the person is a friend, relative, former client, or existing client.[10] In contrast, written or recorded solicitations, especially if aimed at the general public, are usually permissible provided they are clearly labeled as advertisements.[11]

Third, notwithstanding Rule 23 and the Model Rules of Professional Conduct, under the First Amendment, a court cannot place unlimited restrictions on communications from attorneys to putative class members.[12] Thus, if a court finds attorney-class member communications to be improper, it may need to consider whether and how restricting those communications might violate the First Amendment.

Gulf Oil Co. v. Bernard,[13] a Supreme Court case involving pre-certification communications with putative class members, has emerged as the seminal case governing communications with putative class members. Employees brought discrimination claims against Gulf Oil.[14] However, prior to filing any lawsuit, Gulf Oil reached a conciliation agreement with the Equal Employment Opportunity Commission, under which Gulf Oil agreed to offer back pay to its affected employees to settle their discrimination claims.[15] As a result, the company began sending notices to affected employees offering back pay in exchange for a full release of discrimination claims.[16] Shortly thereafter, a group of employees who had not settled, along with rejected employee applicants, filed a class action suit against Gulf Oil, which then ceased sending settlement offers to individuals who were now putative class members.[17]

Nevertheless, class counsel held a meeting with putative class members and recommended that they not sign Gulf Oil's releases and return any back pay checks they may have received.[18] In response, Gulf Oil sought a court order limiting communications between putative class members and class counsel.[19] The district court granted Gulf Oil's motion and issued a temporary order prohibiting all communications between class counsel and putative class members.[20]

But the story did not end there. Gulf Oil later requested a modification to the district court's order to allow it to continue soliciting releases from class members.[21] Class counsel opposed Gulf Oil's request and simultaneously argued that the court's earlier ban on communications between class counsel and class members violated the First Amendment.[22] They further argued that class counsel needed to communicate with class members to obtain important information about the case and inform class members of their rights.[23]

Without taking evidence or making findings of fact, the district court banned all communications concerning the case between any party or its counsel and potential or actual class members not formally party to the action without prior approval of the court or if the communication was initiated by the client.[24] Thereafter, as required by the court's order, class counsel sought court approval to send a notice to class members urging them to speak to a lawyer before signing any release from Gulf Oil.[25] The court denied class counsel's motion in a one-sentence order.[26]

Whether and how plaintiffs' and defense counsel may communicate with putative class members is not easily resolved by a simple reading of the rules. Rather, much depends on whether the class member is represented by counsel, a seemingly simple inquiry that is actually quite challenging in practice.

On appeal, the Supreme Court held that the district court abused its discretion in issuing its orders limiting communications between parties or their counsel and putative class members, explaining, "An order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."[27]

The guidance of *Gulf Oil* and its progeny is that when determining whether counsel's communications with putative class members should be limited, the court must inquire into whether the communications "threaten[] the proper functioning of the [class action] litigation."[28] For instance, the court must consider whether the communication might coerce class members into excluding themselves from the class; contain false, misleading, or confusing statements; or undermine cooperation with or confidence in class counsel.[29] If not, the communication may be proper upon balancing the need for information against the potential for abuse.

Applying the Rules: A Difference of Opinion on Representation

Whether and how plaintiffs' and defense counsel may communicate with putative class members is not easily resolved by a simple reading of the rules. Rather, much depends on whether the class member is represented by counsel, a seemingly simple inquiry that is actually quite challenging in practice.[30] In order to apply this test in the class action context, courts have attempted to simplify the inquiry by drawing lines, which have not always been so bright.

A minority of courts hold that absent class members are deemed to be clients of class counsel prior to class certification.[31] In these jurisdictions, once a case has been filed, class counsel may communicate with absent class members and defense counsel must only communicate through class counsel, even prior to certification.[32] In *Dondore v. NGK Metals Corp.*,[33] for example, the court addressed the question whether a defense attorney could interview potential witnesses who were members of a putative class without the

consent or involvement of class counsel. The court, applying Pennsylvania law, concluded that "[t]he 'truly representative' nature of a class action suit affords its putative members certain rights and protections including, we believe, the protections contained in Rule 4.2 of the Rules of Professional Conduct."[34] The court explained that unnamed class members have identifiable interests in the class action suit, including the right to challenge the adequacy of the representation by the named plaintiffs and the right to be informed of or enter into settlements.[35] Accordingly, the *Dondore* court prohibited defense counsel from contacting or interviewing potential witnesses who were putative class members without the consent of class counsel.[36]

The vast majority of courts hold that putative class members do not officially become clients of class counsel until some point at or after class certification.[37] Prior to class certification, absent class members are regarded as "relatively passive beneficiaries" of the named plaintiffs' efforts.[38] In other words, prior to class certification, absent class members do not have the duty to provide documents or make themselves available for depositions and, most importantly, they do not authorize class counsel to maintain the action on their behalf and therefore no attorney-client relationship may form.[39] Rather, the relationship is triggered at class certification, which in turn triggers the protections of Rule 4.2 such that defense counsel may only communicate with putative class members about the litigation through class counsel.[40] Class counsel, by contrast, may freely communicate with class members at that point.

Yet a minority of courts withhold putative class members' client status even longer, until the opt-out period expires.[41] These decisions are in line with both the ABA and the *Restatement (Third) of the Law Governing Lawyers*. In a formal ethics opinion, the ABA stated, "A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired."[42] The ABA reasoned that an attorney-client relationship is established when the client either authorizes the representation or when there is some substitute for that authorization.[43] Thus, because opting out allows putative class members the right to decline representation by class counsel, the attorney-client relationship cannot attach until the putative class member has chosen whether or not to opt-out of the class case.

Applying the Rules: A Practical Guide to Pre-Certification Communications

As an initial matter, both plaintiffs' and defense counsel have legitimate reasons for wanting to communicate with class members. Plaintiffs' counsel have an interest in notifying putative class members about the existence of the lawsuit and keeping them informed about their rights. Plaintiffs' counsel may also want to interview putative class members about potential claims. Defense counsel may want to contact putative class members to obtain information about potential claims and relief,[44] to make settlement offers,[45] or to gather information for purposes of opposing class certification.[46] The decisions outlined above put class action practitioners on notice to play by the rules. Thus, for example, regardless of whether the case is pre- or post- certification, communications that are abusive, coercive, or misleading are not permitted.[47]

Apart from such limitations, the current rules generally give defense counsel more freedom to communicate with putative class members pre-certification than post-certification. Because class members are considered by most courts to be unrepresented at the pre-certification stage of the litigation, defense counsel may be able to contact potential class members to obtain information about their claims or the relief they are seeking, or to make settlement offers. However, defense counsel should still tread lightly.

For example, communications with putative class members are not protected from disclosure in discovery proceedings. Furthermore, "Courts are wary [] of communications—frequently in the form of settlement attempts—that fail to convey the necessary context to allow potential class members to make informed decisions between individual and collective litigation."[48] Defense counsel should, in any communication with putative class members, make sure to clearly state their role in the litigation, inform putative class members of the existence of the class action litigation, and advise putative class members that they are not required to speak to defense counsel, making clear that there is no reward for speaking with defense counsel and no consequence for refusing to do so.[49]

Where defense counsel seeks releases or declarations from putative class members, it is advisable that these declarations or releases are only obtained after a clear articulation of class members' rights, disclosure of the class action litigation, and identification of class counsel. For their part, class counsel should always be alert and prepared to seek court intervention to prohibit or rectify misleading or coercive communications.[50]

The current rules tend to afford class counsel less freedom to communicate with class members before certification rather than after. Prior to class certification, class counsel may publicly announce the class action and provide general information about the litigation to absent class members who contact them directly. However, class counsel must be especially careful in soliciting class members with whom they have no prior relationship, ensuring they are in compliance with Rule 7.3 or the relevant state's ethics rules.[51] However, prior to the point at which putative class members are deemed "clients" of class counsel, class counsel should be cautious about giving legal advice to absent class members since doing so may violate Rule 4.3.

Lingering Concerns in "Opt-Out" Jurisdictions

Once putative class members are deemed clients of class counsel—that is, once the class is certified and/or the opt-out period expires—class counsel may, among other things, freely

seek information from class members as well as provide class members with information about the class action. On the other hand, at this point in the litigation, defense counsel may only communicate with putative class members about the litigation through class counsel.[52] However, the nature of the relationship between class counsel and putative class members is not always clear, particularly between class certification and the opt-out deadline.[53]

Where courts dispense with the majority rule that putative class members become clients of class counsel once the class is certified[54] and withhold that status until after the conclusion of the opt-out period,[55] class members may be left vulnerable to improper influence. After the class is certified, defendants may be especially motivated to settle with individual class members, as they are often facing trebled class-wide damages in bet-the-company litigation. If the attorney-client relationship has not been established at that point, class counsel will find their hands tied in trying to protect the interests of the class and, after investing significant time and money in the case, risk losing putative class members to opt-out suits[56] or separate settlements with defendants.

Allowing defense counsel to communicate with the class without the involvement of class counsel during this period is potentially harmful to class members even where defense counsel does not reach out to class members directly. For example, in *Smith v. SEECO*, an Arkansas state court certified a state class of Arkansas citizens.[57] In a separate but related case, an Arkansas federal court certified a class that was not limited by residency or state citizenship.[58]

Defense counsel thereafter negotiated a settlement with counsel for the state class on behalf of both the state *and* federal classes.[59] The state court preliminarily approved the settlement and counsel for the federal class made an emergency motion in the Eastern District of Arkansas for a temporary restraining order.[60] The federal court denied class counsel's motion, stating that defendants' settlement negotiations with class counsel for the state class, to the extent they related to the federal class, raised ethical questions that could not be addressed through the temporary restraining order sought by counsel for the federal class.[61] Still, the court recognized that it was "troubling" that by negotiating a settlement that included the federal class, "defendants maneuvered themselves to do an end-run around the communication barrier."[62] Because attorneys for the federal class were never consulted, members of the federal class found themselves subject to a settlement that they never authorized.

Thus, even where defense counsel communicates with putative class members through an attorney, the class may still lack adequate protection if class counsel is not privy to the communication. In another example, in *Dodona I LLC v. Goldman Sachs*, a putative class of mostly large institutional investors brought suit against Goldman Sachs for violation of federal securities laws.[63] After the class was certified, but prior to the expiration of the opt-out period, the defendants contacted in-house counsel for two class members to inquire about certain company policies relevant to the litigation.[64] The court declined class counsel's request to limit Goldman's communications with attorneys for class members because the communications took place between skilled lawyers and there was therefore little risk of coercion or abuse of class members.[65] However, even where communications take place with in-house counsel, no matter how skilled they may be, class counsel will generally be better attuned to the various nuances and complexities of the class action litigation and therefore better positioned to protect the interests of the class.

Further complicating matters is the fact that absent class members in class action litigation are often not sophisticated entities with their own in-house counsel from whom to seek legal advice. While class counsel may communicate with absent class members who contact them directly, those communications may not be protected by the attorney-client privilege in jurisdictions where no attorney-client relationship is established between class certification and the opt-out period—a time during which class members may benefit the most from legal advice. Thus, class counsel must carefully weigh the class members' need for information against the risk of having to disclose potentially sensitive information later in the litigation simply by engaging in routine communications with class members.

In sum, ambiguities and problems still persist in using class certification as a means of determining when the attorney-client relationship is established and, therefore, whether and how plaintiffs' and defense counsel may communicate with putative class members. Moreover, it is undeniable that the stakes are heightened once the class is certified. This is true on both sides of the "v" as class counsel has much invested in the case and defendants are facing class-wide damages in staggering amounts. Given these pressures, class members are still, if not even more, vulnerable to coercion and abusive, misleading communications between class certification and the expiration of the opt-out period.

It is at this point that courts should consider whether and how the rights of class members may be protected, rather than attempting to squeeze class action relationships into the traditional attorney-client mold. To continue to do so is to try to fit a round peg in a square hole.

The Better Question

Instead of attempting to draw bright lines, putative class members would be better served if courts focus their analyses on the fairness of the litigation by asking what the needs of absent class members are during the vulnerable period between class certification and expiration of the opt-out deadline. Between class certification and the expiration of the opt-out period, the importance of providing class members with truthful information about their rights and the need to guard against potentially misleading ex parte communications with class members are especially pronounced. Requiring defense counsel to communicate with putative class members through class counsel protects these class members. As individuals

whose rights are directly affected by the litigation, putative class members are entitled to this protection.

Moreover, this approach comports with *Gulf Oil*. Under *Gulf Oil* and its progeny, courts examine the circumstances surrounding the communications to determine whether the communications are misleading, abusive, or coercive such that they impair the functioning of the class action litigation.[66] Notably, *Gulf Oil* was not decided based on whether the class members were clients, but instead looked to the risk of abuse and the policies underlying Rule 23 and weighed them against the First Amendment guarantee of freedom of speech.

Under this approach, in all jurisdictions, defense counsel would be permitted to communicate with class members about the litigation post-certification only through class counsel. This would not impair a defendant's ability to speak, cautiously, with putative class members about matters unrelated to the litigation or to seek leave from the court should defense counsel need to communicate with class members about the class action. Class counsel, on the other hand, who have a duty to protect the interests of the entire class, would be free to provide class members with truthful and non-abusive information about the litigation and their rights. Of course, it would be—and is—incumbent upon both defense and class counsel to be well-versed in the ethics codes and governing case law in their jurisdictions.

Ultimately, by asking what rules will best protect putative class members between class certification and expiration of the opt-out period, practitioners and courts can heed their own advice and avoid the mechanical application of ethics and other rules to communications between counsel on both sides of the "v" and absent class members. The end result is fairness to unrepresented individuals, who deserve the utmost protection. ■

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1 *In re* Agent Orange Prod. Liab. Litig., 800 F.2d 14, 19 (2d Cir. 1986) ("[T]he traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation."); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Prods., Inc., 80 Cornell L. Rev. 1045, 1121 (1995) (stating it is an "oft-made remark that the ethics rules cannot be mechanically applied to class actions.").

2 This article focuses on how one's status as a represented party affects the ability of counsel to engage in ex parte communications with that individual. It does not discuss conflicts implications under Model Rules of Prof'l Conduct R. 1.7.

3 *See, e.g.*, Model Rules of Prof'l Conduct R. 4.2 (2016) (adopted in, among other jurisdiction, New York, Minnesota, Utah, and Texas); Cal. Rules of Prof'l Conduct R. 2-100 (2015).

4 *See, e.g.*, Gulf Oil Co. v. Bernard, 452 U.S. 89, 99–100 (1981).

5 *Id.* ("Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases.").

6 Burford v. Cargill, Inc., No. 05-0283, 2007 U.S. Dist. LEXIS 1679 (W.D. La. Jan. 9, 2007) (applying *Gulf Oil* and Rule 23 and finding releases communicated by defense counsel to potential class members without notification of the pending putative class action misleading as a matter of law); Cheverez v. Plains All Am. Pipeline, LP, CV15-4113, 2016 U.S. Dist. LEXIS 27818 (C.D. Cal. Mar. 3, 2016) (ordering curative notice and prohibiting defendants from communicating with potential class members, citing Rule 23 as the governing legal standard).

7 Model Rules of Prof'l Conduct R. 4.2.

8 Model Rules of Prof'l Conduct R. 4.3

9 Model Rules of Prof'l Conduct R. 7.3. Each jurisdiction has its own rules regarding attorney advertising.

10 Model Rules of Prof'l Conduct R. 7.3(a).

11 Model Rules of Prof'l Conduct R. 7.3(b)–(c).

12 *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1205 (11th Cir. 1985) (stating that limitations on communications will not violate the First Amendment where they are "grounded in good cause and issued with a 'heightened sensitivity' for [F]irst [A]mendment concerns").

13 452 U.S. 89 (1981).

14 *Id.*

15 *Id.* at 91.

16 *Id.*

17 *Id.* at 91–92.

18 *Id.* at 93–94.

19 *Id.*

20 *Id.* at 94.

21 *Id.*

22 *Id.* at 93.

23 *Id.* at 93–94.

24 *Id.*at 94–96.

25 *Id.* at 96.

26 *Id.*at 97.

27 *Id.* at 101.

28 Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc., 214 F.R.D. 696, 697–98 (S.D. Ala. 2003) (collecting cases).

29 *Id.* at 698.

30 *See* Model Rules of Prof'l Conduct R. 4.2.

31 Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001); Corll v. Edward D. Jones & Co., 646 N.E.2d 721 (Ind. Ct. App. 1995); Rankin v. Bd. of Educ., 174 F.R.D. 695, 697–98 (D. Kan. 1997); Pollar v. Judson Steel Corp., No. C 82-6833 MPH, 1984 U.S. Dist. LEXIS 19765, at *2 (N.D. Cal. Feb. 3, 1984).

32 *See, e.g.*, *Dondore*, 152 F. Supp. 2d at 666; *Corll*, 646 N.E.2d 721.

33 152 F. Supp. 2d 662.

34 *Id.* at 666 (citation omitted); *see also* Impervious Paint Indus. Inc. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (From the time the complaint is filed "the implication is unavoidable that defendants' counsel must treat plaintiff class members as represented by counsel.").

35 152 F. Supp. 2d at 666.

36 *Id.*

37 *See* Restatement (Third) of the Law Governing Lawyers § 99 cmt, 1 (2000) ("[A]ccording 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."); *see also* McWilliams v. Advanced Recovery Sys., Inc., 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); Gortat v. Capala Bros., Inc., No. 07-CV-3629, 2010 U.S. Dist. LEXIS 45549, at *16 (E.D.N.Y. May 10, 2010) (citing *In re* Sch. Asbestos Litig., 842 F.2d 671, 679–83 (3d Cir. 1988) and Erhardt v. Prudential Grp. Inc., 629 F.2d 843, 845 (2d Cir. 1980)); Jacobs v. CSAA Inter-Ins., No. C 07-00362, 2009 U.S.

Dist. LEXIS 37153, at *2 (N.D. Cal. May 1, 2009); Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992) (quoting Bower v. Bunker Hill Co., 689 F. Supp. 1032, 1033 (E.D. Wash. 1985)); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986), Resnick v. ADA, 95 F.R.D. 372, 376–77 (N.D. Ill. 1982).

[38] *See, e.g.*, Winfield v. St. Joe Paper Co., NO. MCA 76-28, 1977 U.S. Dist. LEXIS 13926, at *4 (N.D. Fla. Sept. 19, 1977) (holding defendants could contact members of the proposed class without prior consent from class counsel because "the members of the class are not 'parties' in the strict sense of the term" and are "relatively passive beneficiaries of the efforts of the plaintiffs in their behalf.").

[39] *See, e.g.*, *In re* Chicago Flood Litig., 682 N.E.2d 421, 426 (Ill. App. Ct. 1997) (citing *Winfield*, 1977 U.S. Dist. LEXIS 13926, at *4, and finding class counsel is not entitled to attorneys' fees from absent class members or opt-outs); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974) (addressing statute of limitations arguments, holding "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.").

[40] *See* MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.33 (2004) ("[O]nce a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."); WILLIAM B. RUBENSTEIN, HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §19.6 (5th ed. 2015) [hereinafter NEWBERG ON CLASS ACTIONS] ("[F]ollowing certification, class counsel and absent class members have a formal, if unique attorney-client relationship. Absent class members are therefore "represented parties," and ethics rules prohibit opposing counsel from contacting them directly.").

[41] *See, e.g.*, *In re* Wells Fargo Wage & Hour Emp't Practices Litig., 18 F. Supp. 3d 844, 851 (S.D. Tex. 2014); Bobryk v. Durand Glass Mfg. Co., No. 12-cv-5360, 2013 U.S. Dist. LEXIS 145758, at *29 (D.N.J. Oct. 9, 2013) ([T]he attorney-client relationship with putative class members "does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.") (internal quotations omitted); Velez v. Novartis Pharm. Corp., No. 04 Civ. 9194, 2010 U.S. Dist. LEXIS 7775, at *2 (S.D.N.Y. Jan. 26, 2010); *In re* Katrina Canal Breaches Consol. Litig., Civil Action No. 05-4182, 2008 U.S. Dist. LEXIS 112504, at *8–11 (E.D. La. Sept. 22, 2008); The Kay Co., LLC v. Equitable Prod. Co., 246 F.R.D. 260 (S.D. W. Va. 2007).

[42] ABA Formal Opinion 07-445 (Apr. 11, 2007). *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS at § 99 cmt, 1.

[43] ABA Formal Opinion 07-445 (Apr. 11, 2007); *See also* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 15.6 at 15-44 to 15-45 (3d ed. 1992) ("In an action for damages under Rule 23(b)(3), the actual scope of the class cannot be determined until after the period for exclusion from the class has expired. At this time, the number and identity of class members who wish to opt out of the action will be known.").

[44] McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 295, 299 (D. Mass. 2004) (Defendant sought "to conduct the interviews so that it can realistically assess the scope and nature of the case brought against it. There is nothing inherently wrong with that.").

[45] NEWBERG ON CLASS ACTIONS, *supra* note 40, § 9.7 n.1.

[46] *Id.*

[47] *See, e.g.*, *Gulf Oil*, 452 U.S. 89. State law also recognizes the danger of allowing unfettered communications with class members. The Southern District of New York stated with regard to New York Rules of Professional Conduct, "Rule 4.2 was designed to prevent [] obtaining a tactical advantage by knowingly contacting a represented party without notifying her lawyer." Dodona I, LLC v. Goldman, Sachs & Co., 300 F.R.D. 182, 187 (S.D.N.Y. 2014).

[48] NEWBERG ON CLASS ACTIONS, *supra* note 40, § 9.7, at 400.

[49] *See, e.g.*, Yingling v. eBay, Inc., No. C 09-01733 JW (PVT), 2010 U.S. Dist. LEXIS 65322, at *7 (N.D. Cal. July 5, 2011) (finding ex parte communications between defense counsel and potential class members for the purposes of obtaining declarations from the putative class members appropriate where defense counsel advised the putative class members who they were, about the existence and nature of the litigation, and that putative class members' declarations would be used in connection with the defense of the litigation).

[50] Although not the primary focus of this article, there are also significant concerns regarding communications between financially interested third parties and absent class members. For example, in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. 2016), a number of third-party claims-filing companies sent a "barrage" of mailings and emails, set up websites, and established hotlines in order to solicit potential class members to use their services to file opt-out or class claims. One company contacted 500,000 potential class members. These communications included false and misleading statements, including one statement that claims by the U.S. government would delay payment to class members. The court held several hearings and issued several orders requiring the claims-filing companies, among other things, to correct misleading statements and inform class members that class counsel would provide no-cost assistance during the claims-filing period.

[51] MODEL RULES OF PROF'L CONDUCT R. 7.3(a).

[52] Note that Rule 4.2 governs communications between *counsel* and represented parties. Direct communications between represented parties are generally permissible if they do not pertain to the litigation. If a defendant wishes to communicate with members of a certified class in any way pertaining to the lawsuit, it is highly advisable that defense counsel obtain court permission in advance.

[53] *Impervious Paint Industry*, 508 F. Supp. 720, 722 (W.D. Ky. 1981) ("During the time between the institution of a class action and the close of the opt-out period, the status of plaintiffs' counsel in relation to the class members cannot be stated with precision.").

[54] *Gortat*, 2010 U.S. Dist. LEXIS 45549, at *5 (holding "[u]pon class certification, the rules governing communications with class members are heightened because they 'apply as though each class member is a client of the class counsel,'" and collecting cases that hold the attorney-client relationship arises once a class is certified and before the expiration of the opt-out period.); *see also* Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. (1992) ("I agree with courts which have held that 'once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.") (internal quotations omitted).

[55] *See supra* note 31; *see also In re* Potash Antitrust Litig., 162 F.R.D. 559, 561 n.3 (D. Minn. 1995) ("While we agree that a *potential* attorney-client relationship is formulated upon the certification of a class, 'it cannot truly be said that [counsel for the class] fully "represents" prospective class members until it is determined that they are going to participate in the class action'") (emphasis added) (internal quotations omitted).

[56] *Gortat*, 2010 U.S. Dist. LEXIS 45549, at *9 (Court issued order "prohibit[ing] defense counsel from attempting to persuade class members, either directly or through communications by his clients to class members, to opt out of the class action" where defense counsel requested more than 90 days to "work on . . . possible exclusions" after class certification.).

[57] Smith v. SEECO, Inc., 2017 U.S. Dist. LEXIS 76945, at *2–4 (E.D. Ark. May 20, 2017).

[58] *Id.*

[59] *Id.*

[60] *Id.* at *3–5.

[61] *Id.* at *8–9.

[62] *Id.* at *8.

[63] 300 F.R.D. 182, 182 (S.D.N.Y. 2014) (applying N.Y. Code of Professional Conduct Rule 4.2, which tracks ABA Rule 4.2).

[64] *Id.*

[65] *Id.* at 187–88.

[66] *See generally Gulf Oil*, 452 U.S. 89; *Kleiner*, 751 F.2d 1193.