Communicating With and Obtaining Declarations From Putative Class Members

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Unlike discovery in some other kinds of civil litigation, the urgency and necessity of conducting comprehensive formal and informal discovery at the outset of a class action is critical. Defense counsel should approach class actions in the earliest phases of these cases with the goal of attacking class allegations and class certifications. As secondary goals, defense counsel should take all permissible measures to narrow the class or the class claims.

I. Communications with Putative Class Members Are Generally Permissible.

It is commonplace for each side in a class action to wish to communicate with members of the putative class before a motion to certify the class has been filed, or before the class is certified. Before class certification, communications with putative class members generally are not prohibited. Efforts by defendants to control communications with putative class members by plaintiffs’ counsel, and similar efforts by plaintiffs’ counsel to block communications by the defense, have met with limited success. Indeed, the majority of federal courts to decide this issue have agreed that a defendant may communicate with putative FLSA collective action members as long as they have not yet opted-in. Further, numerous district courts have held that pre-certification communications with putative FLSA collective action members are permitted unless such communications are factually inaccurate or misleading. The cases decided on this point involve the intersection of rights of free speech, the court’s ability to control proceedings, and rules of professional responsibility governing attorneys.

In Parks v. Eastwood Ins. Servs., the court denied plaintiffs’ attempt to prevent defense communications with potential opt-in class members in a FLSA collective action. Notably, the court found that “pre-certification communication from the defense to prospective plaintiffs is generally permitted,” and “a defendant employer may communicate with prospective plaintiff employees who have not yet ‘opted in,’ unless

1 Several excerpts in this article were taken from Littler Mendelson on Employment Law Class Actions, The Attorney’s of Littler’s Class Action Practice Group (2007).
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the communication undermines or contradicts the Court’s own notice to prospective plaintiffs.”

In another FLSA collective action, the court determined that “[p]laintiff’s counsel cannot be deemed to represent any putative collective action member until such time as those persons opt-in to the litigation.” The court also noted that because of the fundamental distinction in the relationship between putative collective members and counsel (i.e., the only persons bound by the action are those that affirmatively opt-in), if a putative plaintiff believes that counsel had acted adversely to his or her interests prior to certification, that person’s rights could be equally protected by declining to opt-in to the litigation. Notably, the court limited plaintiff’s counsel’s communications with putative collective action members by ordering counsel to remove one-sided misleading communications from counsel’s website before the case had been conditionally certified.

In Maddox v. Knowledge Learning Corp., a FLSA collective action, the court held that it would be an abuse of discretion to entirely prevent counsel from communicating with the putative class prior to conditional certification. Like Jones, the court limited plaintiff’s counsel’s communications with putative collective action members ordering counsel to remove misleading website material before the case had been conditionally certified.

Based on the foregoing authority, it is clear that pre-certification communications with putative class members are allowed in certain circumstances.

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5 Id. See also Gerlach v. Wells Fargo & Co., No. C 05-0585, 2006 WL 824652, at *7 (N.D. Cal. Mar. 28, 2006) (FLSA pre-certification communications permissible; citing Parks with approval); Maddock v. KB Homes, Inc., No. CV-06-05241, 2007 WL 2221030, at *3 (C.D. Cal. July 9, 2007) (FLSA pre-certification communications permissible; citing Parks with approval holding that ex parte communications by defendant with putative collective action members were permissible); Piper v. RGIS Inventory Specialists, Inc., No. C-07-00032, 2007 WL 1690887, at *7 (N.D. Cal. June 11, 2007) (FLSA pre-certification communications permissible; citing Parks with approval).


7 Id. at 1084.

8 Id. at 1088-89.


10 Id. at 1344-45.

11 Some courts have adopted local rules prohibiting or limiting communications with class members in class actions. See, e.g., Local Rule 23 (N.D. Ga. 2004); Local Rule 23.1(E.D., M.D., W.D. La. 2002). However, these rules have not been extended to FLSA collective actions. See Maddox v. Knowledge Learning Corp., 499 F. Supp. 2d 1338, 1342 (N.D. Ga. 2007). The other much discussed issue in class action cases is determining when the attorney-client relationship forms and the impact of the anti-contact rule that prohibits counsel from contacting a party known to be represented. American Bar Association (ABA) Model Rule 4.2, commonly known as the anti-contact rule, provides that “[i]n 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 to do so by law or a court order.” MODEL RULES OF PROF’L CONDUCT R. 4.2 (2003). A version of the rule exists in every United States jurisdiction. In general, the rule is that a putative class member is not represented by a lawyer until the class is actually certified. However, one district court in Pennsylvania has held that counsel for a defendant in a class action was barred from any contact with potential members of the class, even in the pre-certification stage of the proceeding. Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662 (E.D. Pa. 2001). One commentator has argued that this approach not only is in conflict with...
II. The Scope of Communications with Putative Class Members

*Gulf Oil Co. v. Bernard*¹²

The seminal case in class action suits concerning communication among the attorneys and prospective class members is *Gulf Oil Co. v. Bernard*. In *Gulf Oil* the petitioner Gulf Oil Co. and the Equal Employment Opportunity Commission (EEOC) entered into a conciliation agreement resolving alleged discrimination against African American and female employees at one of Gulf Oil’s refineries.¹³ Under this agreement, Gulf Oil offered back pay to alleged victims of discrimination and began to send notices to employees eligible for back pay, stating the amount available in return for execution of a full release of all discrimination claims. Employees of Gulf Oil then filed a class action in federal district court against Gulf Oil and the local chapter of the Oil, Chemical, and Atomic Workers International Union on behalf of all African American, current and former employees and applicants rejected for employment. The suit alleged racial discrimination in employment and sought injunctive, declaratory, and monetary relief.¹⁴ Gulf Oil filed a motion seeking to limit the communications from the named plaintiffs and their counsel to class members. Ultimately, the district court ordered a complete ban on all communications concerning the class action between the named plaintiffs and their counsel and any actual or potential class member who was not a formal party without the court’s prior approval.¹⁵

The Supreme Court held that the district court abused its discretion by imposing the order. The Supreme Court held that the order was inconsistent with the general policies embodied in Federal Rule of Civil Procedure 23, which governs class actions in federal district courts.¹⁶ It interfered with the plaintiffs’ efforts to inform potential class members of the existence of the lawsuit and may have been particularly injurious — not only to current plaintiffs but to the class as a whole — because employees at that time were being pressed to decide whether to accept Gulf Oil’s back-pay offers.¹⁷ In addition, the order made it more difficult for the plaintiffs to obtain information about the merits of the case from the persons they sought to represent.

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¹³ *Id.* at 91.
¹⁴ *Id.* at 92.
¹⁵ *Id.* at 93.
¹⁶ *Id.* at 100.
¹⁷ *Id.* at 101.
Because of these problems, the Court held that an order prohibiting communications should be based on a clear record and specific findings that reflected the district court’s balancing of the need for a limitation against the potential interference with the parties’ rights. Moreover, the Court noted that such a weighing should result in a carefully drawn order that limits speech as little as possible, consistent with the parties’ rights.18 The trial court’s order did not meet this test and was thus rejected.19

The Supreme Court further commented that the mere possibility of abuses in class-action litigation does not justify routinely adopting a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Federal Rules of Civil Procedure. The Court further noted that there was no justification for adopting the form of order recommended at the time by the Manual for Complex Litigation in the absence of a clear record and specific findings of need.

While Gulf Oil made clear that broad judicial limitations on pre-certification communications were not permissible absent a clear and convincing need, it did little to establish clear boundaries that apply in class action litigation.

Kleiner v. First National Bank of Atlanta20

A few years after the Supreme Court’s decision in Gulf Oil, the Eleventh Circuit began to clarify the specific types of communication that were and were not permissible. Kleiner involved allegations of fraud, RICO violations, and breaches of contract against the defendant bank for backing out on a promise to “peg the interest rate it charged smaller customers to the prime rate.”21 A month after the court certified a class under Rule 23(b)(3), the bank’s attorney served notices of deposition and subpoenas duces tecum on 25 prospective class members.22 The plaintiffs moved for a protective order to bar the bank from what they termed “badgering” class members by taking their depositions.23 Additionally, and more problematic, the bank orchestrated an aggressive telephone campaign with the expressed intent of ensuring that prospective class members understood the merits of the dispute and also that they had the right to opt out of the class.24

In furtherance of the telephone campaign, the bank recruited 175 sales representatives and ordered them to “do the best selling job they had ever done.”25 The bank also fired one of its sales people who refused to participate in this campaign. The employees were given computer lists of customers stating “Friend” or “Foe,” as well as a score sheet lined with columns for tallying opt-out commitments and the dollar amounts of the

19 Id. at 103.
20 Kleiner v. First Nat’l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985).
21 Id. at 1196.
22 Id.
23 Id.
24 Id. at 1199.
25 Id. at 1198.
corresponding loans. The bank eventually succeeded in reaching over 3,000 customers. Nearly 2,800 of them decided to exclude themselves from the class.

The district court first addressed the telephone calls made by the bank to prospective class members, holding that in light of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, “it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action.” The court also ruled that unsupervised, unilateral communications with the plaintiff class, post-certification, sabotaged the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts without opportunity for rebuttal. The court noted that damage from misstatements could well be irreparable. The court of appeals affirmed the lower court’s ruling and stated that the bank’s subterfuge and subversion constituted an intolerable affront to the authority of the district court to police class member contacts.

The Eleventh Circuit also addressed First Amendment concerns in limiting what a party could or could not say to a class. In general, an order limiting communication regarding ongoing litigation between a class and class opponents will not violate First Amendment rights if it is grounded in good cause and issued with a “heightened sensitivity” for First Amendment concerns. In ascertaining good cause, the court found four criteria to be determinative: (1) the severity and the likelihood of the perceived harm; (2) the precision with which the order is drawn; (3) the availability of a less onerous alternative; and (4) the duration of the order.

The court cited a Supreme Court decision that predated Gulf Oil in noting that unsupervised oral solicitations, by their very nature, may produce distorted statements and coercion of susceptible individuals. The appellate court found that the bank’s solicitations constituted a per se violation and that the trial court was justified in denying the bank the right to take discovery from class members in order to prove that its communications were not coercive.

In this more recent case, a group of plaintiffs brought a class action alleging that Coca-Cola systematically discriminated against African American employees with regard to employee evaluations, compensation, promotions and job placement within the

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27 Id. at 1199.
28 Id. at 1202.
29 Id. at 1203.
30 Id. at 1205-06 (citing Gulf Oil v. Bernard, 452 U.S. 89 (1981)).
31 Id. (citing Ohradik v. Ohio State Bar Ass’n, 436 U.S. 447, 457 n.13 (1978)) (“[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education.”).
corporation’s divisions.\textsuperscript{33} Despite a local rule prohibiting parties and their counsel from communicating with prospective class members regarding the substance of the lawsuit between the date of the filing of the complaint and the opt-out deadline — the constitutionality of which was challenged by the parties — counsel for both sides had communicated with class members.

The plaintiffs’ attorneys spoke with newspaper reporters, telephoned prospective class members, and provided a copy of the complaint along with their contact information to a third party for posting on a website. Coca-Cola’s CEO sent all company employees in the United States two e-mails discussing the allegations in the complaint. In the first e-mail, the CEO assured employees that Coca-Cola did not tolerate discrimination and the lawsuit was “without merit.”\textsuperscript{34} In the second e-mail, the CEO explained that the lawsuit was troubling to him because Coca-Cola had always endeavored to treat all of its employees fairly. Finally, Coca-Cola’s CEO met with senior African American associates “to get their opinions on the circumstances that [have] led to this serious litigation.”\textsuperscript{35}

The district court applied the following rule when deciding what type of communication to potential class members was appropriate:

\begin{quote}
While we cannot say that orders authorizing communication with potential class members may never precede class certification, district courts must strive to avoid authorizing injurious class communication that might later prove unnecessary. An order authorizing class communications prior to class certification is likely to be an abuse of discretion when (1) the communication authorized by the order is widespread and clearly injurious; and (2) a certification decision is not imminent or it is unlikely that a class will in fact be certified. In such circumstances, the danger of abuse that always attends class communications — the possibility that plaintiffs might use widespread publication of their claims, disguised as class communication, to coerce defendants into settlement — is not outweighed by any need for immediate communications.\textsuperscript{36}
\end{quote}

The court recognized that large companies rely on their ability to communicate with employees, and thus it was neither realistic nor appropriate to prohibit a company from speaking to its employees about a pending class action. As such, the court did not hold that the CEO’s company-wide communications were prohibited and expressly noted that the company could continue to share its views about the lawsuit with employees. However, the court required that any future statements contain the following disclaimer:

\begin{quote}

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\textsuperscript{33} Id. at 674.
\textsuperscript{34} Id. at 675.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 676 (citing \textit{Jackson v. Motel 6 Multipurpose, Inc.}, 130 F.3d 999, 1004 (11th Cir. 1997)).
The foregoing represents Coca-Cola’s opinion of this lawsuit. It is unlawful for Coca-Cola to retaliate against employees who choose to participate in this case.37

While the company was permitted to continue sharing its views broadly, the court prohibited it from discussing the lawsuit directly with potential class members, except to the extent it needed to speak with managerial employees to investigate the acts, omissions, and statements they committed to expose Coca-Cola to liability in the action.

III. Obtaining Declarations From Putative Class Members

Informal discovery can be as important as formal discovery in investigating the claims and defenses relevant to the case for Defense counsel. Putative class members may be an important source of facts. Additionally, in certain circumstances, Defense counsel may be able to settle claims and obtain signed declarations containing favorable information. Plaintiffs’ attorneys, however, may seek to limit an employer’s access to its own employees and demand access to potential class members before the class is certified. Moreover, the “rules,” such as they are, may depend on the stage of the litigation.

One successful defense strategy can be the “blitz” campaign of affidavit gathering. In order to gather these affidavits, contact with class members is obviously required. As such, knowing when contact can be made with class members and the permissible scope of that contact often drives the parameters of the blitz campaign.

In Mevorah v. Wells Fargo,38 a mortgage consultant filed a FLSA class action alleging incorrect categorization of employees as exempt, and a failure to pay proper overtime.39 Plaintiff moved the court to issue a notice to all potential class members correcting certain alleged misrepresentations that defendant had made to prospective class members.40 Specifically, Plaintiff alleged “that defendant, through counsel, contacted members of the potential class and made false and misleading statements regarding this action and its potential impact.”41 Plaintiff further alleged “that defendant asked members of the potential class to sign declarations regarding the nature of their duties ... and their compensation preferences, and that these declarations as drafted by defendant [were] inaccurate and omit[ted] critical facts.”42 In addition, a former employee of the defendant also declared that she was misled by defendant’s counsel, and was not made aware of the fact that “if the action was successful she might be eligible to recover overtime pay, that her declaration could be used against the interests of the potential class (including herself), that declining to be interviewed would not impact her job, or that she should seek the advice of counsel.”43

37 Id. at 679.
39 Id. at *1.
40 Id.
41 Id.
42 Id.
43 Id.
Despite defendant’s rebuttal argument, the court acknowledged that other courts have “limited pre-certification communications with potential class members after misleading, coercive, or improper communications were made.” 44 The court determined that defendant’s communications improperly characterized the lawsuit, and misrepresented the impact of the outcome of the suit if Plaintiff prevailed. 45 The court also noted that because the communication occurred with an employee of the defendant, there was a greater need for defendant’s counsel to be cautious, as its communication was more likely to be coercive. 46 As a result of its findings, the court ruled that no party could engage in further communication unless pre-approved by the court. 47 Additionally, the defendant had to provide a list of potential class members contacted and allow plaintiff to depose these individuals. 48 The parties were also required to send notice (containing a summary of the case, defenses and impact of outcome) to all potential class members at the defendant’s expense. 49 Finally, the parties were required to create a questionnaire to elicit facts about potential class members’ employment, again at the defendant’s expense. 50

Despite the unfavorable outcome of *Mevorah*, it is important to note that employers can obtain declarations from their employees if defense counsel is careful to ensure that all declarants receive full disclosure concerning their interview. Case law makes clear that simply interviewing and obtaining sworn statements from employees who are putative class members is entirely proper when carefully conducted. 51

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44 *Id.* at *3.
45 *Id.* at *4.
46 *Id.*
47 *Id.* at *5.
48 *Id.* at *6.
49 *Id.*
50 *Id.*