

American Bar Association
Labor and Employment Law Section
Federal Labor Standards Legislation Committee
Miami Beach, Florida
February 19-21, 2014

Ethical Issues

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I. SOLICITING & ADVERTISING: MAKING THE FIRST CONTACT

In assembling a class or collective action, a plaintiffs' lawyer usually must communicate with many additional people who may become clients or witnesses, including potential class representatives, opt-in plaintiffs, declarants, and fact witnesses among others. These communications must stay clear of improper solicitation by staying within the protected chalk lines created by the First Amendment and the professional duty to prosecute the case.

A. United States Supreme Court Decisions

In *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 454 (1978), the Court upheld a blanket prohibition against any form of in-person solicitation of legal business for pecuniary gain.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), limited *Ohralik*'s prophylactic ban to in-person and telephonic solicitations and held that the ban does not apply to printed advertisements. In *Zauderer*, the Supreme Court evaluated constitutional limitations on the content of printed solicitations. The State may always regulate false or misleading statements. Other restrictions may be made only "in the service of a substantial governmental interest and only through means that directly advance that interest." *Zauderer* at 638. For instance, the State's desire that attorneys maintain their dignity in communications with the public is not an interest substantial enough to justify abridgement of the First Amendment right. *Id.* at 648.

In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court held that a State Bar Association may not preclude a lawyer from sending mail advertisements to individuals who are known to require specific legal services. The Court rejected the claim that *Shapero* was *Ohralik*, writing: "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero*, 486 U.S. at 475. The letter sent by Shapero posed much less risk of overreaching or undue influence than in-person solicitation because of the absence of "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer." *Id.* The recipient of a letter is free to ignore the mailing, discard the mailing or if he chooses read it. The personalized mailing is, of course, subject to the same limitation on misrepresentation as any other public communication.

In *re Primus*, 436 U.S. 412 (1978), the Court held that the *Ohralik* prohibition on in-person and telephonic solicitation does not apply to non-profit organizations. The constitutional ability to ban solicitation is limited to situations where the lawyer is motivated by pecuniary gain. The Supreme Court specifically ruled that in cases where there is no motivation for pecuniary gain (public interest litigation), the Bar may not regulate solicitation of prospective clients because of the lawyers right to free association.

B. First Amendment Issues as Developed in Recent Federal Decisions

Recent federal decisions have emphasized the need for rules to be “narrowly tailored,” so as to advance the substantial government interest of protecting the public from misleading advertising. However, courts have differed as to what constitutes a “narrowly tailored” rule.

1. Florida Bar Rule Requiring Advance Submission of Advertisements for Review Not Unconstitutional

In *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010), the Eleventh Circuit ruled that the Florida Bar’s advertising rule, which required a lawyer to submit television or radio advertisements for review at least 20 days before their planned airing date, did not amount to an unconstitutional imposition on protected commercial speech under the First Amendment. The rule was found to directly advance the Bar’s substantial interests in protecting the public from abusive practices and preserving the reputation and integrity of the legal profession. The court found that the 20-day delay placed minimal burden on attorneys. *Harrell*, 608 F.3d at 1245.

2. New York District court holds that restrictions on attorney solicitation letters must directly advance substantial government interest

In *Gordon v. Kaleida Health*, 2010 WL 3395543 (W.D.N.Y. 2010), the court held that unless shown to be false, deceptive, or relating to illegal activity, restrictions on attorney solicitation letters must be in furtherance of a “substantial governmental interest and only through means that directly advance that interest.” *Gordon*, at *7, (quoting *Shapiro*, 486 U.S. at 472). The court discussed solicitation letters in the context of an FLSA collective action and further held that even regulations on attorney solicitations that may more clearly carry the potential for “abuse or confusion” could be no broader than reasonably necessary to prevent the “perceived evil.” *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

3. Second Circuit holds that several New York rules on advertising do not materially advance substantial state interests

In *Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010), a suit brought by a New York personal injury law firm and a not-for-profit consumer rights organization, the Second Circuit ruled on the First Amendment constitutionality of several new attorney advertising rules issued by the New York Code of Professional Responsibility. The court used the *Central Hudson* test to evaluate the New York rules and, in so doing, held that the rules must be in furtherance of a substantial government interest, materially advance

that interest, and be narrowly tailored in a reasonable manner to serve that interest. *Alexander*, 598 F.3d at 88 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

The first New York rule, a prohibition on client testimonials of a lawyer or law firm, failed to meet the test. *Alexander*, 598 F.3d at 92. Holding that common sense did not “support the conclusion that client testimonials are inherently misleading,” the Second Circuit contended that not all testimonials mislead, especially those accompanied by disclaimers, and that the defendants failed to show that the rule materially advanced the substantial state interest against deceiving prospective clients. *Id.*

The court further held that a rule prohibiting the portrayal of a judge was similarly invalid. *Id.* at 93. Although it was plainly true that “implying an ability to influence a court” was likely misleading, the defendants were found to have failed to draw “the requisite connection” between such a “common sense observation” and the “portrayal of judges in advertisements generally.” *Id.* In fact, an advertisement like that used by the plaintiff law firm, in which the judge was portrayed as overseeing the fairness of the trial, was found “informative” rather than “misleading.” *Id.*

The third New York rule that did not pass muster was a prohibition on irrelevant techniques, or attention-garnering techniques, that were unrelated to the selection of counsel, including the portrayal of lawyers demonstrating characteristics unrelated to legal competence. *Id.* at 93. Warning not to conflate “irrelevant” components of advertising with “misleading” ones, the court asserted that “we cannot seriously believe” that “ordinary individuals” would be likely to be misled into thinking that attorneys could indeed tower over local buildings as depicted in their advertisements. *Id.* at 94.

The court then went on to proscribe a fourth New York rule prohibiting nicknames, mottos and trade names. *Id.* It held that the defendants failed to prove that consumers would be misled by names and promotional devices. *Id.*

Notably, the Second Circuit held that even if all of these rules had been shown to materially advance a substantial state interest, they would have still failed the *Central Hudson* inquiry because none of them were narrowly tailored to further the state interest of protecting prospective clients from deception. *Id.* at 96. This was because all of the rules prohibited “potentially” misleading techniques as opposed to “inherently” or “actually” misleading techniques. The “categorical nature” of New York’s prohibitions, where their target was merely latently misleading techniques, “was enough to render the prohibitions invalid.” *Id.*

Notwithstanding these holdings, the Second Circuit found that New York’s moratorium provision – a provision establishing a 30-day moratorium on the soliciting of accident victims – materially advanced a substantial state interest. *Id.* at 97-98.

4. Louisiana case a moderate contrast to Alexander

In a 2009 suit brought by the same not-for-profit group in *Alexander*, challenging the constitutionality of a number of amended professional conduct rules issued by the Louisiana Attorney Discipline Board (LADB), the Fifth Circuit Court of Appeals found one of the rules to be inherently misleading. *Public Citizens, Inv. v. Louisiana Attorney Discipline Board*, 632 F.3d 212 (5th Cir. 2011). The other five rules were potentially misleading, implicating the First Amendment, thus requiring application of the *Central Hudson* and *Zauderer* tests. *Id.* at 219. The Court found three of the six rules to violate the First Amendment. *Id.* at 229.

The first rule, which barred advertisements that promised results, was found to be constitutional. *Id.* at 218. The court stated that “[a] promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results.” *Id.* Under the *Central Hudson* test, because these statements are necessarily false and deceptive, they can be freely regulated. *Id.* at 219.

The second rule prohibited communications “containing a reference of testimonial of past successes or results obtained,” and statements “of opinion or quality and...[those] of objective facts that may support an inference of quality.” *Id.* at 221. The Court first recognized that it is “well established that inclusion of verifiable facts in attorney advertisements is protected by the First Amendment.” *Id.* (citing *Zauderer*, 471 U.S. at 647-49). The court went on to say that the evidence provided by the LADB was not sufficient to support the rule, thus failing the second prong of the *Central Hudson* test. *Id.* The evidence, in the form of survey questions, did not point to specific harms caused by the testimonials or how to alleviate them. *Id.* at 222. The Court also found that the rule was too broad and failed the third prong of the *Central Hudson* test. *Id.* at 223. Any fears of misleading consumers with testimonials could be addressed with a disclaimer. *Id.* at 223.

The third rule prohibited advertisements that included a portrayal of a judge or jury. *Id.* Here, the Fifth Circuit found such advertisements not to be inherently misleading, and the LADB’s argument to the contrary assumes “that the people of Louisiana are insufficiently sophisticated to avoid being misled” by such advertising. *Id.* at 223. The court noted that its decision on this rule was in accord with the Second Circuit’s opinion in *Alexander*. *Id.* at 224.

The fourth rule prohibited “utilizing a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter.” *Id.* The Fifth Circuit found that sufficient evidence was presented to show the use of such nicknames had the effect of improperly promising results. *Id.* at 225. A focus group and survey showed consistently showed that the public was misled by such advertising. *Id.* The court also found the rule to be narrowly drawn as to advance the substantial government interest of protecting the public from misleading advertising, since it only prohibited monikers that implied the ability to obtain results. *Id.* at 225-26.

Here, the court distinguished for the alternate outcome reached by the *Alexander* court. *Id.* at 226. There, the Fifth Circuit noticed that the Second Circuits specifically noted that the enactment specifically failed for lack of evidence. *Id.* The Fifth Circuit found that the LADB provided the sufficient evidence that was lacking in *Alexander*. *Id.* The Fifth Circuit also rejected the plaintiffs’ argument that the prohibition was too vague. *Id.* The LADB had extensive published guidelines that provide sufficient guidance to attorneys. *Id.*

The fifth rule addressed portrayals of clients, scenes or pictures without a disclaimer. *Id.* at 227. Evidence, and the court’s “simple common sense” (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 628 (1995), that disclaimers are reasonably related to the legitimate state interest of preventing consumer deception. *Id.* at 228.

The sixth rule dealt with formatting requirements for disclosures in advertisements and was challenged on requirements dealing with font size and speed of speech. *Id.* The Fifth Circuit found this rule to be overly burdensome on attorneys. *Id.* at 229. The rule would effectively make it impossible for attorneys to run shorter or smaller advertisements since the rules apply to 1) the lawyer’s name and office location; 2) a client’s responsibility for costs; 3) all jurisdictions in which the lawyer is licensed; 4) the use of simulated scenes or pictures or actors portraying clients; and 5) the use of a spokesperson, whether the spokesperson is a lawyer, and whether the spokesperson is paid. *Id.*

5. Friend Requests to Third Parties

The San Diego Bar Association and the Kentucky Bar Association have both considered the ethical implications of when a lawyer tries to access the site of a third person that is not public. The Kentucky Bar Association stated that if a lawyer attempts to gain access to a third party’s private site or page, the general rules prohibiting direct contact with someone who is represented by counsel would apply. Kentucky Bar Assn. Ethics Opinion KBA E-434 (Nov. 17, 2012). Likewise, if the third party is unrepresented, such as a witness, then Kentucky’s rule dealing with unrepresented persons would apply, even if that person initiates contact. *Id.* A lawyer also may not request a third person, such as an investigator, to obtain information through means that the lawyer cannot ethically use, including via social media. *Id.*

The San Diego Bar Association opined that an attorney is barred from making an ex parte Facebook friend request to a represented party. It stated that the general friend request message in Facebook that says “[Name] wants to be friends with you on Facebook” is “at least an ex parte communication with a represented party” if the lawyer sending the friend request knows that the recipient is represented by counsel. San Diego County Bar Association Legal Ethic Opinion 2011-2 (May 24, 2011). If the attorney sends the friend request with the purpose of learning more about the third party or for purposes of finding out more about the subject of representation, the friend request is a

“communication about the subject of representation” because the message could just as clearly read “[Name] wants to have access to the information you are sharing on your Facebook page.” *Id.*

The Association noted that friending a member of the opposing party is not the same as accessing the public website of an opposing party because the very reason the attorney would want to access the person’s Facebook page is because that information is unavailable to the public. *Id.* Furthermore, an attorney’s duty not to deceive prohibits him from making a friend request even to unrepresented witnesses without disclosing the purpose of the request. *Id.*

C. Internet Intake: Privilege and False Advertising Issues

1. Privilege Issues

a. Attorney-Client Privilege

Whether or not online questionnaires may be protected by attorney-client privilege is generally based on the expectations and beliefs of the person completing the form, and the intentions of class counsel in disseminating the questionnaires. Generally speaking, if the person completing the questionnaire believed that, in filling out the form, s/he was in the process of seeking potential legal assistance, then courts tend to find the material privileged.

Privileged

- *Barton v. U.S. Dist. Court for Central Dist. of Cal.*, 410 F.3d 1104 (9th Cir. 2005) (class counsel’s online questionnaires regarding antidepressant drug were protected by attorney-client privilege when potential class members submitted answers “in the course of an attorney-client relationship” as they were seeking legal representation at the time.)
- *Harlow v. Sprint Nextel Corp.*, 08-2222-KHV-DJW, 2012 WL 646003 (D. Kan. Feb. 28, 2012) (answers to online questionnaires given to potential clients are protected from discovery by attorney-client privilege because the answers were given in the course of the attorney-client relationship, were submitted for the purpose of seeking legal advice and were made in confidence).
- *Gates v. Rohm and Haas Co.*, 2006 WL 3420591, *4 (E.D. Pa. 2006) (paper questionnaires were protected by the attorney-client privilege when “the questionnaires were ‘prepared by counsel in anticipation of litigation’ and were allegedly distributed only to persons seeking legal advice or representation.”)

- *Vodak v. City of Chicago*, 2004 WL 783051, *1 (N.D. Ill. 2004) (paper questionnaires were protected where only persons who were “seeking legal representation or specific advice were requested to complete the form” and where the completed forms were used in subsequent litigation.)

Not Privileged

- *Schiller v. City of New York*, 245 F.R.D. 112, 117-8 (S.D. N.Y. 2007) (finding no attorney-client privilege, when the NYCLU provided no evidence that people who submitted an online questionnaire regarding police misconduct had believed that they were seeking representation, as the online form made no mention of providing legal services or confidentiality and NYCLU made no suggestion that it intended to file a class action lawsuit in connection with the questionnaires); *see also Morisky v. Pub. Serv. Elec. and Gas Co.*, 191 F.R.D. 419 (D. N.J. 2000).
- *Taylor v. Waddell & Reed, Inc.*, 2011 WL 1979486, *3 (S.D. Cal., 2011) (finding that letter seeking information regarding ongoing class action and inviting recipients to contact the counsel if they wanted to learn more about the lawsuit, there was no effort to convey the impression of an attorney client privilege, or that such a privilege could be created by inquiries based on the letter, distinguishing it from the website in *Barton* which was seeking individuals who had been harmed, and finding the letters and responses subject to discovery.)

b. Work-Product

work-product protection afforded questionnaires/intake forms may be limited only to the blank-form questions written by the attorneys, and that may be lost when counsel produces an example of the blank form. *See Morisky*, 191 F.R.D. at 425.

2 False Advertising Issues

a. Generally

As a general rule, the standards for attorney websites correspond to the rules applicable to information provided to a prospective client at the prospective client's request. *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346, 1364 (S.D. Fla. 2012). The ABA has reiterated that websites, and all information about an attorney or attorney's services are subject to the prohibitions against false and misleading statements outlined in Model Rules 8.4(c) and 4.1(a). American Bar Association Committee on Ethics and Professional Responsibility, 2010-8, 10-457, August 2010:

http://www.americanbar.org/content/dam/aba/migrated/cpr/mo/10_457.authcheckdam.pdf.

The ABA stressed that no website communication may be false or misleading either in content or in omission. The opinion stated that Model Rules 5.1 and 5.3 reinforce this professional obligation to keep information accurate, requiring managerial lawyers in law firms to make reasonable efforts to ensure that “all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.” *Id.* at 1.

The ABA also stressed that the legal information disseminated through lawyer websites was also subject to the rules regarding false advertising and materially misleading information. *Id.* at 2. The opinion emphasized the need for lawyers to ensure the accuracy of their legal information and encouraged them to include qualifying statements or disclaimers to prevent a prospective client from having unjustified expectations. *Id.*

b. Client Intake

In *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 5038508 (2009 D.Nev.), attorneys who were counsel for a group of employees in a collective action were found to have violated a court order and professional conduct rule by operating a website to advertise for additional opt-in class members. This required the attorneys to make new disclosures to the employer in the collective action, where the Court held that the attorneys were required, in good faith, to identify all the class members who were secured through the website.

The attorneys, as Plaintiffs in this action, argued that their website was protected as routine legal services. *Id.* at *6. However, the Court found that the site was not a form of truthful commercial speech that would be protected by the First Amendment, since it improperly stated that the class of opt-in Plaintiffs was not restricted to the three states that it in fact was and since the site failed to indicate clearly that the employer in the action had not been held liable. *Id.*, 6-7. The Court additionally sanctioned Plaintiffs for violating the pertinent Nevada ethics rule prohibiting false or misleading communications regarding a lawyer’s services. *Id.* at *7.

c. Specialties

The New York State Bar Association concluded that a lawyer or law firm listed on a social media website may identify one or more areas of law practice but if the site has a separate area titled “Specialties,” the lawyer may not list anything unless he or she has been certified as a specialist in a particular area by a private organization approved for that purpose by the ABA or other authority having jurisdiction. New York State Bar Assn., Opinion 972 (June 26, 2013). Further, even if a particular lawyer has been so certified, the law firm employing that lawyer cannot claim recognition or certification as a specialist. *Id.*

D. Soliciting and Advertising through Virtual Chat Sessions and Social Media: Rule 7.3 Considerations

1. ABA Model Rule 7.3 – Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

2. Social Media Under Model Rule 7.3

The more vexing question is whether social media, real-time online conversations, blogging, etc. are considered “real-time electronic contact” under Model Rule 7.3 and its state rule permutations.

a. *California: Clarification on Attorney's Posts on Social Media Websites*

On January 1, 2012, the State Bar of California issued an opinion that material posted by an attorney on social media websites are subject to professional responsibility rules and standards governing attorney advertising when that material constitutes a “communication.” *California State Bar Standing Committee on Professional Responsibility and Conduct Opinion 2012-186*, January 1, 2012. “Communication” includes “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client.” CA ST RPC Rule 1-400. It provided the example of a posting that read “Case finally over. Unanimous verdict! Celebrating tonight” as not being a communication because it does not discuss potential employment. However, a post that read “Another great victory in court today! My client is delighted. Who wants to be next?” would be a communication because it suggests availability for professional employment.

The Northern District of California recently held that posting on a website was not a solicitation because it was not directed at a particular person. *Ramirez v. Trans Union, LLC.*, 2013 WL 1164921 (March 20, 2013). Plaintiff’s attorneys wrote a posting on their lawfirm’s blog recounting Plaintiff’s case and giving a warning to the public about fraudulent credit report flags. The Defendants argued that this statement constituted a “solicitation” and was false and misleading under the California Rules of Professional Conduct. The Court found that the statement was not a solicitation because it was not delivered in person or by telephone, and was not directed to a person known to the sender to be represented by counsel. (Id. at 3).

b. *Philadelphia: Solicitation by Chat Not Considered Real-Time Electronic Communication*

In June, 2010, the Philadelphia Bar Association Professional Guidance Committee stated its view that solicitation in “chat rooms” did not constitute the “real-time electronic communication” prohibited by Rule 7.3 of the Pennsylvania Rules of Professional Conduct. The committee defined chat rooms as “electronic forums where individuals generally participate simultaneously with each other having a kind of typed out ‘conversation’ in real time.”

The Committee reasoned that chat rooms offer a prospective client the same ability to dismiss the solicitation as he or she would with a letter or email. Chat room participants could readily terminate at their discretion, where leaving the conversation would not be “socially awkward” as in an in-person solicitation.

The Committee applied this same rationale to emails and blog posts, asserting that these communications did not constitute real-time electronic communication, again because of a prospective client’s inherent and exclusive ability to dismiss them. Ultimately, the

Committee’s go-to test for assessing electronic communications under Rule 7.3 seemed to be whether such communications would make it “socially awkward or difficult for a recipient of a lawyer’s overtures to not respond in real time.” Philadelphia Bar Association Professional Guidance Committee Opinion 2010-6, June 2010: <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>.

c. *Kentucky Advertising Exception for Blogs*

Kentucky has carved out an exception from its general rules requiring that all advertisements be submitted to the Kentucky Attorney Advertising Commission. Attorneys in Kentucky must normally send copies of all advertisements, along with a fee, to the Commission. KY ST S CT RULE 3.130, RPC Rule 3.130(7.05). However, the Supreme Court of Kentucky has created an exception for “Information and communication by a lawyer to members of the public in public speaking forums, radio, television broadcasts or postings on the internet that permit real time communication and exchanges on topics of general interest in legal issues, provided there is no reference to an offer by the lawyer to render legal services. This exception includes any republication or rebroadcasts of such communications.” KY ST S CT RULE 3.130, RPC Rule 3.130(7.02).

d. *Texas Considers Social Media Use to be Advertising*

In the fall of 2010, the litigation section of the State Bar of Texas summarized the current position of the Texas Bar Advertising Review Committee on the use of social media advertising. Dustin B. Benham, *The State Bar of Texas Provides New Guidance to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes*, 52 *The Advoc. (Tex.)* 13, Fall 2010. Social media pages on sites such as Facebook or LinkedIn were considered to be advertising and subject to the Bar’s regulation, subject to some nuances.

In an Interpretive Comment, the Committee noted that if “landing” pages on Facebook, Twitter, LinkedIn, etc. were “generally available to the public” they are considered to be an advertisement and had to be submitted to the Committee for review. *Id.* On the other hand, if such pages were modified by privacy settings so as to make them of limited visibility, they were not considered advertisements.

Continuing further, the The Committee noted that even if a page is made generally available to the public, the page’s content must be considered. If the page did not relate to obtaining employment or the availability of a lawyer’s services, the page would be exempt from regulation. Moreover, even if such a page did relate to a lawyer’s availability of services, the page would be exempt if it contained only basic information, such as a lawyer’s name or firm, practice areas, and bar admissions. *Id.*

As for “status updates” that would be posted on various social media sites or blogs, the Committee considered them to be exempt if educational or informational in nature. Ultimately, as with any social media or electronic posting, the Committee placed the burden of ensuring the appropriateness of content on the attorney.

e. Florida Issues Guidelines for Advertising on Networking and Video Sites

The Florida Bar Association issued Guidelines for Networking Sites on April 16, 2013. In this set of guidelines, the Association stated that pages appearing on networking sites that are used to promote the lawyer or law firm’s practice are subject to the Florida lawyer advertising rules. Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer’s page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are solicitations and will violate the Florida Rules of Professional Conduct 4-7.18(a) unless the recipient is the lawyer’s current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the page sent via email must comply with the direct e-mail rules.

Although lawyers are responsible for all content that the lawyer posts on his/her own page, a lawyer is not responsible for information posted on the page by a third party, unless the lawyer prompts the third party to post. If a third party posts information on the lawyer’s page about the lawyer’s services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the page.

Lawyers who post information on Twitter whose postings are generally accessible are subject to the lawyer advertising regulations set forth in Rules 4-7.11 through 4-7.18. A lawyer may post information on Twitter and may restrict access to the posts from that lawyer. If access to a lawyer’s Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules.

The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites Opinion Revised April 16, 2013.

[http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/\\$FILE/Guidelines%20%20Social%20Networking%20Sites.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20%20Social%20Networking%20Sites.pdf?OpenElement)

The Florida Bar Association has also issued Guidelines for Video Sharing Sites:

Videos appearing on video sharing sites that are used to promote the lawyer or law firm’s practice are subject to Florida’s lawyer advertising rules. Regulations include prohibitions against any misleading information, and against statements characterizing skills, experience, reputation or record unless objectively verifiable.

Invitations to view or link to a video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are direct solicitations. Any invitations to view the video sent via email must comply with the direct email rules if they are sent to people who are not current clients, former clients, relatives, other lawyers, or people with whom the lawyer has a prior professional relationship or people who have requested information from the lawyer.

[http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4AEC3CC3C76510A885257B5900643E6E/\\$FILE/Guidelines%20%20Video%20Sharing%20Sites.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4AEC3CC3C76510A885257B5900643E6E/$FILE/Guidelines%20%20Video%20Sharing%20Sites.pdf?OpenElement)

E. Soliciting and Advertising Concerns in the Use of Internet Referral Services

1. Arizona finds that use of for-profit referral service violates prohibition against paid recommendation of services

A number of jurisdictions have commented on the ethical considerations involved in the use of internet referral services. The following is a scenario discussed in a 2005 State Bar of Arizona opinion:

Participating lawyers pay fees to an internet referral service, which may include a one-time application fee in the range of \$500 and an annual fee in the range of about \$4000. The service after verifying the lawyers' credentials, includes the lawyers in its database. The service advertises for prospective clients on the internet, where the home page of the service's website prompts prospective clients to provide information just as they would during an initial consultation with an attorney. Such clients are informed on the site that the information they submit will be sent to lawyers in the specific practice areas and geographic locations that the clients select. The prospective clients, while told that all the lawyers in the referral service are licensed and in good standing with their state bars, are not told that the lawyers pay a substantial sum of money to participate in the service.

State Bar of Arizona Ethics Opinion, 05-08, July 2005, <http://www.myazbar.org/ethics/opinionview.cfm?id=684>.

The State Bar of Arizona, which illustrated this example, identified rules that govern communications concerning a lawyer's services, and advertising and direct contact with prospective clients as relevant. *Id.* at 1. The Bar found that participation in the service constituted an improper use of a for-profit referral service, since the lawyers, in paying fees to the service, were providing consideration to an agent that functioned and held itself out to the public as a referral service.

The Bar further found that such use of the referral service violated Arizona Rule 7.1, which prohibits “false or misleading communication about the lawyer or lawyer’s services.” *Id.* at 2. It began by determining that communications made through an intermediate entity like the referral service could be governed by Rule 7.1 as direct communication could. Accordingly, since the referral service failed to disclose to clients that lawyers pay a substantial fee to be included in the service, coupled with the fact that the service claimed to match clients with the “right” lawyers,” this constituted a materially misleading communication.

Interestingly, the State Bar of Arizona found that the lawyers’ use of the referral service complied with Rule 7.3, which prevents in-person, telephone or real-time electronic solicitation. *Id.* at 2. While this rule applied to internet communication such as the referral service, the Bar found it determinative that none of the attorneys participating in the service initiated communication with clients. *Id.* at 2.

2. South Carolina addresses a modified referral situation involving ratings

In September 2010, the South Carolina Bar illustrated the following example:

A company operates a free website providing information about attorneys nationwide. Lawyers have not actively signed up to have their names listed on the website, since the company has obtained information through publicly available information. Lawyers can “claim” their profiles and update their information. Moreover, attorneys may also give each other peer endorsements. Client ratings are also featured, where anyone can submit a client rating about any lawyer and lawyers may invite current and former clients to submit ratings. Client ratings do not impact an attorney’s internal rating, which is managed by the company, but are featured prominently on the attorney’s listings. While the company monitors and inspects both the client and peer ratings, attorneys cannot control who endorses or rates them.

South Carolina Bar, Ethics Advisory Committee 09-10, 2009:

http://www.scbbar.org/member_resources/ethics_advisory_opinions/&id=678

The Ethics Advisory Committee made several determinations associated with this scenario. First, lawyers featured on the website were not responsible for its content unless and until they “claimed” their listing. *Id.* at 2. Once an attorney claimed his or her listing, this action constituted “placing” or “disseminating” communication regarding their services, such that Rule 7.1 of the South Carolina Rules of Professional Conduct would be invoked. *Id.* In the same vein, any lawyer who adopted, endorsed or updated his or her

information listed on directory websites such as Martindale-Hubbell or Superlawyers would then be responsible for its content. *Id.*

Soliciting peer ratings, the Committee determined, did not violate any ethics rules. As long as the rating was presented in a non-misleading way and was independently verifiable, displaying peer ratings was permissible. *Id.* at 3.

However, with regard to client ratings, the Committee did find that they may indeed be proscribed by the rules. Rules 7.1(b) and (d) respectively prohibit client endorsements and testimonials. *Id.* at 3. The Committee defined a testimonial as a “statement by a client or former client about an experience” with a given lawyer, whereas “an endorsement” was a “general recommendation or statement of approval of the lawyer.” *Id.* Lawyers may not solicit endorsements unless they are non-misleading and prevent unjustified expectations, which may be done by attaching relevant disclaimers. As for solicitations, lawyers may not solicit or publish them outright. The Committee recommended that lawyers monitor any “claimed” listing for compliance with these rules governing ratings. *Id.* at 4.

II. POST-FILING CONTACT WITH POTENTIAL/PUTATIVE CLASS MEMBERS

A. First Amendment Protection

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100-03 (1981), the Court recognized the need to inform potential class members of the existence of a lawsuit and class representatives’ interest in obtaining information about the merits of the case. It held that the district court abused its discretion by issuing an order prohibiting parties and their counsel from communicating with potential class members without court approval. The Court stated that such restrictions can only be imposed when the court has, on a case-by-case basis, made factual findings that justify such restrictions. The Court recognized that, because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

B. Pre-Certification Communications

There are opposing views as to whether prior court approval is necessary for pre-certification communications.

1. No Prior Court Approval Needed

a. The Parris case

No prior court approval is needed for plaintiffs’ precertification communication with potential class members. *Parris v. Superior Court*, 109 Cal. App. 4th 285, 135 Cal.

Rptr. 2d 90, 2003 Cal. App. LEXIS 793 (Cal. App. 2d Dist. 2003). The *Parris* Court held that the requirement of court approval for precertification communications was a classic example of a prior restraint on speech.

The employees in *Parris* sought: (1) leave to communicate with potential class members prior to class certification; (2) approval of the content of their proposed communication; and (3) to compel the discovery of names and addresses of potential class members.

The proposed notice contained the following information: “A class action lawsuit had been filed on behalf of current and former Lowe’s employees alleging Lowe’s had failed to pay overtime compensation to certain of its hourly employees” (a three-paragraph description of plaintiffs’ contentions and a one-paragraph summary of Lowe’s defense were included). It also stated that individuals who worked for Lowe’s at any time since October 29, 1997, in an hourly position may be members of the proposed class; the attorneys for the plaintiffs in the lawsuit (who were identified in the proposed notice) wished to gather information from the recipients of the notice regarding the nature of their work at Lowe’s, including any overtime they may have worked. The recipients of the notice were under no obligation to contact plaintiffs’ counsel. The recipients of the notice were told the attorneys for Lowe’s (who were also identified in the proposed notice) or other representatives of Lowe’s might also wish to discuss the case, and they were under no obligation to provide information or to discuss the matter with attorneys for Lowe’s or with any supervisor or manager at Lowe’s (“[y]our employer may not retaliate against you in any manner for refusing to provide information.”). Finally, it stated that further information regarding the lawsuit was available at a Web site set up by the plaintiffs’ counsel.

- The *Parris* Court held this was a permissible advertisement. Although some aspects of the proposed communication with potential class members appeared to fall outside the traditional definition of commercial speech—for example, the description of the pending lawsuit and summary of employees’ rights to overtime compensation under the Labor Code—the Court held it to be a protected advertisement for the services of the plaintiffs’ lawyers.
- The *Parris* Court disagreed with the reasoning of two other courts that had upheld the role of the trial court in screening the content of the proposed notice to prevent abuses and improprieties. The first was *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (1985), followed by *Howard Guntz Profit Sharing Plan v. Superior Court*, 88 Cal. App. 4th 572, 575-576, 105 Cal. Rptr. 2d 896 (2001). The *Parris* Court held that absent specific evidence of abuse, an order prohibiting or limiting precertification communication with potential class members by the parties to a putative class action is an invalid prior restraint.

b. Ethical issues based on the form of the communications

Precertification communications, like any communication with a prospective client, require adherence to Rule 1-400 of the California Rules of Professional Conduct. Prohibited are false, misleading and deceptive messages. The *Parris* Court found that because the proposed communication was delivered in written form, it was not a “solicitation” prohibited by rule 1-400(C). Rule 1-400(A)(4) defines “communications” to include “unsolicited correspondence from a member or law firm directed to any person or entity.” Subdivision (B)(2) defines a “solicitation” as any communication “delivered in person or by telephone” or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication. (Rule 1-400(B)(2)(a)-(b).) Subdivision (C) provides, “A *solicitation* shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.” (italics added) *Parris*, 109 Cal. App. 4th at 298. The *Parris* Court held that neither the proposed notice to class members nor the Web site prepared by plaintiffs’ counsel was to be “delivered in person or by telephone,” therefore, it was not prohibited by Rule 1-400.

c. Ethical issues based on the source of the communications

The following cases explore *Parris*-type communications that do not originate from the plaintiff’s attorney. It is worth keeping in mind that *Gulf Oil* free speech protection may attach to attorney-client communications as well as those from a plaintiff or a non-lawyer to potential class members.

- The District Court in *Hathaway v. Masonry*, No. 11 Civ. 121, 2011 WL 4916532 (W.D. Ky. Oct. 17, 2011), reaffirmed a plaintiff’s counsel’s right to contact potential plaintiffs in a putative opt-in FLSA collective action, even where an improper solicitation was disseminated to potential plaintiffs without the attorney’s knowledge. The defendant sought an order barring the plaintiff’s counsel from communicating with putative members of the FLSA collective based on a letter that the named plaintiff had distributed to his co-workers, which appeared to be an improper solicitation. *Id.* at 1. The letter stated “PLEASE BE ADVISED THAT YOU ARE ENTITLED TO MONEY WHICH HAS BEEN ILLEGALLY NOT PAID TO YOU BY SHAWN JONES MASONRY,” and attached the attorney’s business card. *Id.* The court observed that the letter might be an improper solicitation in violation of Kentucky Supreme Court Rule 3.130, but relied on the plaintiff’s attorney’s representation that he was unaware of it and had directed his client to cease its dissemination. *Id.* Addressing the defendant’s motion to bar further communications, the court declined to issue a protective order, because “the rights of the plaintiff to contact and communicate with potential plaintiffs outweighs the need for a prohibition on such communications,” and because no specific harm had resulted from the plaintiff’s communications. *Id.* at 3.
- In *Bennett v. Advanced Cable Contractors, Inc.*, No. 12-CV-115, 2012 WL 1600443 (N.D. Ga. May 7, 2012), the Court denied defendant’s motion for sanctions and a protective order after a “non-attorney representative” of plaintiffs violated the Georgia Rule of Professional Conduct by contacting putative plaintiffs by phone. The Court declined sanctioning plaintiffs because plaintiffs’ counsel agreed “to cease communications with potential opt-in Plaintiffs until the Court could give the parties guidance on the extent to which such communications could be had. *Id.* at *9. To avoid any prejudice caused by the communication, the Court ordered the two opt-in plaintiffs who filed their notices after the communication in question to file renewed consent forms to join the case. *Id.* at *12.

2. Cases Allowing Pre-Notice Communications While Limiting Misleading Statements

- a. *Piper v. RGIS Inventory Specialists, Inc.*, 2007 U.S. Dist. LEXIS 44486, at *24 (N.D. Cal. June 11, 2007) (holding courts may limit pre-notice communications where a party has engaged in misleading or improper communications or

where they are inconsistent with court-authorized notice);

- b. *Vogt v. Texas Instruments Inc.*, 2006 U.S. Dist. LEXIS 96515 (N.D. Tex. Aug. 8, 2006) (prohibiting use of flyer and e-mail deemed misleading while allowing a mailing to potential class members that contained factual information, was marked “advertisement,” and was modeled after court-authorized notice in another case);
- c. *Melendez Cintron v. Hershey Puerto Rico, Inc.*, 363 F. Supp. 2d 119 (D.P.R. 2005) (refusing to sanction plaintiffs for pre-certification letter to potential class members that did not make false representations and was not misleading);
- d. *Maddox v. Knowledge Learning Corporation*, 499 F. Supp. 2d 1338 (N.D. Ga. 2007) (holding it would be an abuse of discretion to totally prevent plaintiffs in a Section 216(b) collective action from communicating with potential class members through a website or other means prior to conditional certification, but that it was within its discretion to prohibit the plaintiffs from issuing pre-certification statements with putative class members through its case-specific website *www.kindercareovertime.com* that was factually inaccurate, unbalanced, or misleading).

The *Maddox* Court cured the notice (the Court added the words in boldface print), as follows:

Plaintiff’s Original Notice in <i>Maddox</i>	<i>Maddox</i> Court’s revisions
Each Plaintiff was paid on an hourly basis, was required to work more than 40 hours per week, and did not receive overtime as required by law.	The lawsuit alleges that each Plaintiff was paid on an hourly basis, was required to work more than 40 hours per week, and did not receive overtime as required by law. Knowledge Learning Corporation denies this allegation.
Positions eligible to participate include...	Positions that may be eligible to participate include....
Current and former employees who worked for any of KLC’s centers are eligible to join this case and seek payment for overtime.	OMIT ENTIRELY
In order for you to be eligible to assert a claim in this case, the following must apply: ... (3) You execute a written consent form	In order for you to be eligible to assert a claim in this case, the following must apply: ... (3) You execute a written consent form agreeing

Plaintiff's Original Notice in <i>Maddox</i>	<i>Maddox</i> Court's revisions
agreeing to join this case and be represented by Plaintiffs' attorneys	to join this case and be represented by Plaintiffs' attorneys. You are not required to be represented by Plaintiffs' attorneys to opt-in to the lawsuit. You may retain the attorney of your choice to represent you.
Even if KLC were to take any action against you, the lawyers in the case stand ready to combat any retaliation on your behalf.	KLC is prohibited by law from taking any action against you for participating in this lawsuit.

- e. *Jones v. Casey's General Stores*, 517 F. Supp. 2d 1080 (D. Iowa 2007). Without dictating precise changes to be made, the Court ordered plaintiffs to substantially modify their website <http://www.caseysovertimelawsuit.com> finding a host of "one-sided, misleading communications with putative opt-in collective members" and that "Plaintiffs' conduct, if permitted to continue, could easily have the effect of tainting the entire putative class and jeopardizing this entire litigation." *Id.* at 1089.
- f. *West v. Mando America Corp.*, 2008 U.S. Dist. LEXIS 81296 (M.D. Ala. Oct. 2, 2008). The court would not order plaintiff's counsel to cease and desist running advertisements soliciting opt-ins, nor disqualify counsel from representing any solicited opt-ins. The employer complained that plaintiff's advertisement was misleading because it is titled "Notice" rather than "Advertisement" and because it promised to represent solicited opt-ins at no cost if plaintiffs recover any proceeds from the lawsuit. The court held the advertisement was not misleading and did not require changes to the language because it stated as "claims" not "facts" the allegation of unlawful deductions from compensation; and it told readers in a certain class that they may have a claim. The promise of no-cost representation was clearly qualified by plaintiffs' recovery and the reader being a class member.
- g. *Self v. TPUSA, Inc. et al.*, 2008 U.S. Dist. LEXIS 71341 (D. Utah Sept. 19, 2008). Plaintiffs' counsel was permitted to keep its website (and domain name), which provided information about the case and urged employees to join the lawsuit by signing consent forms provided on the website. The court noted counsel had made substantial changes to the website without being ordered to do so. The court

ordered the employees to modify the website to qualify or remove the conclusory language and reflect that the statements were merely the employees' contentions rather than uncontested facts in the lawsuit. Relying heavily on *Maddox v. Knowledge Learning Corp.*, 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007); *see also Jones v. Casey's Gen. Stores*, 517 F. Supp. 2d 1080, 1089 (S.D. Iowa 2007), the court ordered counsel to send a letter to all opt-in Plaintiffs who signed and returned consent forms, informing them that (1) the factual statements on the website were merely allegations and that no liability had been established; (2) they are not required to join this lawsuit; (3) they may seek counsel of their choice and pursue individual claims against defendants; (4) a class had not yet been certified by this court; and (5) if they wanted to remain in this lawsuit as one of the opt-in plaintiffs, they must fill out and sign another consent form.

- h. *Frye v. Baptist Memorial Hosp., Inc.*, No. 07 Civ. 2708, 2008 WL 2117264 (W.D. Tenn. May 20, 2008). Defendant argued that a letter sent by plaintiffs' counsel to potential collective action members was a direct solicitation in violation of *TRPC 7.3*, that plaintiffs' counsel did not file the website or a copy of the letter with the Tennessee Board of Professional Responsibility, and that the letter did not contain the words "This is an Advertisement" in conspicuous print on the outside envelope or at the beginning and end of the letter, and that the first sentence of the letter failed to state "If you have already hired or retained a lawyer in this matter, please disregard this message." The defendant also argued plaintiffs' counsel's website was misleading. Noting that counsel made revisions to the website after defendant complained and mailed a revised letter, the court refused to impose a communications ban.
- i. *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 U.S. Dist. LEXIS 116663 (D. Nev. Dec. 15, 2009). Plaintiffs' counsel created a website, www.westgatelawsuit.com, three months before the court ruled upon plaintiffs' motion to circulate notice. The court granted the motion to circulate notice, but restricted circulation of notice by U.S. mail and e-mail and denied four separate forms of notice. After the ruling, plaintiffs' counsel left up the website, which stated that the case was

potentially national in scope when the litigation had already been limited to Nevada, Florida, and Tennessee. The court found that advertising on the website violated the court order restricting notice to U.S. mail and e-mail, even though the order did not specifically prohibit website advertising. *Id.* at *24-28. The court noted that such case-specific advertising did not constitute “general advertising,” such as advertising particular categories of cases, such as personal injury or DUI defense. *Id.* at *28 n.1. The court also found that the statement that the case was potentially national in scope was false, not constitutionally protected, and in violation of the Nevada Rules of Professional Conduct. *Id.* at *31-32. Nevertheless, the court in its discretion declined to order sanctions. *Id.* at *32

- j. *Hobson v. Comm’cns Unlimited, Inc.*, No 10 Civ. 0734, 2010 WL 3062505 (N.D. Ga. Aug. 2, 2010). Plaintiff’s counsel mailed advertisement letters to potential plaintiffs and maintained a website containing information about the case, including information on how potential plaintiffs can get involved in the lawsuit. Defendants sought an emergency motion to cease and desist unauthorized communications to putative class members. The court denied defendants’ motion to the extent that it would require plaintiff’s counsel to cease all communications with putative class members. The court ordered plaintiff’s to correct several statements it deemed inappropriate, however, and suggested language to cure the defects. *Id.* at *2.
- k. *LaRocque v. TRS Recovery Services, Inc.*, No. 11 Civ. 91, 2011 WL 5178344 (D. Me. Oct. 28, 2011). In a Rule 23 consumer class action, the parties proposed two different methods for pre-certification communication with putative class members. The defendants proposed that plaintiff’s counsel mail postage-prepaid postcard to class members, which class members would mail back to the court in the event they wished to be contacted. The plaintiff argued that putative class members should instead be invited to call a toll-free phone number. The Court agreed with the defendants that putative class members should return postage-prepaid postcards, which would provide a clear record of putative class members’ consent to pre-certification contact. *Id.* at *4. However, the court rejected

the defendants' suggestion that the postcards contain the court's return mailing address as opposed to counsel's address. *Id.* The court adopted the plaintiff's proposal to include the term "class action", but required plaintiff to further define that term in plain English according to a court-approved notice appended to the opinion. *Id.* at *5.

- l. *Nguyen v. Baxter Healthcare Corp.*, 275 F.R.D 503 (C.D. Cal. June 6, 2011). In a state law wage and hour class action, before the plaintiff's counsel could contact putative class members, the parties were required to send a notice to putative class members along with an opt-out form, to give them an opportunity to exclude themselves. *Id.* at 512. The court rejected defendant's proposal that putative class members affirmatively opt-in to the state law class action, holding that this would unduly impair the ability of plaintiff's counsel to communicate with potential class members. *Id.*
- m. *Austen v. Catterton Partners V, LP*, 831 F. Supp. 2d 559 (D. Conn. 2011). In a WARN Act class action, the court imposed limited restrictions on both parties' ability to communicate with putative class members. *Id.* at 10. Among other restrictions, any attorney was to identify the party that he or she represented and inform the putative class member that he or she could be a plaintiff in the case. *Id.* The court ordered the counsel not to discuss opting out of the case or settling claims with putative class members and to keep records of all communications for eventual submission to the court. *Id.*
- n. *Doyon v. Rite Aid Corp.*, No. 08 Civ. 168, 2011 WL 5837942 (D. Me. Nov. 18, 2011). In a state law employee misclassification class action, the court granted the plaintiff's motion to compel putative class contact information. *Id.* at *9. However, the court ordered that communications with putative class members would be conducted under court supervision and pursuant to a protective order to ensure that members of defendant's managerial control group were not contacted and to avoid confusion, as many putative class members had already been contacted in connection with another related lawsuit. *Id.*
- o. *Filby v. Windsor Mold USA, Inc.*, No. 13 Civ. 1582, 2014 WL 243961 (N.D. Ohio Jan. 22, 2014). Defendant sent out

a notice regarding its settlement with the Department of Labor (“DOL”) in a separate lawsuit. Plaintiffs argued that the notice contained misleading language that would lead putative class members to think that it affected the current lawsuit. Plaintiffs requested the court to supervise defendant’s communications with putative class members. While it denied the request, the court found that some of defendant’s language was misleading and ordered defendant to include a standalone statement that acknowledged the existence of the above-referenced case and “unambiguously” state that the DOL settlement was separate from the class action.

- p. *Gonzalez v. Preferred Freezer Services LBF, LLC*, No. 12 Civ. 03467, 2012 WL 4466605 (C.D. Cal. Sept. 27, 2012). After plaintiff filed this collective action, defendant “unilaterally” drafted and provided a “Release Agreement” to its employees, potential plaintiffs. Defendant’s “Release Agreement” stated that the employees would receive a settlement “in full satisfaction of all claims that Employee has, had or could have had arising out of the lawsuit or in any way related thereto,” additionally each employee waived any and all claims arising out of a “former employee[‘s]” lawsuit. The Court found the Release Agreement misleading because it did not state when this unnamed lawsuit was filed, the name of the former employee, the names of the employee’s attorneys, the attorneys’ contact information, or the period of time covered by the release. Therefore, the Court ordered defendant to provide to plaintiff the contact information of all of those prospective plaintiffs with whom defendant has had contact regarding settlement. The Court further ordered that any communication either party sent out had to include: (1) the name of this case; (2) the case number; (3) a summary of the basis of plaintiff’s claims; (4) the name of plaintiff’s attorneys and their contact information; and (5) a statement concerning the effect of executing defendant’s released documents will have on its employees’ ability to participate in this lawsuit.

When an attorney is approached and asked legal advice by an individual, it is safe to say the response will be immune from charges of unethical conduct. Beyond that, however, it is sometimes difficult to determine whether a communication falls safely within the boundaries of protection or begins to toe them.

3. Cases Disapproving Communications

a. Prohibiting Plaintiff from Sending Pre-Certification ‘Consent-To-Sue’ Forms

Plaintiffs’ counsel intended to send a letter and “Consent To Sue” form to putative class members prior to the court ruling on its motion for conditional certification. The court held the solicitation to be improper. Specifically, plaintiffs’ counsel sought to send the package to “all registered representatives,” regardless of the title or position the individual held while employed by defendants. The court held plaintiffs had not “established that the various positions that fall under the category of ‘registered representatives’ were similarly situated to their positions, that the positions are similarly situated to one another, or that the employees who occupied the positions are similarly situated to each other or to the named plaintiffs.” Hence, the court found the letter misleading to the extent it suggested putative class members were eligible to participate in this lawsuit collectively. *Bouder v. Prudential Financial, Inc.*, No. 06 Civ. 4359, 2007 WL 3396303 (D.N.J. Nov. 8, 2007). *But see Frye v. Baptist Memorial Hospital, Inc.*, No. 07 Civ. 2708, 2008 WL 2117264 (W.D. Tenn. May 20, 2008) (limiting *Bouder* to deceptive statements).

b. Sanctioning Plaintiff’s Counsel for Improper Solicitation

In *Hamm v. TBC Corporation*, 345 Fed. Appx. 406 (11th Cir. 2009), the court affirmed the district court’s order sanctioning plaintiffs’ counsel for impermissibly soliciting putative class members in violation of Florida Rule of Professional Conduct 4-7.4(a) and Southern District of Florida Local Rule 11.1.C. Plaintiff’s counsel had conceded that its administrative assistant had contacted three current employees of the defendant, who all later opted into the lawsuit. While plaintiff’s counsel argued that the assistant had contacted the employees in order to investigate the case, the employees testified that the assistant had asked them if they wanted to join the lawsuit. In finding that plaintiffs’ counsel had improperly solicited the three employees, the magistrate judge faulted plaintiffs’ counsel for not having a written policy on solicitation, for failing to train the assistant regarding solicitation of clients, and for failing to give the assistant a script from which to

work in making calls to current employees. In affirming, the Court of Appeals for the Eleventh Circuit found it irrelevant that the solicitation was made by a non-attorney, and that there was no evidence of attorney knowledge or ratification. *Id.* at 411 n.2.

c. Prohibiting Plaintiff from Follow-Up Communications

If a lawyer sends a letter permitted under Rule 7.2 to a client but receives no response to it, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b), according to the ABA 2004 Model Rules Comment to Rule 7.3. Citing this provision, a court denied plaintiffs' request to send a postcard to potential opt-ins "reminding" them to submit their consent to join forms 30 days before the deadline. *Barnwell v. Corrections Corp. of Am.*, 2008 U.S. Dist. LEXIS 104230 (D. Kan. Dec. 9, 2008); *see also Byard v. Verizon W. Virginia, Inc.*, No. 11 Civ. 132, 2012 WL 5249159 (N.D. W.Va. Oct. 24, 2012) ("The purpose of notice is simply to inform potential class members of their rights. Once they receive that information, it is their responsibility to act as they see fit.") (internal citation and quotation marks omitted).

d. Prohibiting Plaintiff from Advertising Upon Grant of Conditional Certification

Prior to the court's grant of conditional certification, plaintiffs' counsel sent "advertisement letters" and posted to their website notices regarding the litigation. While the court did not find that plaintiffs' pre-certification notice efforts were not constitutionally permitted, it held that once the court grants conditional certification "the court controlled mechanism should trump any attorney driven notice." *Ruggles v. Wellpoint, Inc.*, 2008 U.S. Dist. LEXIS 90819 (N.D.N.Y. Nov. 9, 2008).

Similarly, in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09 Civ. 85, 2009 WL 3719483 (W.D. Pa. Nov. 4, 2009), the court denied defendants' motion for sanctions where plaintiffs mailed copies of a "reminder letter" to putative collective action members after the issuance of Court-approved notice. Instead, the court, recognizing "the need for Court supervision over the FLSA notice process," ordered the plaintiffs, in the event they find additional

mailings necessary, to provide copies to the Court and to opposing counsel and to allow the Court to consider the proposed course of action. *Id.* at *4.

e. Requiring Defendant to Issue Corrective Notice

One month before the court conditionally approved the collective class and plaintiff's proposed notice, defendant's counsel sent a letter and a check to eight putative plaintiffs, advising them of a county audit that had revealed certain employees' wages were not adequately paid, attached a check to ensure "compliance with all State and federal laws," and explained reasons for sending the check. The court ordered that defendant send corrective notice to all prior recipients of the letter, notifying them that they may still join the collective action notwithstanding their receipt of the prior letter and check, and that the recipient has an additional 30 days to join the action. *Goody v. Jefferson County*, No. 09 Civ. 437, 2010 WL 3834025 (D. Idaho Sept. 23, 2010); *see also Zamboni v. Pepe W. 48th St. LLC*, No. 12 Civ. 3157, 2013 WL 978935 (S.D.N.Y. Mar. 12, 2013) (requiring defendant to send corrective notice after it had solicited releases from putative class members because while the releases did not operate as a waiver, it may have misled putative class members to think they were precluded from opting in to the lawsuit).

C. Disclosure of Contact Information for Putative Class Members

1. **Privacy Interests**

The disclosure of names, addresses, and telephone numbers can be permitted in the pre-certification class action context, so that a lead plaintiff may learn the names of other persons who might assist in prosecuting the case. Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches. *See Pioneer Elecs. (USA), Inc., v. Superior Court*, 40 Cal. 4th 360, 370-371 (2007); *see also Coleman v. Jenny Craig, Inc.*, No. 11-Civ. 1301, 2013 WL 2896884, at *10 (S.D. Cal. June 12, 2013) (finding class list information did not implicate privacy issues and ordering defendant to produce name, address and phone number of the putative class members pre-certification); *In re Bank of Am. Wage & Hour Employment Practices Litig.*, 275 F.R.D. 534, 543 (D. Kan. 2011) (same); *Justison v. McDonald's Corp.*, No. 08 Civ. 448, 2010 WL 2382604, at *2-4 (D. Del. June 11, 2010) (same); *see also McArdle v. AT&T Mobility LLC*, No. 09 Civ. 1117,

2010 WL 1532334 (N.D. Cal. Apr. 16, 2010) (finding plaintiff's need for defendants' customers' contact information outweighs defendants' privacy concerns, but finding plaintiff's request overbroad); *Davis v. Chase Bank U.S.A.*, No. 06 Civ. 04804, 2010 WL 1531410 (C.D. Cal. Apr. 14, 2010) (holding that defendant failed to demonstrate a sufficiently serious invasion of privacy to preclude disclosure of a sample of potential class members' names, addresses, telephone numbers, e-mail addresses, and billing records); *Guan Ming Lin v. Benihana Nat'l Corp.*, 755 F. Supp. 2d 504, 514 (S.D.N.Y. Dec. 15, 2010) (noting that, in the FLSA context, "[c]ourts in the Second Circuit have become progressively more expansive regarding the extent of the employee information they will order defendants to produce ... even at the pre-certification stage[,]” but the “disclosure of employee social security numbers raises obvious privacy concerns.”); *Jones v. Nat'l Council of Young Men's Christian Associations of U.S.*, No. 09 Civ. 6437, 2011 WL 1312162 (N.D. Ill. Mar. 31, 2011) (in a putative race discrimination class action, granting plaintiffs' motion to compel employees' and managers' home addresses, home telephone numbers, and e-mail addresses; denying request for social security numbers on privacy grounds); *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926 at *29-*30 (S.D.N.Y. Nov. 22, 2011) (directing defendants to produce the names, last known addresses, telephone numbers (both home and mobile), and e-mail addresses); *Rosario v. Valentine Ave. Disc. Store Co.*, No. 10 Civ. 5255, 2011 WL 5244965, at *11 (E.D.N.Y. Nov. 2, 2011) (ordering disclosure of potential opt-in plaintiffs' names, last known addresses, telephone numbers, and dates of employment); *Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176, 2011 WL 1742109 (S.D.N.Y. Jan. 5, 2011) (ordering disclosure of putative class members' names, addresses, and dates of employment with Defendant); *Allard v. Post Rd. Entm't*, No. 11 Civ. 901, 2012 WL 951917 (D. Conn. Mar. 20, 2012) (ordering disclosure of the names, addresses and e-mail of every server and bartender employed at each of the seven Black Bear Saloon restaurants during the statutory period).

However, “Precertification class discovery is not a matter of right,” and privacy interests may in some cases trump a plaintiff's interest in classwide contact information. *Starbucks Corp. v. Superior Court*, 194 Cal. App. 4th 820 (Cal. App. 4th Dist. 2011). Plaintiff's class action challenged Starbucks' improper policy requiring job applicants to disclose marijuana convictions that were more than two years old. *Id.* Starbucks sought review of the Superior Court's order directing it to provide classwide discovery by reviewing old job applications until it found 25 individuals who had disclosed a marijuana conviction that was more than two years old. *Id.* at 825. Employing the *Parris* balancing test, the appeals court agreed that the privacy rights of the proposed class, and legislature's intent to ensure that records of prior marijuana convictions were accorded the highest degree of privacy, outweighed plaintiffs' interest in obtaining class contact information. *Id.* at 828.

2. Burden on Defendant

However, courts may limit the scope of the contact information to be produced where defendants can demonstrate that it would be unduly burdensome to produce the information. *See Kress v. Price Waterhouse Coopers*, No. 08 Civ. 0965, 2011 WL

3501003 (E.D. Cal. Aug. 9, 2011) (where plaintiffs sought pre-certification contact information for a putative class of associates who did not hold CPA licenses, the defendant successfully argued that it would be burdensome to review records to determine whether each associate held a CPA license; the court ordered the defendant to produce contact information for a random sample of 5%); *see also Charles v. Nationwide Mut. Ins. Co., Inc.*, No. 09 Civ. 94, 2010 WL 7132173, at *9 (E.D.N.Y. May 27, 2010) (denying plaintiff's request for pre-certification contact information for putative class members because the discovery was limited to certification issues and production would be unduly burdensome on defendant).

Furthermore, where defendants seek to limit plaintiffs and their counsels' communications with the class members to "the mailing of the court-approved notice," courts have held defendants must provide "evidence of coercive, misleading, or improper communications." *McKnight v. D. Houston, Inc.*, CIV.A. H-09-3345, 2010 WL 5101957 (S.D. Tex. Dec. 8, 2010). In *McKnight*, defendants argued that without restricting plaintiffs' communication they would be able to recruit more plaintiffs "under the guise of contacting fact witnesses, undermining the purpose of court-approved notice to potential class members." The court, cognizant of the holding in *Gulf Oil* that courts should refrain from restricting counsel's ability to obtain information about the merits of the case, did not find evidence of "coercive, misleading, or improper communications" to justify a protective order.

D. ABA Opinions: Contact by Counsel with Putative Members of Class Prior to Class Certification

ABA opinion (Formal Opinion 07-445 April 11, 2007) seems to narrow the plaintiff lawyer's latitude in communicating with potential class members. It suggests that the only valid purpose of advertising communications is to investigate a claim, and it rejects the notion that a nascent attorney-client privilege exists between class counsel and the putative class members prior to certification. The opinion neither expressly condones nor forbids communications that seek to inform putative class members of a case, or invite their joinder. It merely condones investigation-only communications while withholding its imprimatur from other uses of advertising. The upshot is that the ABA reinforces rather than dispels the suspicion that publicity-based advertisements are problematic if not unethical, because of the "serious potential for overreaching and other abuse."

As the opinion states:

"If ... plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3, which governs lawyers' direct contact with prospective clients, applies. The fact that an action has been filed as a class action does not affect the policies underlying Rule 7.3 that prohibit the types of contact with prospective clients that have serious potential for overreaching and other abuse.

However, Rule 7.3's restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules." (emphasis added.)

Rule 7.3(a) provides, "[a] lawyer shall not by in-person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (i) is a lawyer; or (ii) has a family, close personal, or prior professional relationship with the lawyer." Rule 7.3(c) states that any permissible communication under Rule 7.3 must include the words "Advertising Material" on the outside of the envelope or at the beginning and ending of any recorded or electronic communication. Rule 7.2 sets out the requirements for advertising.

The ABA Formal Opinion 07-445 further limits the leeway of plaintiffs' counsel by denying the existence of a proto-attorney-client relationship between counsel and putative class members that might have justified freer speech.

"Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. 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. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period."

Earlier Informal Opinions also took a hard-line approach against soliciting class members. ABA Formal Opinion 07-445 is in keeping with its prior pronouncement in an informal opinion. (ABA Informal Op. 1469 (July 6, 1981). It approved of an ad letter publicizing a class action to stimulate joinder, but only because the sender stated that he would not represent any additional plaintiffs. The lawyer who represented plaintiffs in a class action sent letters to a targeted group advising them of possible advantage in joining the pending litigation. The lawyer believed that it would strengthen his clients' case to have the support of additional plaintiffs, but he did not seek to represent any recipient of the letters. The Committee concluded that sending the letters was not prohibited by the Code. Of critical importance to this conclusion was the fact that the lawyer's letter expressly stated that he would not represent additional plaintiffs who might join the class. Although such letters would have been improper if the lawyer were seeking additional employment, they were permissible because their purpose was to communicate with persons whose legal rights may have been in jeopardy.

E. Other Jurisdictions Permitting Lawyers To Communicate With Putative Class Members, Subject to Certain Conditions

- District of Columbia: District of Columbia Bar Ass’n Eth. Op. 302 (Nov. 21, 2000) (Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web Pages) (permissible for lawyers to use Internet-based web pages to seek plaintiffs for class action lawsuits as long as communications are not vexatious or harassing);
- Massachusetts: Massachusetts Bar Ass’n Eth. Op. 93-5 (Mar. 23, 1993) (lawyer in class action permitted to contact prospective plaintiffs under applicable class action law);
- North Carolina State Bar 2004 Formal Eth. Op. 5 (Jan. 21, 2005) (Solicitation of Claimants in a Class Action) (lawyer may send solicitation to prospective class members on wide array of topics prior to class certification, but letter must contain the words “This is an advertisement for legal services.”);
- Ohio: Ohio Bd. of Comm’rs on Grievances and Discipline Op. 92-3 (Feb. 14, 1992) (Ohio Code of Professional Responsibility does not ban direct mail communication from named plaintiffs and their counsel to potential or actual class members during pendency of a class action, nor does Code prohibit lawyer from accepting employment in response to such advertising).
- *See also* Debra Lyn Bassett, Pre-Certification Communication Ethics in Class Actions, 36 GA. L. REV. 353 (2002)

II. EX PARTE CONTACTS

A. Introduction

Attorneys are generally prohibited from communicating with represented persons outside the presence of their counsel. Counsel on both sides of a caption face an ethical quagmire when contacting employees, especially in the early stages of litigation. It is often difficult to tell, whether or not employees are represented persons.

Prior to commencing any litigation, counsel for plaintiffs will be in contact with prospective class representatives and fact witnesses. Early in a litigation – the plaintiff *and* the defendant invariably will need to contact fact witnesses. And invariably, most if not all of these plaintiffs, potential plaintiffs and fact witnesses will be current or former employees of the defendant. All the while, Plaintiffs must keep hands off certain organization personnel and their materials, while defendant must observe the attorney-client relationship between its represented employees and their counsel.

B. The Ethical Standard

ABA Model Rules of Professional Conduct Rule 4.2 (2003) (“Model Rule 4.2”) governs opposing attorneys’ communications with represented individuals and states:

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 to do so by law or a court order.

Rule 4.2’s purpose is to preserve the lawyer-client relationship, protect clients against overreaching by other lawyers, and reduce the likelihood that clients will disclose confidential information.¹

C. Plaintiff’s Contact with Employees of the Defendant

In the course of fact-gathering, putative class counsel is likely to interview scores of witnesses who are current or former employees of the defendant company. Interviews of such witnesses are fraught with ethical risks.

1. Current Employees

Counsel who wishes to interview, *ex parte*, a witness who is currently employed by the corporate defendant, especially one who holds a managerial position, will – like defendant’s counsel seeking to interview represented class members – run a significant risk of violating Model Rule of Professional Conduct 4.2 (really, the analogous applicable state rule), prohibiting contact with a represented party. It is abundantly clear that corporate parties are entitled to the protections of this rule as is any natural-person party. What varies from jurisdiction to jurisdiction, however, is how much of the employer’s workforce this rule covers.

Effectively, there are three rough categories of views on which corporate employees an adverse attorney may contact without running afoul of disciplinary rules. The most restrictive view, articulated by a small minority of courts, would bar putative class counsel from *any* contact with *any* employee of the defendant on the subject of their employment. *See, e.g., Lewis v. CSX Transp., Inc.*, 202 F.R.D. 464 (W.D. Va. 2001) (barring all *ex parte* contact with employees); *accord Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995) (allowing *ex parte* contact with employees

¹ ABA Model Rules of Prof’l Conduct R. 4.2 cmt. (2003); *see also Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (“If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.”)

only with court permission).² The tension this creates with putative class counsel's ethical duties of representation to employees in the putative class renders it an almost unworkable view in the context of complex employment litigation. Decisions in this vein often hinge the clause "any other person whose . . . statement may constitute an admission on the part of the organization" which was found in the official Comment to the ABA's 1995 version of the Model Rule of Professional Conduct 4.2 and widely adopted. In 2002, however, the ABA struck this language from the Comment. *See generally Palmer v. Pioneer Inn Ass'n, Ltd.*, 338 F.3d 981 (9th Cir. 2003).

By contrast, the most permissive view (also a minority view) would bar *ex parte* contact only with the most senior corporate executives: those in the so-called "control group," who actually have the power to direct and control the corporation. *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1442 (D. Colo. 1996). Some jurisdictions have gone farther still, adopting a "litigation control group test that limits communications only with those employees who have the authority to control the corporation with respect to the *litigation at issue*. *See, e.g., Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999) (finding that class counsel may communicate with high-level employees who are putative class members, if the employee is the one to initiate the communications); New Jersey Rules of Professional Conduct 1.13(a), 4.2 (prohibiting *ex parte* contact only with those who are in a position to control the litigation at issue).

The majority of courts and jurisdictions, of course, hew to a middle path, using everything from set rules to the "case-by-case" approach. *See, e.g., NAACP v. State of Florida*, 122 F. Supp. 1335 (M.D. Fla. 2000). The most common variant of the moderate view is the "alter ego" approach, wherein the adverse lawyer is prohibited from contacting:

corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel

Niesig v. Team I, 76 N.Y.2d 363, 374 (1990).³

² Without entering a long discourse on this topic, most of these decisions turn on the "any other person whose . . . statement may constitute an admission on the part of the organization" language found in the official Comment to the ABA's 1995 version of the Model Rule of Professional Conduct 4.2 and adopted wholesale in some jurisdictions. In 2002, in direct response to the restrictive view of the Rule taken by some courts, the ABA excised this language completely from the Comment. For a longer discussion of the history of Rule 4.2, *see generally Palmer v. Pioneer Inn Ass'n, Ltd.*, 338 F.3d 981 (9th Cir. 2003). It is safe to assume that there is movement afoot in some jurisdictions to adopt this change.

³ New York's *Niesig* is typical of the approach taken in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 100 cmt. E (2000), as well as a host of jurisdictions around the country, from Maine to Texas, and from Alaska to Georgia. *See, e.g., Niesig*, 76 N.Y.2d at 375 n.5 (listing jurisdictions with similar rules as of 1990).

In a slightly different procedural context, one court was recently asked by defendants to issue a protective order to prohibit plaintiffs' counsel from, after the 60 day notice period ended, using any of the putative class member information to communicate with defendants' employees who had not elected to join the action, but who may nevertheless be eligible to opt-in to a yet uncertified class on plaintiffs' related claims and its state law class action. *Hinterberger v. Catholic Health Sys., Inc.*, 2010 WL 3395672 (W.D.N.Y. May 13, 2010). The court rejected the request, holding that "court-imposed restrictions on an attorney's ability to communicate with prospective class members, even after completion of the initial notice phase, unless factually justified, 'involve serious restraints on expression,' protected by the First Amendment" and that defendants failed to establish such justification." *Id.* at *8.

2. Former Employees

Rules governing contact with former employees of a corporate defendant are decidedly more relaxed, although variations are present here, too. The approach affording the widest latitude is that reflected in the comment to the 2002 restructuring of the ABA Model Rule 4.2: "consent of the organization's lawyer is not required for communication with a former constituent." This is subject to the caveat, which we will discuss shortly, that "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization." This expansive view is probably the majority view. *See, e.g., Patriarca v. Ctr. For Living & Working, Inc.*, 438 Mass. 132, 140 (2002) ("the majority of courts that have decided this issue have concluded that former employees, for the most part, do not fall within the constraints of rule 4.2").

Other approaches have restricted communications between the adverse attorney and employees formerly in the "control group," *see, e.g., Bobele v. Super. Ct.*, 199 Cal. App. 3d 708 (1988), or the "litigation control group," *Transamerica v. Sordoni Skanska Constr. Co.*, 766 A.2d 761 (N.J. Super. Ct. App. Div. 2001).

The surest way for putative class counsel to stumble into an uncomfortable thicket is to speak with former employees likely to be in possession of privileged information. It should be obvious to all, therefore, that an *ex parte* interview of the company's former general counsel is generally not going to be considered proper. *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) (disqualifying lawyer for *ex parte* contact with former general counsel of adverse corporation). In the employment law context, former human resources directors or EEO directors are likely to have been in contact with legal counsel, perhaps regarding the policies at the heart of the class lawsuit, or the lawsuit itself, and *ex parte* contact with these former executives should be avoided. *See, e.g., Arnold v. Cargill, Inc.*, 2004 WL 2203410 (D. Minn. Sept. 24, 2004) (disqualifying class counsel for, *inter alia*, contact with former human resources and EEO director that led to class counsel being provided privileged documents); *Hammond v. City of Junction City*, 167 F. Supp. 2d 1271 (D. Kan. 2001) (disqualifying employee's counsel for contact with former human resources director of city, even where director was a potential class member and had initiated the contact with counsel, because director had managerial responsibilities

and speaking authority for the city); *E.E.O.C. v. Hora, Inc.*, 239 Fed. Appx. 728 (3d Cir. 2007) (holding that contact with administrative assistant was not prohibited by Rule 4.2 because the assistant did not regularly consult with defendants' lawyer regarding the matter, did not have authority to bind defendants in the matter, and could not act to impute liability to defendants).

3. Employees with Access to Confidential Information And Documents Or Under Restrictive Policies or Nondisclosure Agreements

Courts dealing with these issues have often focused on employees who have attorney-client privileged or work-product doctrine protected information, as well HR personnel or high level company decision makers. Broadly speaking, when interviewing counsel has reason to know the interviewee has knowledge of litigation-related information or "confidential information," the interview cannot proceed. When the employee has non-privileged information, courts will likely look at what the information is and conduct a case-by-case analysis.

Confidential information, as defined by the following cases, includes: confidential "business documents," the litigation strategy of opposing counsel or any information or communications relating to defendant's strategy, and communications protected by the attorney-client privilege. For example in *Arnold v. Cargill Inc.*, 2004 WL 2203410, *1 (D. Minn. 2004), the Court found 4.2 violations where plaintiff counsel interviewed former EEO Director and senior HR manager who: 1) had knowledge of previous discrimination claims brought against company; 2) had "knowledge of [defendant's] litigation theory;" and 3) possessed copies of defendant's internal company documents labeled "confidential." *See also, Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) ("[o]nly insofar as a former employee has been *extensively* exposed to confidential information and only insofar as an adversary attorney knows (or, it must be added, should reasonably know) of that fact, will *ex parte* contact be precluded. So long as privileged matters are respected, all other former employees remain fair game."); *Camden v. State of Md.*, 910 F. Supp. 1115, 1116 (D. Md. 1996) ("a lawyer representing a client in a matter may not, subject to few exceptions, have *ex parte* contact with the former employee of another party interested in the matter when the lawyer knows or should know that the former employee has been extensively exposed to confidential client information of the other interested party."); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651, 653 (M.D. Fla. 1992) (defendant company's former chief financial officer, who was "privy to confidential and proprietary information and had access to confidential and business documents belonging to [defendant]," in addition to engaging in "intra-office communications" regarding the litigation.); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163 (3d Cir. 2003) (affirming order finding that attorney had violated ethical canon to "avoid even the appearance of impropriety" when he hired a former executive administrative assistant who had had access to substantial confidential information belonging to her former employer); *Snider v. Superior Court*, 113 Cal. App. 4th 1187 (Cal. Ct. App. 2003) (holding that attorney did not violate ethical rules by contacting two current employees of the defendant who may have been privy to confidential attorney-

client information absent evidence that employees discussed any privileged information with attorney, but nonetheless advising attorneys to terminate communication with employees of represented organizations if they learn that the employees have spoken the organization's counsel about the matter at issue).

A majority of states permit *ex parte* communications with former management employees who have been privy to confidential and privileged information, provided that the privileged information remains protected. *LaPoint v. AmerisourceBergen Corp.*, No. Civ.A. 327-N, 2006 WL 2105862, *2 (Ct. Chancery Del. July 18, 2006). *See, e.g., Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004) (permitting *ex parte* contact with former office manager who had been privy to attorney-client privileged materials, provided that attorney did not inquire into areas subject to the privilege); *FleetBoston Robertson Stephens v. Innovex, Inc.*, 172 F. Supp. 2d 1190 (D. Minn. 2001) (allowing attorney to interview former CEO of corporate defendant where attorney did not solicit any privileged information); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 820 N.Y.S.2d 54 (N.Y. App. Div. 2006) (disqualification of defendant's counsel for *ex parte* interview with plaintiff's former COO was unnecessary where counsel had instructed COO not to disclose privileged information, and where no evidence indicated that counsel obtained privileged material); *Nestor v. Posner-Gerstenhaber*, 857 So. 2d 953 (Fla. Ct. App. 2003) (allowing *ex parte* interviews with former employees regardless of contractual confidentiality agreement); *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ct. App. Ind. 2002) (expressing concern that *ex parte* interviews with former high-level employees could lead to disclosure of privileged attorney-client information, but nonetheless holding that Rule 4.2 contained no limitations on contacts with former employees). *But see G-I Holdings, Inc. v. Baron & Budd*, 199 F.R.D. 529 (S.D.N.Y. 2001) (issuing protective order barring *ex parte* interviews of former employees of defendant law firms to avoid risk of inadvertent disclosure, even if plaintiff's investigators directed the employees not to reveal privileged information).

An opinion by a Magistrate Judge in the Western District of Virginia provides extensive analysis of Rule 4.2 in *Bryant v. Yorktowne Cabinetry*, 538 F. Supp. 2d 94 (W.D. Va. 2008). Defendant sought to discover the notes of plaintiff's counsel's interview with its former Human Resources Manager who had knowledge of her termination, to disqualify counsel for plaintiff and prohibit any further former employee interviews. The court denied defendant's motion, finding the former manager was not represented by counsel and the notes of the communications between plaintiff's counsel and the former employee reflected that the communication did not concern confidential or privileged matters.

Interviews by investigating agencies such as the EEOC of management employees without permission do not violate Rule 4.2. *Equal Employment Opportunity Commission, et al., Plaintiffs, vs. AutoZone, Inc.*, 2008 U.S. Dist. LEXIS 104461 (D. Ariz. Dec. 16, 2008).

D. Defendant's Contact with Its Employees

At least in actions with class elements, plaintiffs' counsel and the putative class members are not legal strangers, even prior to class certification. Whether the relationship is defined as a full-fledged attorney-client relationship or something less than that, a Defendant should exercise caution if it chooses to interview its own employees regarding the subject of the class litigation.

1. Class Members as Represented or "Quasi-Represented" Persons

Most courts agree that an attorney-client relationship is established for all class members following certification. *See, e.g., Fulco v. Cont'l Cablevision, Inc.*, 789 F. Supp. 45 (D. Mass. 1992) (finding that after class certification, class members are represented by class counsel); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (same); *see also* Debra Lyn Basset, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 355 (Winter 2002). The status of putative class members, however, remains a bone of contention.

At least one court likens the relationship between plaintiffs' attorney and a putative class as similar to the relationship between plaintiffs' attorney and individuals in a collective action who have yet to "opt-in" to the lawsuit. *See Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002) (finding that a 216(b) collective is analogous to pre-certification class for purposes of determining applicability of professional rules governing *ex parte* contact).

Practitioners should be aware that there is substantial authority that putative class members are considered "represented persons" in the fullest sense. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1206-07 (11th Cir. 1985) (stating "defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner") (footnote omitted); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) (prohibiting defense counsel from contacting putative class members).⁴ The ramifications of this fact should be clear to all sides: If a

⁴ Compare *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 264 (S.D. W.Va. 2007) (holding that putative class members are not represented parties prior to class certification); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827, 830 (N.D. Ind. 2002); *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) (rejecting the view that putative class members are represented by plaintiffs' counsel prior to certification); *Garrett v. Metro. Life Ins. Co.*, No. 95- CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. 1996) (noting that "before class certification, the putative class members are not 'represented' by the class counsel for purposes of DR 7-104"); *Babbitt v. Albertson's, Inc.*, No. G-92-1883, 1993 WL 128089, at *4 (N.D. Cal. 1993) (stating "the putative class members in the instant case are not represented by class counsel for the purpose of application of the disciplinary rules"); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 n.6 (D.C. Ill. 1982) ("Before certification DR 7-104 does not apply because the potential class members are not 'represented' by counsel."); *with Gates v. Rohm & Haas Co.*, 2006 WL 3420591, *2 n. 2 (E.D. Pa. 2006) (finding that putative class members were represented parties for purposes of *ex parte* communications); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (the "mere initiation" of a class action prohibits defense attorneys from contacting putative class members);

mature attorney-client relationship exists between putative class counsel and the putative class, many communications between a defendant's attorney (or her agents) and a putative class member regarding the litigation will run directly afoul of the prohibition on *ex parte* contact with represented parties found in Model Rule of Professional Conduct 4.2 (more precisely, its applicable state analogue). The courts that have found putative class members to be represented parties have looked to the position of putative class members in relation to the litigation and have recognized that "unnamed class members do have certain interests in the lawsuit." *Miller v. Federal Kemper Ins. Co.*, 508 A.2d 1222, 1228 (Pa. 1986) (quoting *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1087 (3d Cir.1980)).

For instance, in *Gates v. Rohn and Haas Co.*, 2006 WL 3420591, *2 n. 2 (E.D. Pa. 2006), the court held that putative class members "are more properly characterized as parties to the action." Therefore, they were represented parties for purposes of the ethical rules. As "represented parties," class counsel owes them a fiduciary duty and has an ethical obligation to keep them reasonably informed about the status of litigation.

On the other hand, while some courts that have declined to recognize an attorney-client relationship have done so because the putative class members were not active participants in the litigation and had not cultivated a relationship with class counsel,⁵ other courts have found a partially, though not fully ripened attorney-client relationship. Those taking this more cautious approach have generally suggested that certification marks the genesis of the fully formed relationship; prior to class certification, only a partially developed attorney-client relationship exists between putative class members and class counsel. *See, e.g., Resnick*, 95 F.R.D. at 377 n.6.

Several respected commentators agree with this more cautious approach. Herbert Newberg and Alba Conte write in their treatise that pre-certification communications by the class opponent with putative class members are permitted "as long as they do not infringe on what some courts have characterized as the constructive attorney-client relationship that exists between counsel for class representatives and the members of the class." 5 NEWBERG ON CLASS ACTIONS §15.14 (3d ed. 1992) (footnote omitted). The MANUAL FOR COMPLEX LITIGATION (THIRD) states in §30.24 (Other Communications) at 260-61, and in its footnote 741:

Although no formal attorney-client relationship exists between class counsel and the putative members of the class prior to class

Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981) (stating that "[d]uring 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" and limiting defendant's contact with class members).

⁵ *See, e.g., Winfield v. St. Joe Paper Co.*, No. MCA 76-28, 1977 WL 15325 (N.D. Fla. Sept. 19, 1977) (court refused to apply DR 7-104 to defendants in order to keep them from contacting members of potential class stating that such members had not retained counsel, but were merely passive beneficiaries of the action).

certification, there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent.⁷⁴¹ *Knuth v. Erie-Crawford Dairy [sic] Coop. Ass'n*, 463 F.2d 470 (3d. [sic] Cir. 1972). See Newberg & Conte, *supra* note 662, § 15.14 (some courts have stated that constructive attorney-client relationship exists between putative class members and class counsel prior to certification); Thomas A. Dickerson, CLASS ACTIONS: THE LAW OF 50 STATES § 4.06 [2] (1994) (“members of the purported class . . . are deemed represented by counsel for the class representatives as of the time the complaint is filed with the court”).

Even under this more relaxed approach, counsel for all parties should be vigilant when seeking to communicate with putative class members as regards the litigation. Likewise, class counsel should consider themselves to owe a significant duty to the class they purport to represent. See, e.g., *Culver v. City of Milwaukee*, 277 F.3d 908, 914–15 (7th Cir. 2002) (dismissal of a putative class action or decertification of a class action may impose on plaintiffs’ counsel the obligation to provide notice to all members of the now uncertified class).

2. Content of Communications with Putative Class Members

In most jurisdictions, where some communications between the corporate defendant and its employees are permitted, the test of whether the incipient attorney-client relationship between putative class members is infringed generally turns on the content of the communication. In *Gulf Oil Co.*, 452 U.S. at 99-100, Justice Powell observed that “[c]lass 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.” The importance of early judicial intervention to prevent such abuse is “one of the most significant insights that skilled trial judges have gained in recent years” in the management of class litigation. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 171 (1989). On occasion, this “abuse” of the process may take the form of communications from an unethical defendant employer seeking to mislead or threaten putative class members, in hopes of diminishing participation in the action. Compare *Mevorah v. Wells Fargo Home Mortgage, Inc.*, No. C 05-1175, 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005) (finding defendants’ counsel pre-certification communications, in which counsel interviewed and attempted to obtain depositions from potential class members, were misleading and improper where counsel mischaracterized the litigation, did not inform them the depositions might be adverse to their interests, and at least one declarant indicated that she was misled by the communications); with *Gerlach v. Wells Fargo & Co.*, No. C 05-0585, 2006 WL 824652 (N.D. Cal. Mar. 28, 2006) (holding that question and answer document disseminated by defendant to potential class members that described the litigation were not sufficiently misleading or coercive to grant corrective notice, where the document did not mischaracterize the litigation, and no evidence indicated that recipients of the document were misled or coerced). See also *Brown v. Mustang Sally’s Spirits and Grill, Inc.*, 2012 U.S. Dist.

LEXIS 144722 (W.D.N.Y. Oct. 5, 2012)(Employer prohibited from speaking with putative plaintiffs regarding the litigation including any counterclaims or possible tax implications that might result from such claims); *Saucedo v. NW Mgmt. and Realty Services*, 2013 U.S. Dist. LEXIS 6091 (E.D. Wash. Jan. 15, 2013)(Plaintiff's motion for order restricting defendant's contact with absent class members and protective order on immigration status granted in part and denied in part. Defendant barred from questioning putative class members as to immigration status but permitted to have ex parte contact with putative class members about the case prior to certification.); *Gortat v. Capala Brothers, Inc.*, 2010 U.S. Dist. LEXIS 45549 (E.D.N.Y. May 10, 2010)(defense counsel's unsupervised contact with class members after class certification for the purpose of dissuading class members from participating in the case was improper); *Burford v. Cargill, Inc.*, No. 05-0283, 2007 U.S. Dist. LEXIS 1679, *5 (W.D. La. Jan. 9, 2007) (finding that sending settlement offer without notifying putative class members of pending class action was misleading as a matter of law); *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664 (E.D. Tex. 2003) (holding that letter sent by defendant to absent class members was misleading and coercive, where letter misrepresented the litigation and discouraged recipients from joining the suit); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. at 632 (N.D. Tex. 1994) (defendant's letters constituted the type of misleading communications that justify court intervention); *Pollar v. Judson Steel Corp.*, 1984 WL 161273 (N.D. Cal. Feb. 3, 1984) (defendant's notice was an attempt to solicit information from class members who are represented by counsel and may seriously prejudice the rights of the absent class members); *Carnegie v. H&R Block, Inc.*, 687 N.Y.S.2d 528, 531 (N.Y. Sup. Ct. 1999) ("The test for whether a party with or without aid of its counsel, has had impermissible contact with potential members of the plaintiff class, is whether the contact is coercive, misleading, or an attempt to affect a class member's decision to participate in the litigation.").

In the employment context, this sort of dissembling can be troublesome – consider that employee and defendant employer are well known to each other, and in an ongoing but imbalanced business relationship. Courts, recognizing this, have “found the danger of such coercion between employers and employees sufficient to warrant the imposition of restrictions regarding communication between defendants and potential class members.” *E.E.O.C. v. Morgan Stanley & Co., Inc.*, 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002). “Coercion of potential class members by the class opponent may exist where both parties are ‘involved in an ongoing business relationship.’” *Id.* (quoting *Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 WL 1035132, *3 (S.D.N.Y. Sept.7, 2001)); see also *Hampton Hardware*, 156 F.R.D. at 632 (“Members must necessarily rely upon the defendant for dissemination of factual information They are therefore particularly susceptible to believing the defendant's comments . . .”).

As one district court has observed, “[c]lass members gain no benefit from such [misleading] contact. Quite the contrary, the imbalance in knowledge and skill which exists between class members and defense counsel presents an extreme potential for prejudice to class members rights.” *Bower*, 689 F. Supp. at 1034 (E.D. Wash. 1985) (emphasis added); cf. *Kleiner*, 751 F.2d at 1202 (11th Cir. 1983) (“it is obviously in

defendants' interest to diminish the size of the class and thus the range of potential liability . . . [omitted 'by soliciting exclusion requests']"). Defendants must avoid any "misleading communications" with employees. *Erhardt v. Prudential Group*, 629 F.2d 843, 846 (2d Cir. 1980). This sidesteps any appearance of wrongdoing, avoids needless and time-consuming collateral litigation over the propriety of the communications, and obviates any danger of the communications "chilling of the rights of the potential class members or . . . seeming to pressure any of them unduly to opt out of the class . . . or . . . creating confusion." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 602 (2d Cir. 1986) (quoting *Gulf Oil Co.*, 452 U.S. at 123, 126).

3. Corrective Notice or Other Remedial Orders

Where a party has been found to have misled or threatened the putative class, courts are empowered to fashion appropriate remedies. In fact, Rule 23(d) of the Federal Rules of Civil Procedure provides federal courts with broad remedial powers in the maintenance of class actions. "The issuance of a remedial order under Fed. R. Civ. P. 23(d) does not require a finding of actual harm. A remedy is appropriate if the communications at issue create a 'likelihood' of abuse, confusion, or an adverse effect on the administration of justice." *Georgine v. Amchem Prods.*, 160 F.R.D. 478, 498 (E.D. Pa. 1995).

In *Morgan Stanley*, for example, the court put into place several safeguards to protect the putative class members from abuse from defendant:

Employees must be told that there is a pending lawsuit which they may join, and that it is unlawful for Morgan Stanley to retaliate against them if they do. In addition to informing employees of the right to non-retaliation, the notice must also provide a short summary of the claims in the EEOC lawsuit so that employees can make an informed decision concerning their interest in the case. Furthermore, because the interest of the employees/potential class members is not co-extensive with that of the EEOC, they should be apprised of this fact. Therefore, the notice should inform employees that they are not required to join the EEOC action and that they have a private right of action. Such notice must be in writing and in a form approved by the Court.

Morgan Stanley, 206 F. Supp. at 563.

In another employment discrimination class action, *Gutierrez v. Johnson & Johnson*, Civ. 02-5302 (D.N.J.), a court-appointed Special Master required defendants to give putative class members a sort of "Miranda" warning before having *ex parte* conversations with them. Along these lines, another court allowed defendant to negotiate with its franchisees, who were also putative class members, "provided that counsel for each franchisee shall be present, during all discussions, and counsel for plaintiff be given advance notice of such negotiations." *Weight Watchers of Philadelphia, Inc. v. Weight*

Watchers Int'l., Inc., 55 F.R.D. 50, 51 (E.D.N.Y.1971), *appeal dismissed*, 455 F.2d 770 (2d Cir. 1972).

Corrective notice – a notice to the putative class from counsel or the court directly designed to correct any misinformation – is probably the most common remedial order. Pursuant to Federal Rule of Civil Procedure 23(d), the court “h[as] explicit authority to require ‘for the protection of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action.’ Courts often issue protective orders after parties initiate improper communications with class members.” *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (court issued corrective notice to the class at defendants’ expense) (collecting cases); see MANUAL FOR COMPLEX LITIGATION (THIRD), Section 30.22, at 230 (1995) (the court may require notice to certain class members to correct misinformation or misrepresentations); see also *Belt*, 299 F. Supp. 2d at 669-70 (enjoining defendant from engaging in future non-approved communications with absent class members and ordering defendant to issue corrective notice); *Pollar*, 1984 WL 161273 at *1 (corrective notice ordered to counteract confusion caused by defendant’s conduct); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1484 (S.D.N.Y. 1986) (court ordered letter authorized for the purpose of correcting any misconceptions that might have been engendered by defendant’s conduct). While corrective notice is an imperfect remedy not likely to completely rebottle the genie, it is far preferable to allowing misinformation sown among the putative class to go completely unrebuted.

However, to obtain an order authorizing a corrective notice, a party must make some showing that the other party’s communication “was in some way coercive, misleading, or improper.” *Jackson v. Papa John’s USA, Inc.*, No. 08 Civ. 2791, 2009 U.S. Dist. LEXIS 23325, at *6 (N.D. Ohio Mar. 10, 2009). In *Jackson*, in which plaintiff alleged that he and other assistant managers were misclassified because his primary responsibility was to “make pizza” and not to manage, defendants interviewed six assistant managers in connection with preparing its briefs opposing class certification. The defendants informed the assistant managers beforehand of the pending action and of their rights. After the court granted class certification, plaintiff asked the court to issue a corrective notice to the six interviewees. Finding that plaintiff had not adduced any evidence that the communications were coercive, misleading, or improper, the court denied the request. *Id.* at *7.

4. Defendant’s In-Person Contacts – Proper

- *Kuhl v. Guitar Center Stores, Inc.*, 2008 U.S. Dist. LEXIS 101747 (N.D. Ill. Dec. 16, 2008). Plaintiffs claimed employer’s fact-finding interviews with potential class members were an abuse of the class action process designed to discourage them from participating in the class action. The court found that aside from the interviews themselves, there was no specific action by defendants or counsel discouraging participation in the class action. The court rejected plaintiffs’ argument that there is any ‘inherently coercive relationship between employer and employee.’”

Rather, the court found the interviews permissible as part of defendants' internal investigation into the validity of the allegations and related exposure in this case. The court denied plaintiff's request to attend defendant's interviews but allowed plaintiffs to hold their own, and ordered defendants to produce copies of the signed interview statements. Finally, the court refused to order the parties to prepare a neutral and confidential questionnaire but encouraged them to collaborate on a joint questionnaire.

- *Kerce v. West Telemarketing Corporation and West Telemarketing, LP*, 2008 U.S. Dist. LEXIS 98281 (S.D. Ga. May 28, 2008). Plaintiff sought to strike declarations claiming defendant's contact with members of the putative class was unauthorized, and possibly coercive or misleading. Denying plaintiff's motion, the Court refused to restrict defendant's free speech rights, and its right to defend itself in this litigation, given the absence of evidence that defendant misrepresented facts about the lawsuit, discouraged participation in the suit, or undermined the class' confidence in, or cooperation with, class counsel.

5. Defendant's In-Person Contacts – Improper

- *Longcrier v. HL-A Co., Inc.* 595 F. Supp. 2d 1218 (S.D. Ala. Dec. 9, 2008). The court struck 245 declarations defendant procured in interviews with potential class members. Defendant had called each declarant to meet individually with its attorney during work hours, and was informed that the company "was conducting a survey." The court found that representation was, "at best, highly misleading."

The defendant was not "conducting a survey" for academic, internal or informational purposes. Instead, it was marshaling data to use against all of its hourly workers (including the declarants themselves) in litigation. Armed with this data, [defendant] intended to seal off all 245 declarants from participating in th[e] lawsuit and to combat their claims to the extent that they are permitted to, and elect to, opt in. Of critical importance, [defendant's] lawyers neither informed the declarants that a class action lawsuit concerning the very pay practices about which they were being "surveyed" was pending, nor that those declarants were themselves potential class members whose execution of a form declaration for [defendant] might effectively strip them of an opportunity to join in the lawsuit. Rather than receiving fair and reasonable disclosure of the purposes and potential consequences of their ostensibly voluntary cooperation with [defendant], the declarants were duped into believing that they were

participating in an innocuous “survey” without being alerted that their cooperation with [defendant] and their execution of a declaration might compromise and waive their rights, and prevent them from participating in a class action lawsuit whose existence [defendant] had covertly concealed from them. Such unabashedly deceptive activity is exactly the type of misleading communication that has prompted federal courts to step in and regulate communications with potential class members prior to the certification of a § 216(b) class.

Id. at 1227-28. The district court denied defendant’s subsequent motion for reconsideration. *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218 (S.D. Ala. 2009).

- *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373 (S.D. Ga. 2009). Georgia Legal Services sent a request to defendants seeking employment records of seasonal H-2A guestworkers who worked on defendants’ farm. Defendants disputed whether the non-profit was the plaintiffs’ representative and sent an employee to Mexico, allegedly to verify whether the plaintiffs had in fact retained the non-profit to represent them. Defendants submitted affidavits claiming that the interviews were friendly and not coercive, while plaintiffs submitted affidavits claiming that defendants’ employee frightened and intimidated them. The court found the communications to be coercive and granted plaintiffs’ motion for a protective order prohibiting telephone and in person contacts with plaintiffs and their family members. *Id.* at 1379-81. Among other factors supporting the decision, the court noted the “unilateral and unsolicited” nature of defendants’ communications, the fact that there was “a past as well as a potential future employment relationship between the parties,” and the fact that “the communications were in-person and required the plaintiffs to make a decision under the pressure of the moment.” *Id.* at 1379-80. However, the court allowed defendants to communicate with plaintiffs in writing, provided that they give notice to plaintiffs’ counsel. *Id.* at 1381-82.
- *Gortat v. Capala Bros., Inc.*, No. 07 Civ. 3629, 2009 U.S. Dist. LEXIS 101837 (E.D.N.Y. Oct. 16, 2009). On plaintiffs’ motion for conditional certification and Rule 23 class certification, defendants attempted to defeat numerosity by obtaining identical affidavits from forty-one of the seventy-four manual workers in the proposed class, stating that each was aware of the litigation and disclaiming interest in joining the litigation. The magistrate judge held that the releases were not valid and enforceable releases of the affiants’ claims because they did not evince a clear and unambiguous agreement to release defendants from liability, the affiants

did not have the benefit of counsel, and the purported releases indicated a lack of consideration. *Id.* at *12-13. The magistrate judge therefore included all seventy-four employees in the numerosity determination and recommended Rule 23 class certification. *Id.* at *13-16. The magistrate judge further found that defendants' ex parte contacts were improper and sua sponte issued an order to show cause why the court should not prohibit defendants from communicating with putative class members and require defendants to provide putative class members with notice of the action. *Id.* at *36-37.

- *See also Abadeer v. Tyson Foods, Inc.*, No. 09 Civ. 125, 2009 U.S. Dist. LEXIS 110685 (M.D. Tenn. Nov. 25, 2009) (noting that defendants had taken affidavits from absent class members without court approval and submitted them in support of their opposition to class certification, and that the appropriate remedy was for the court not to consider those affidavits on the motion for class certification).
- *See also Town of New Hartford v. Connecticut Resources Recovery Authority*, 970 A.2d 592 (Conn. 2009) (in non-employment case, holding under Connecticut law that a class action defendant's inappropriate or misleading communications may properly be considered by a trial court in making a certification decision, and affirming trial court's ruling that defendant's misleading communications tipped the scales in favor of finding numerosity).

6. Defendant's Written Communications - Improper, Prohibiting Future Contact

- *Oetinger v. First Residential Mortgage Network, Inc. a/k/a Surepoint Lending*, 2008 U.S. Dist. LEXIS 41281 (W.D. Ky. May 23, 2008). Plaintiffs moved for sanctions against defendant and its co-owners for unauthorized contact with members of the opt-in plaintiffs' class. Two communications were involved, both from a co-owner who was also an attorney. One suggested that the individual contacted may not have understood "what they were signing up for." The letter "described the extensive discovery process that may take place, which was said to include 'exploring Plaintiffs' hard drives, personal and work internet usage records, e-mail records, phone records, review of noncompete arguments. . . [and] interviews with co-workers.'" The second communication asked for the plaintiffs' summer plans so that depositions and discovery could be scheduled and also alluded to the invasive discovery that would occur. The court held the situation was rife with the

potential for confusion and abuse given defendants' interest in this lawsuit, regardless of whether it was intended to mislead. The risk of unnecessary complication and

confusion is especially high when communications contain potentially intimidating language about the nature and extent of discovery. Such communication may interfere with the administration of the collective action by encouraging parties not to continue to participate. For instance, when a party contacts another about scheduling depositions, something that lawyers are supposed to arrange, the communication is surely confusing.

Id. at *2. The court refused to find an ethical violation but ordered defendants to refrain from contacting plaintiffs, opt-in plaintiffs, and potential class plaintiffs outside of formal discovery for the purpose of discussing the litigation, except with permission of counsel.

7. Defendant's Written Communications – Improper, Granting Motion for Cure Communication

- *In re M.L. Stern Overtime Litigation*, 250 F.R.D. 492 (S.D. Cal. 2008). Plaintiffs claimed as inherently coercive and misleading a survey sent by employers to putative overtime class member Account Executives and settlement and release letter which most of them signed. The court refused to nullify the executed settlement and release agreements and held the letters were not, on balance, an improper, misleading, or coercive pre-certification communication, but ordered an amended letter be sent to the Account Executives, and that all be given sufficient time to consider and respond to the amended letter. The court required that a sentence be added letting Account Executives know they will still be able to be paid by commission in the event Plaintiffs' lawsuit was successful. It required a sentence be changed to clarify that if a class were certified, class members would be automatically covered and not have to opt-in. It also required the modification of a statement that threatened that the effect of plaintiffs' prevailing would be a "bankruptcy" to a "material adverse effect on the company's financial condition."
- *Gonzalez v. Preferred Freezer Services LBF, LLG*, 2012 U.S. Dist. LEXIS 139764 (C.D. Ca. Sept. 27, 2012). Employer provided putative class members with a release agreement seeking a waiver of any and all claims the employees had or could have arising out of the lawsuit. District court held the employer's efforts to seek a release were misleading because they did not specifically identify the lawsuit and failed to contact plaintiffs' counsel regarding the possible communication to putative class members regarding a potential settlement. Employer interviewed nurses in order to investigate allegations in plaintiffs' complaint and obtained declarations. Court held that although there exists the potential for coercion in employer-employee relationships, that risk is present in almost any FLSA case and, does not without more, justify a restriction on defendant's

communications with putative class members. The court further held that although plaintiffs' failed to establish a "clear record" of misleading or coercive communications, plaintiffs were entitled to copies of the declarations and the declarants contact information.

8. Defendant's Written Communications – Proper, Denying Cure

- *Cram v. Electronic Data Systems Corporation*, 2008 U.S. Dist. LEXIS 3669 (S.D. Cal. 2008). Employer sent proposed class member settlement checks and DOL-style release receipt forms for their FLSA claims. Plaintiffs sought to compel an urgent follow-up communication to explain plaintiffs' and avoid possible misunderstandings by potential class members at the pre-notice, pre-certification phase in the litigation explaining the distinctions between federal labor law rights and unreleased independent state law claims advanced in this lawsuit. The court found the challenged communication was neither misleading nor improper so as to justify the court's intervention.
- *Camilotes et al. v. Resurrection Health Care Corp.*, 2012 U.S. Dist. LEXIS 8731 (N.D. Ill. Jan. 25, 2012). Defendant ordered to provide plaintiffs' counsel with names, addresses and telephone numbers of each person contacted regarding the release and that any further communication to potential plaintiffs include information regarding the case.