

**BEST PRACTICES IN COMPLEX EMPLOYMENT LITIGATION:
CONTACTING EMPLOYEES**

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Invariably – and early in any class or collective action litigation – plaintiff *and* defendant will need to contact fact witnesses. And invariably, most if not all of these witnesses will be current or former employees of the defendant.

Especially in state wage-and-hour class actions and state/federal class/collective hybrids, this can pose a number of potential pitfalls for *both* parties.

Defendant's Contact with Members of the Putative Class or Collective

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 the utmost caution if it chooses to interview its own employees regarding the subject of the class litigation.

Class Members as Represented or "Quasi-Represented" Persons

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); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (affording protections of Model Rule 4.2 to potential class members from filing of complaint); *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (holding that pre-certification communications by defense counsel urging potential class members not to meet with class counsel violated Model Code DR 7-104); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) (prohibiting defense counsel from contacting putative class members). The ramifications of this fact should be clear to all sides: If a 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).¹

Other courts have declined to go so far as to find a fully gestated attorney-client relationship. Those taking the 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 v.*

¹ In the State of New York, where the Authors practice, that rule is New York Code of Professional Responsibility DR 7-104.

American Dental Ass'n, 95 F.R.D. 372, 377 n.6 (N.D. Ill. 1982).

Several respected commentators agree with this more cautious approach. Herbert Newberg and Alba Conte write in their seminal 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 certification, there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent.⁷⁴¹

⁷⁴¹ *Knuth v. Erie-Crawford Diary [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”).

Geoffrey C. Hazard, Jr., and W. William Hodes, in 2 THE LAW OF LAWYERING, (3d ed. 2001) § 38.4 at pp. 38-6 and 38-7, seem to agree with this approach:

For certain purposes the unnamed class members should be regarded as clients of the lawyer

representing the class from the inception of the suit, even before certification by the court as a proper class action. For example, most authorities rightly assume that the lawyer acts in a fiduciary capacity toward these people, and thus owes them duties of loyalty and care, even though he is still seeking formal authority to proceed on their behalf.

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. As a matter of best practices, a prudent defendant should at the very least consider putative class members “nearly represented” by putative class counsel, if not represented outright. 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).

Misleading or Threatening Communications with the Putative Class

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. *See, e.g., 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. 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 especially 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. “Coercion of potential class members by the class opponent may exist where both parties are ‘involved in an ongoing business relationship.’” *Id.* 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002)

(quoting *Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 WL 1035132, 3 (S.D.N.Y. Sept.7, 2001)); see also *Hampton Hardware v. Cotter & Co., Inc.*, 156 F.R.D. 630, 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 therefore, at the very least, 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).

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 Products*, 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 apprized 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 Fed. R. Civ. P. 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*, 115 F.R.D. at 512 (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); *Pollar*, 1984 WL 161273 at *1 (corrective notice ordered to counteract confusion caused by defendant’s conduct); and *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.

Plaintiff's Contact with Employees

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. Proceeding blindly – if at all, in some cases – with interviews of such witnesses is fraught with ethical risks and can lead to dire consequences for counsel, and consequently the putative class.

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 putative 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* corporate employee 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 Imp. Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995) (allowing *ex parte* contact with employees 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.

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., 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, have nestled somewhere in the middle of these poles. In the middle of the road there are

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 Assoc., 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.

many variations of approach, including the most variable variant of all – 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). 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).

The majority view, failing as it does to draw a readily understandable “bright line,” can be frustrating in practical application for practitioners on both sides of the case caption. But consider, for example, the brief flirtation by a New Jersey federal court with a blanket prohibition on *any* contact, with *any* employee, *current or former*. *Public Serv. Elec. & Gas Co. v. Assoc. Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037 (D. N.J. 1990) (hereinafter, “PSE&G”). There, Judge Politan, criticizing the *Niesig* approach as “muddy[ing] this already clouded ethical area”, specifically undertook to draw “an understandable bright line test.” *Id.* at 1042-43. Not two months later, however, a magistrate judge sitting

in the same district, declined to follow the *PSE&G* lead: “The clear weight of authority and the carefully chosen wording of RPC 4.2 and the ABA Comment do not admit of a ‘bright line test,’ no matter how desirable the need for clarity might be in matters of ethics”; the district judge, on objection, affirmed the magistrate judge’s decision. *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77 (D. N.J. 1991). This sort of reception continued for several years thereafter. The *PSE&G* “bright line” was rejected repeatedly by other courts and other jurisdictions before finally being expressly rejected via an express amendment to New Jersey’s ethical rules, adopting a rule a pendulum swing away: the “litigation control group” test referenced above. This reaction was summarized best by Judge Politan himself some ten years later:

Although some commentators praised the decision and even deemed it a ‘sensible approach to Model Rule 4.2,’ the decision sparked much controversy and was widely criticized for creating such a bright-line rule. The decision also created a jurisprudential split in this district, and others, as well as, at the State level regarding whether the Rule applied to *ex parte* communications with ‘former’ employees of an organization It is clear that *PSE & G* and the case law that followed the decision served as the catalysts for extensive commentary both by the Bar and the public which ultimately led the New Jersey Supreme Court to reexamine the Rule.

Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59, 71-72 (D. N.J. 2000). It may be that “bright line” rules are more attractive in theory than they are in day-to-day practice.

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. Fir Living & Working, Inc.*, 438 Mass. 132 (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”).

More narrow approaches have popped up here and there. The most notable and extreme of these is no doubt the ill-fated *PSE&G* decision. 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 kosher. *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).