THE ETHICS OF COMMUNICATIONS WITH ABSENT CLASS MEMBERS

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I. Introduction

A natural way to think about the ethics of communications with absent class members is in terms of ethical codes. Along those lines, two ethical rules jump to mind. First, there is the "no contact" rule. It derives from Model Rule of Professional Conduct 4.2 and similar state ethics rules. The no contact rule prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.

A second relevant rule is the ban on solicitation. As codified by Model Rule 7.3—and in state equivalents—it limits lawyers' abilities to solicit professional employment through communications with potential clients.

If these ethical rules were to define the bounds of permissible communications in class actions, an issue of paramount importance would be when plaintiffs' lawyers in proposed class actions are deemed to represent absent class members. Before the plaintiffs' lawyers are treated as representing absent class members, defense counsel might be relatively free to communicate with absent class members and plaintiffs' counsel might be significantly constrained. In contrast, once the plaintiffs' lawyers represent the absent class members, the opposite would be true.

To some extent, that approach is useful. Most courts hold that the plaintiffs' lawyers in a proposed class action represent absent class members once a class is certified and not before.[1]

[1] *See* Restatement (Third) of the Law Governing Lawyers § 99 cmt, 1 (2000) ("[A]ccording to the majority of decisions, once the proceeding has been certified as a class action the members of

There are also two minority position, one that the plaintiffs' lawyers represent absent class members as soon as litigation is filed[2] and another that plaintiffs' lawyers do not represent absent class members until the opt-out period expires.[3] These rulings do indeed matter, as we will discuss below.

But they fail to tell the full story. The reality is that a procedural rule—Federal Rule of Civil Procedure 23—plays as important a part in shaping communications with absent class members as do the ethical rules. Indeed, when the U.S. Supreme Court addressed the issue over forty years ago in *Gulf Oil Co. v. Bernard*,[4] it emphasized the policies underlying Rule 23 and barely discussed the rules of professional responsibility.[5]

Before the Court in *Gulf Oil* was a case involving allegations of employment discrimination. The Equal Employment Opportunity Commission had entered a conciliation agreement regarding black and female employees of an oil refinery.[6] The refinery sent notices to 643 affected employees proffering backpay in exchange for execution within thirty days of a full release of all discrimination claims.[7] The notices asked the employees not to discuss the offer

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the class are considered clients of the lawyer for the class."); *see also McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("A number of courts have held that this [attorney-client] relationship arises once the class has been certified and not only at the end of the opt-out phase.") (collecting cases).

[2] *See, e.g., Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001); *Rankin v. Bd. Of Educ.*, 174 F.R.D. 695, 697-98 (D. Kan. 1997).

[3] *See, e.g., Gortat v. Capala Bros., Inc.*, 2010 WL 1879922, at *5 (E.D.N.Y. May 10, 2010) ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); *Bobryk v. Durand Glass Mfg. Co., Inc.*, 2013 WL 5574504, at *9 (D.N.J. Oct. 9, 2013) (adopting the position that an attorney-client relationship between class counsel and absent class members does not begin until the class has been certified and the opt-out period has expired).

[4] 452 U.S. 89 (1981).

[5] Id. at 104, n. 21.

[6] Id. at 91.

[7] Id.

with others, although it proposed to arrange an interview with a government representative for employees who were confused.[8] About a month after the signing of the conciliation agreement, plaintiffs' attorney filed a proposed class action on behalf of the then-present and former African American employees of the refinery as well as African American rejected applicants for employment.[9]

The controversy arose because the defendant, Gulf Oil Company ("Gulf"), requested a protective order preventing parties and their counsel from communicating with potential class members.[10] The court issued such an order and, then, nevertheless permitted Gulf to continue its mailings about the conciliation agreement and its settlement process.[11] The result was that Gulf could communicate with class members about a potential settlement but the named plaintiffs and their attorneys could not do the same regarding the possibility of participating in class litigation.[12]

In rejecting that approach, the Supreme Court issued an opinion instructive in various ways. A first point of note was that in resolving the issue before it the Court relied only on Rule 23. The Court explicitly declined to resolve the Free Speech issues implicated by its prior restraint[13] and implicitly declined to parse the relevant ethical rules, relying instead on the general purposes of Rule 23. The Court explained that "the question for decision is whether the

[8] Id. at 91, n.1
[9] Id.
[10] Id. at 93. A later court allowed some exceptions, such as communications initiated by "clients" and, potentially, communications based on an asserted constitutional right such as, presumably, the right to free speech. Id. at 95. As to the latter, the Supreme Court expressed skepticism about the adequacy of allowing communications subject to potential sanctions. Id. at 103, n. 17.
[11] Id. at 94.
[12] Id.
[13] Id. at 101, n. 15.

limiting order entered in this case is consistent with the general polices embodied in Rule 23, which governs class actions in federal court."[14] To be clear, the Court acknowledged the potential for abuses in class action cases, but it largely ignored the approach to such abuses set out in any ethical codes.[15]

A corollary is that the Court crafted an approach based on the policies underlying Rule 23 without asking whether they were compatible with the ethical rules. It suggested that a court should *balance* the harm from potential abuses in class action practice against the importance of the class action device.[16] The Court did not focus on the technical requirements of the ethical rules in deciding how, if at all, to constrain attorney behavior in the class context.

As to the issue before the Court—whether the trial court had properly restricted communications from the named plaintiffs and their lawyers to the potential class members—it reached two relevant conclusions. First, it criticized the trial court for failing to make appropriate findings and for imposing a broader prohibition on communication than was necessary.[17] Second, it held that the potential for abuses in class actions did not justify routine

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[14] Id. at 99.

[15] A limited exception is the Court's citation in a footnote to the "no contact rule." *Id.* at 104, n. 21 (ABA Code of Professional Responsibility, DR 7–104 (1980).

[16] *See, e.g., id*. at 101-02 ("Because of these potential problems [regarding informing potential class members of their rights and obtaining information from them], an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a *weighing* of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially rule 23.") (footnotes omitted; emphasis added); *id.* at 100 ("Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in management of cases. ") (footnotes omitted).

[17] *Id.* at 104.

prohibition of communications that could assist in either the formation or prosecution of class actions.[18]

In reaching these conclusions, the Court focused on the restrictions on communications from the named plaintiffs and their lawyers to absent class members, not on communications from defendants and their counsel. The Court explained, "[I]n this case we. . . consider the authority of district courts under the Federal Rules to impose sweeping limitations on communications by named plaintiffs and their counsel to prospective class members."[19] Although the Court hardly addressed any formal ethical rules, it did note near the end of the opinion—arguably with apparent approval—that some ethical rules constrain expression and cited in particular the provision of the Model Code that imposes the "no contact rule."[20] That might suggest a greater openness to restricting communications from defendants and defense counsel to absent class members. After all, in this regard the "no contact rule" affects only the defense attorneys, not the plaintiffs' attorneys. To be sure, at times the Court referred to the rights of the "parties" in class actions rather than the rights of plaintiffs.[21] But the Court paid little attention to the rights of defendants or their attorneys to communicate with a class.

Also notable is that Court did not draw any distinction between communications that occur before a class is certified and those that occur after. Indeed, it recognized the importance of protecting communication not only if it could promote the "prosecution" of a class action but

[18] *Id. ("*We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with potential class members. But the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or prosecution of a class action in accordance with the rules.") (footnote omitted).
[19] Id. at 99.
[20] Id. at 103, n. 21 (citing ABA Code of Professional Responsibility, DR 7-104 (1980)).
[21] See, e.g., id. at 101.

also its "formation."[22] Similarly, the Court affirmed the value of ensuring that potential class members know their legal rights and that named plaintiffs and their counsel are able to secure the information they need to prosecute class litigation.[23]

In the analysis that follows, we will suggest that the framework for the Court's reasoning in *Gulf Oil* continues to provide valuable guidance. True, courts sometimes rely on the no contact rule and the ban on solicitation in addressing communications with absent class members. Quite frequently, however, they emphasize instead the provisions of Rule 23 and the policies underlying them, and act to protect the interests of absent class members and the integrity of class action litigation. As a result, the relevant ethical rules taken on their own provide an incomplete picture for how courts view communications with absent class members in proposed class actions.

II. General Framework: Protecting the Interests of Absent Class Members and the Integrity of the Class Action Litigation

In this article, following *Gulf Oil*, we suggest the following approach to communications with absent class members: rather than emphasize the existence and timing of an attorney-client relationship to govern communications with absent class members, courts should focus on protecting the rights of absent class members and the integrity of the class action process.[24] As

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[22] Id. at 104.

[23] Id. at 101 ("The order interfered with [plaintiffs'] efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for [plaintiffs], as the class representatives, to obtain information about the merits of the case form the persons they sought to represent.") (footnote and citations omitted).

[24] *See Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (citing the district court's "duty to protect both the absent class and the integrity of the judicial process"); *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3d Cir. 1988) (referring to "[a] district court's

the Supreme Court explained in *Am. Pipe & Const. Co. v. Utah*, before class certification, absent class members are "passive beneficiaries of the action brought on their behalf."[25] The benefits that inure to absent class members may be undermined by certain types of communications, particularly if the interests of the counsel initiating the communications are misaligned with the interests of absent class members. In assessing the propriety of communications with absent class members, protecting absent class members' rights in the litigation and the overall integrity of the litigation should be guiding forces.

Courts derive authority to prohibit, limit, and remedy attorney communications with absent class members in significant part from Rule 23, *Gulf Oil*,[26] and its progeny. Several provisions of Rule 23(d) authorize courts to regulate communications between attorneys and absent class members. Rule 23(d)(1)(B) provides that the court may issue orders "to protect class members and fairly conduct the action." Rule 23(d)(1)(C) empowers courts to issue orders that "impose conditions on the representative parties or on intervenors." Rule 23(d)(1)(E) is a catch-all provisions that allows courts to issue orders that "deal with similar procedures." Courts have repeatedly found that these provisions of Rule 23(d) confer broad authority to regulate communications with absent class members.[27]

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duty and authority under Rule 23(d) to protect the integrity of the class and the administration of justice generally"); *Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *3 (E.D. Cal. Jan. 20, 2017) ("Rule 23(d)'s conferral of authority is not only to protect class members in particular but also to safeguard generally the administering of justice and the integrity of the class certification process.").

[25] *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552 (1974).

[26] 452 U.S. 89 (1981).

[27] *McKee v. Audible, Inc.*, 2018 WL 2422582, at *4 (C.D. Cal. April 6, 2018) ("Rule 23(d) gives district courts the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation."); *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *3 (N.D. Cal. May 1, 2014) ("The prophylactic power accorded to the court presiding over a putative class action under Rule 23(d) is broad…").

Similarly, Rule 23(c)(2) permits courts to direct notice to class members concerning certification, settlement, and other issues. Courts have concluded that it too empowers them to oversee with absent class members.[28]

Gulf Oil established that Rule 23 empowers courts to limit communications with absent class members. The Supreme Court observed that the district court's order prohibiting plaintiffs' counsel in the proposed class action was contrary to the interests of the absent class members, including because "the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of liability for discriminatory acts" but order prevented them from communicating with plaintiffs' counsel regarding the merits of the pending employment discrimination lawsuit.[29] The Supreme Court held that "an order limiting communications between parties and potential class members *should be based on a clear record and specific findings* that reflect a weighing of the need for a limitation and the potential interference with the rights of parties."[30] Further, an order restricting the parties' speech must be "carefully drawn" and limit speech "as little as possible."[31]

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[28] *See Camp v. Alexander*, 300 F.R.D. 617, 621 (N.D. Cal. 2014) (citing the standards for Rule 23 notice in finding that defendant's communications with employees in an FLSA action were coercive and misleading); *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("[I]t is critical that the class receive accurate and impartial information regarding the status, purposes, and effects of the class action.").

[29] 452 U.S. 89, 101 (1981).

[30] *Id.* (emphasis added). *See also Cox Nuclear Medicine v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 697-98 (S.D. Ala. 2003) (interpreting *Gulf Oil* as requiring a showing "that the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation"). Requests for a remedying effect on prior communications must also be accompanied by a clear record and specific findings. *Crosby v. Stage Stores, Inc.*, 377 F. Supp. 3d 882, 888 (M.D. Tenn. 2019).

[31] *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-102 (1981).

An exercise of the court's authority to limit such communications is not at odds with the First Amendment, provided that the limitation is rooted in factual findings.[32] As the Eleventh Circuit explained in *Kleiner v. First National Bank of Atlanta*, "In general, an order limiting communications regarding ongoing litigation between a class and class opponents will satisfy First Amendment concerns if it is grounded in good cause and issued with a 'heightened sensitivity' for First Amendment concerns."[33]

Courts have since confirmed that they have the authority to oversee communications with absent class members before class certification.[34] That authority also extends to communications with future and potential members of the class.[35] To be properly regulated within the bounds of Rule 23, *Gulf Oil* and its progeny, the communication at issue must have actually occurred or be imminent. A court may not regulate hypothetical communications with absent class members.[36] On the other hand, an order limiting communications with absent class members does *not* require a finding that the communicating attorney engaged in misconduct.

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[32] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *5 (N.D. Cal. July 8, 2010) (holding that a party's First Amendment right to communicate with absent class members is properly "limited by considerations for protecting the putative plaintiff class"); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (appropriate to limit communications with absent class members, which "were made solely to protect pecuniary interests" and did not involve "advancement of political beliefs or ideas").

[33] 751 F.2d 1193, 1205 (11th Cir. 1985).

[34] *Urtubia v. B.A. Victory Corp.*, 857 F. Supp. 2d 476, 484 (S.D.N.Y. 2012) ("A court possesses such supervisory authority even before a class is certified."); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *5 (C.D. Cal. April 6, 2018) ("This authority under Rule 23(d) to enjoin or control communications exists even prior to class certification.").

[35] *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *4 (N.D. Cal. May 2, 2014) ("The Court has the authority to regulate communications which jeopardize the fairness of the litigation even if those communications are made to future and potential putative class members.").

[36] *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 561 (S.D. Fla. 2008) ("a communication must have occurred or be threatened to occur" in order for a court to restrict communications with absent class members); *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 465 (D. Md. 2014).

Note that the analysis under Rule 23 is distinguishable from—although related to—the rules of professional conduct. Under Rule 23, when assessing whether to limit attorneys' ability to communicate with absent class members, the focus is on whether the communication creates potential harm to the interests of absent class members or the integrity of the class action process.[37]

Still, courts will sometimes rely on the ethical rules in assessing the propriety of lawyers' communications with absent class members. When they do, most courts hold that class counsel represent absent members of a proposed class once it is certified[38] (although plaintiffs' counsel may have a fiduciary duty to absent class members before certification[39]). Other courts have held that the attorney-client relationship forms only after the period for opting out of the class has

[37] *Slavkov v. Fast Water Heater Partners I, L.P.*, 2015 WL 6674575, at *2 (N.D. Cal. Nov. 2, 2015) ("An order under *Gulf Oil* does not require a finding of actual misconduct—rather, the key is whether there is potential interference with the rights of the parties in a class action.") (citation omitted); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *5 (C.D. Cal. April 6, 2018) ("Plaintiff need not demonstrate 'actual misconduct'—rather, the key is whether there is potential interference with the rights of the parties in a class action.") (citation omitted).

[38] *See* Restatement (Third) of the Law Governing Lawyers § 99 cmt, 1 (2000) ("[A]ccording to the majority of decisions, once the proceeding has been certified as a class action the members of the class are considered clients of the lawyer for the class."); *see also McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("A number of courts have held that this [attorney-client] relationship arises once the class has been certified and not only at the end of the opt-out phase.") (collecting cases).

[39] *In re Avon Secs. Litig.*, 1998 WL 834366, at *10, n.5 (S.D.N.Y. Nov. 30, 1998) ("Even before a class has been certified, counsel for the putative class owes a fiduciary duty to the class."); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000) ("While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class.").

expired, if there is one.[40] Finally, a small number of courts have held that plaintiffs' counsel represent absent class members on filing a proposed class action.[41]

The following figure summarizes the evolving nature of the attorney-client relationship between plaintiffs' counsel and absent class members:

Figure 1: Evolving Nature of Attorney-Client Relationships with Absent Class Members

	Before Class Certification	Class Certified and Opt-Out Period Open	Opt-Out Period Expired
Class Counsel	Potential fiduciary duty, but majority view: no attorney-client relationship	Majority view: attorney-client relationship	Attorney-client relationship

In the following sections, we discuss how courts assess the harm from actual communications with absent class members and the potential harm from threatened communications. We also explore how courts protect the interests of absent class members and the integrity of class litigation in a variety of contexts and at different stages of the litigation. We analyze communications from plaintiffs' counsel, defense counsel, and outside counsel, whether they occur before class certification, after class certification but before expiration of the opt-out period, and after the expiration of the opt-out period.

[40] *See, e.g., Gortat v. Capala Bros., Inc.*, 2010 WL 1879922, at *5 (E.D.N.Y. May 10, 2010) ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); *Bobryk v. Durand Glass Mfg. Co., Inc.*, 2013 WL 5574504, at *9 (D.N.J. Oct. 9, 2013) (adopting the position that an attorney-client relationship between class counsel and absent class members does not begin until the class has been certified and the opt-out period has expired).

[41] *See, e.g., Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001); *Rankin v. Bd. Of Educ.*, 174 F.R.D. 695, 697-98 (D. Kan. 1997).

To be sure, courts say that these analyses are fact-specific; whether a court limits or remedies communications with absent class members depends on the totality of the circumstances.[42] Still, there is some structure to courts' reasoning. We identify factors on which courts have relied in making the requisite "clear record and specific findings" in limiting and correcting communications with absent class members. We also suggest best practices for communications with absent class members.

III. Defense Counsel Communications

Defense counsel's latitude for communicating with absent class members diminishes as the litigation proceeds. Before class certification, defense counsel may communicate with absent class members. However, they cannot do so in a way that threatens to harm the absent class members in the pending litigation or undermines the integrity of the class action procedure, nor can they mislead or coerce the absent class members.[43] In assessing communications with absent

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[42] *Talavera v. Leprino Foods Co.*, 2016 U.S. Dist. LEXIS 29633, at *14-15 (C.D. Cal. Mar. 8, 2016) (observing that the analysis "often depends not on one particular assertion, but rather the overall message or impression left by the communication); *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1062 (W.D. Wash. 2019) ("'Whether a communication is misleading or coercive—and therefore warrants judicial intervention—often depends not on one particular assertion but rather the overall message or impression left by the communication.'") (quoting *Kutzman v. Derrel's Mini Storage, Inc.*, 354 F. Supp. 3d 1149, 1158 (E.D. Cal. 2018)).

[43] *Potts v. Nashville Limo & Transport, LLC*, 2016 WL 1622015, at *13 (M.D. Tenn. Apr. 19, 2016) ("Where communications are misleading, coercive, or an improper attempt to undermine the class action…they may be limited by the court…"); *Marino v. CACafe, Inc.*, 2017 WL 1540717, at *3 (N.D. Cal. April 28, 2017) ("The prophylactic power accorded to the court presiding over a putative class action under Rule 23(d) is broad; the purpose of Rule 23(d)'s conferral of authority is not only to protect class members in particular but to safeguard generally the administering of justice and the integrity of the class action process.") (citation omitted); *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (citing the district court's "duty to protect both the absent class and the integrity of the judicial process"); *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3d Cir. 1988) (referring to "[a] district court's duty and authority under Rule 23(d) to protect the integrity of the class and the administration of justice generally"); *Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *3 (E.D. Cal. Jan. 20, 2017) ("Rule 23(d)'s conferral of authority is not only to protect class members in particular but

class members, courts focus on the *impact* on absent class members and the class action litigation, not on a defendant's intent.[44] Courts assessing the potential harm to absent class members consider how a reasonable person would respond to the communication at issue.[45] As discussed in detail below, defense counsel's interests, by their very nature, do not align with the interests of absent class members.

We identify a non-exhaustive set of factors that courts consider in determining whether defense counsel's pre-certification communications with absent class members threaten the interests of absent class members or the integrity of the class action process, or tend to mislead or coerce absent class members. We also suggest ways to ensure that defense counsel's communications do not harm absent class members as "passive beneficiaries of the action brought on their behalf."[46]

Once the class is certified, an attorney-client relationship forms between class counsel and the absent class members. Defense counsel is thus prohibited from communicating directly with absent class members by the no contact rule.[47] Defense counsel may pursue communications with absent class members only through class counsel.

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also to safeguard generally the administering of justice and the integrity of the class certification process.").

[44] *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 562 (S.D. Fla. 2008) ("[A]lthough the Court does not find that Jeld-Wen intended to interfere with the class action through its communication or for its conduct to be abusive, the Court, nonetheless, recognizes that, as a practical matter, the communication may, in fact, have the effect of interfering with the integrity of the class action."); *Jubinville v. Hills' Pet Nutrition, Inc.*, 2019 WL 1584679, at *8 (D.R.I. Apr. 12, 2019) (noting that defendant's intent in sending the communications to absent class members "is not conclusive").

[45] *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 563-64 (S.D. Fla. 2008) (finding that defendant's communication to absent class members threatens the proper functioning of the litigation based on its interpretation of "a reasonable person reading" defendant's letter).

[46] 414 U.S. 538, 552 (1974).

[47] See Model Rule of Professional Conduct 4.2.

The figure below summarizes defense counsel's diminishing ability to communicate with absent class members as class litigation advances:

Figure 2: Defense Counsel's Diminishing Ability to Communication with Absent Class Members in Class Litigation

	Before Class Certification	Between Class Certification and the Opt-Out Deadline	After Expiration of the Opt-Out Deadline
Defense Counsel	Only if the communication does not harm absent class members, undermine the integrity of the class action, or mislead or coerce.	Majority view: defense counsel may communicate with absent class members only through class counsel.	Consensus: Defense counsel may communicate with absent class members only through class counsel.

A. Communications with Absent Class Members

1. Before Class Certification

Defense counsel's duty is to promote their client's interests. A defendant's interests are generally antagonistic with those of the absent class members. As a result, so are defense counsel's interests.

To oversimplify a bit, the absent class members benefit from recovering as much as possible and defendants benefit from paying as little as possible. That creates incentives for defense counsel to communicate with absent class members in ways that can harm absent class members, undermine the integrity of the class action, or coerce or mislead absent class members.[48] Courts may limit or monitor the communications to prevent, limit, or remedy

[48] Note that communications are improper if they coerce *or* mislead. Both are not necessary. *See Potts v. Nashville Limo & Transport, LLC*, 2016 WL 1622015, at *14 (M.D. Tenn. Apr. 19, 2016) ("Even absent a finding of coercion, however, the court may remedy the effects of any communications between defendants and their employees if those communications were misleading.").

communications that have these effects. Note that attorneys cannot avoid judicial scrutiny by delegating potentially damaging communications to non-attorneys.[49]

In *Gulf Oil*, the Supreme Court held that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of parties."[50] Below we identify various factors courts consider in exercising their power under Rule 23(d) to prohibit, limit, or correct defense counsel's written communications with absent class members.

Before doing so, however, it is important to note that defense counsel's communications with absent class members exist on a spectrum. On one end of that spectrum, the communications may be benign—having little relevance to or effect on the pending litigation—including ordinary communications as part of an ongoing customer relationship. On the other end, communications may undermine the litigation, including by inducing absent class members to opt-out of the class, agree to arbitration, or enter individual settlements. Many communications exist somewhere in the middle, such as communications seeking to obtain information about plaintiffs' allegations or to develop defenses.

The above spectrum can help to situate the following factors courts use to assess whether defense counsel's actual or threatened communications with absent class members may harm

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[49] *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *1-2 (D. Md. June 10, 2013) (ordering limitations on defense counsel's communications with absent class members even though "defense counsel may not have been the one to pick up the telephone and call" absent class members); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (finding that defense counsel were "in derogation of their duty as officers of the Court" where they "had full knowledge of their client's intention to attempt to sabotage the class notice").

[50] 452 U.S. 89, 101 (1981).

absent class members, undermine the integrity of the class action process, or mislead or coerce absent class members.

Relationship to the litigation. A useful initial inquiry is whether defense counsel would have engaged in the communication absent the litigation. If the communication would have occurred regardless of whether the lawsuit existed, it is less likely to harm the relevant interests of absent class members.[51] For instance, consider a proposed class action alleging that a dominant software developer used its market power to exclude competition from nascent software companies in violation of the antitrust laws, thereby causing purchasers of the software to pay inflated, monopolistic prices. A communication from defense counsel to purchasers of the software concerning a software security issue presumably would have occurred even if the antitrust class action litigation had not been initiated. That type of communication is usually benign. Conversely, an offer of individual settlement to an absent class member would require further assessment to determine whether it may harm the interests of absent class members.

Misleading or coercive communications. Courts generally prohibit misleading or coercive communications with absent class members. Mischaracterizations and omissions are both potentially damaging to absent class members. Omissions can create confusion and mislead absent class members.[52] Courts require that notices sent to potential members of the class

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[51] *See, e.g., Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) ("Of course, the Court has no desire to limit Defendant's communications with anyone when those communications relate to routine business matters, and those will remain unaffected by the Court's order.").

[52] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *3 (N.D. Cal. July 8, 2010) ("The putative class members can be misled through omissions and failure to provide enough information, which can include the failure to append plaintiffs' complaint to a settlement offer."). *Marino v. CACafe, Inc.*, 2017 WL 1540717, at *3 (N.D. Cal. April 28, 2017) ("The contention that [defendant's] communication with putative class members did not 'misstate any facts about the case' is disingenuous, since that communication omitted any information about the pending lawsuit.") (finding that settlement releases "were obtained by deceptive omissions of material

pursuant to Rule 23 provide information in a neutral, objective and easily understood manner. Courts generally hold other communications with class members to a similar standard.[53] The best practice is for communications with absent class members to be neutral, balanced, and complete.[54] Determining whether a communication with absent class members is misleading or coercive requires analyzing the substance of the communication and the context in which it occurs.[55] Below we discuss factors courts consider in deciding whether communications with absent class members are misleading or coercive.

Misleading or coercive: who is the recipient of the communication? When assessing whether a communication with absent class members is misleading or coercive, courts consider the recipients of the communication and whether their attributes render them susceptible to being misled or coerced. For instance, absent class members who may not be native English speakers,

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information"); *Friedman v. Intervet Inc*., 730 F. Supp. 2d 758, 763, n.5 (N.D. Ohio 2010) ("Despite defendants' protestations to the contrary, an act of omission may be just as culpable as one of commission.")(limiting defendants' pre-certification settlement discussions with absent class members "because '[u]nlimited contacts by defendants with class members or potential class members may serve to undermine the purposes of Rule 23, by allowing defendants to reduce their liability by encouraging class members not to join the litigation.'" (quoting *Burrell v. Crown Cent. Petroleum, Inc*., 176 F.R.D. 239, 243 (E.D. Tex. 1997))) (emphasis in original).

[53] *See Camp v. Alexander*, 300 F.R.D. 617, 621 (N.D. Cal. 2014) (citing the standards for Rule 23 notice in finding that defendant's communications with employees in an FLSA action were coercive and misleading); *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("[I]t is critical that the class receive accurate and impartial information regarding the status, purposes, and effects of the class action.").

[54] *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) ("If putative class members are to be contacted regarding this lawsuit, then it is important to a fair resolution of the case that the communications with them are neutral, balanced, and complete.").

[55] *Talavera v. Leprino Foods Co.*, 2016 U.S. Dist. LEXIS 29633, at *14-15 (C.D. Cal. Mar. 8, 2016) (observing that the analysis "often depends not on one particular assertion, but rather the overall message or impression left by the communication); *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1062 (W.D. Wash. 2019) ("'Whether a communication is misleading or coercive—and therefore warrants judicial intervention—often depends not on one particular assertion but rather the overall message or impression left by the communication.'") (quoting *Kutzman v. Derrel's Mini Storage, Inc.*, 354 F. Supp. 3d 1149, 1158 (E.D. Cal. 2018)).

who do not have advanced education, or who are unfamiliar with the legal system may be particularly vulnerable.[56] Courts also assess whether class members have an ongoing business relationship with defendant, which may heighten the possibility of coercion.[57] Where an ongoing business relationship exists, even sophisticated class members may suffer from a power imbalance.[58] For instance, a corporate buyer of a good alleged to be the subject of a price-fixing conspiracy could be intimidated by defense counsel's request that the buyer opt-out of the antitrust class action or risk termination of its purchase agreement. Courts may condemn attempts by defense counsel to leverage the economic power of their clients.[59]

Sidebar: Class Actions involving Employment-Related Claims and Collective Actions under the FLSA.

[56] *See, e.g., Guifu Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 511 (N.D. Cal. 2010) (spa workers with limited education and poor language skills are vulnerable); *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6407583, at *6 (N.D. Cal. Dec. 6, 2013) (Uber drivers, many of whom without English as a native language, are vulnerable); *Pickarski v. Amedisys Illinois, LLC*, 4 F. Supp. 3d 952, 956 (N.D. Ill. 2013) (home health care workers are vulnerable); and *Williams v. Securitas Sec. Servs. USA, Inc.*, No. CIV.A. 10-7181, 2011 WL 2713741 at *3 (E.D. Pa. July 13, 2011) (hourly-paid security guards are vulnerable)).

[57] *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.") (citation omitted) (finding that coercion existed where a bank communicated with customers about opting out of a class action where the class consisted of bank borrowers "many of whom were dependent on the Bank for future financing…and who did not have convenient access to other credit sources"); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994) ("The fact that the defendant and potential class members are involved in an on-going business relationship, further underscores the potential for coercion.") (finding that absent class member hardware stores that were part of defendant's wholesale cooperative were "particularly vulnerable to coercion" because absent class members "must rely on defendant for crucial information as to pricing").

[58] *Dial Corp. v. News Corp.*, 2015 WL 9256930, at *2 (S.D.N.Y. Nov. 16, 2015) (noting that the absent class members are "large and sophisticated entities…with their own in-house legal teams" but that, even so, recognizing an "imbalance of information" concerning the litigation between defense counsel and in-house counsel for absent class members).

[59] Cites?

Courts have repeatedly recognized that communications between an employer-defendant and worker-absent class member are particularly vulnerable to coercion.[60] These rulings frequently occur in the context of cases under the Fair Labor Standards Act ("FLSA"). Coercive communications may include threats of adverse employment consequences, such as termination or other retaliation for participation in the lawsuit.[61] Recognizing this heightened risk of coercion, courts have imposed restrictions on employer-defendants' communications with employees-absent class members. If courts permit such communications, they may impose safeguards to minimize the risk coercion.[62] This approach is consistent with the FLSA's goal of addressing "unequal bargaining power between employer and employee.[63]

Misleading or coercive: timing of the communication. If defense counsel's communication to absent class members is litigation-related, the timing of the communication may matter.[64] For instance, if defense counsel seeks to communicate with absent class members

[60] *See Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga. 1999) (explaining in an employment discrimination class action case prior to certification: "Coca-Cola has not given the Court any reason to suspect that it will attempt to mislead its employees and coerce them into non-participation in this case. But simple reality suggests that the danger of coercion is real and justifies the imposition of limitations on Coca-Cola's communications with potential class members"); *id.* at 679 (finding "there is an inherent danger that these types of internal communications [from the employer about the lawsuit] could deter potential class members from participating in the suit out of concern for the effect it could have on their jobs"); *Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010) ("Courts have also recognized that in the context of an employer/worker relationship, there is a particularly acute risk of coercion and abuse when the employer solicits opt-outs from its workers."). *But see Bobryk v. Durand Glass Mfg. Co., Inc.*, 2013 WL 5574504, at *4 (D.N.J. Oct. 9, 2013) ("[I]t bears emphasis that mere inherent coerciveness in the employment relationship in insufficient, in and of itself, to warrant imposition of limitations on employers' ability to speak with potential class members prior to certification.").

[61] *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 466 (D. Md. 2014) (describing evidence that defendant's communications with absent class members in a FLSA action involved "deception" and "fear of termination").

[62] *See Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 679 (N.D. Ga. 1999) (permitting the defendant-employer to share its views with employees concerning an employment discrimination class action but requiring that any such communication clearly identify that it is the views of the defendant-employer and that it would be unlawful for the defendant-employer to retaliate against employees who chose to participate in the case).

[63] *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 706 (1945).

[64] *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *6 (N.D. Cal. May 1, 2014) (finding that the timing of defendant's communication with absent class members "was motivated as a response to the class action suit"). *See also Degidio v. Crazy Horse Saloon & Rest. Inc*., 880 F.3d 135, 138, 140 (4th Cir.), *cert. denied sub nom., Crazy Horse Saloon & Rest. Inc. v. Degidio*, 138 S. Ct. 2666 (2018) (affirming trial court's rejection of arbitration agreements

while a class certification motion is pending, that may indicate an intent to undermine a forthcoming certified class. Courts also may consider whether the communication from defense counsel is likely to be the first time that absent class members will become aware of the existence of the litigation. To the extent that this first communication about litigation is misleading or coercive, it may do significant, ongoing harm to the absent class members.[65] This point is particularly important because, as a general matter, motivating absent class members to take the steps to benefit from a recovery is often difficult.[66]

Misleading or coercive: method of communication. When determining whether a communication with absent class members is misleading or coercive, courts consider the medium. Courts have greater difficulty overseeing real-time communications with absent class members—*e.g.*, by telephone, in-person, or via a real-time electronic chat—than written communications. Real-time communications also have more potential than written communications to intimidate or confuse absent class members, potentially depriving them of the

obtained by defendant years into class litigation and that attempted to "subvert the litigation process" in a class action); *Kater v. Churchill Downs Inc*., 423 F. Supp. 3d 1055, 1059 (W.D. Wash. 2019) (refusing to enforce arbitration agreements in part because they supplemented their general arbitration provision with a new one targeting absent class members after commencement of litigation)

[65] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1064 (W.D. Wash. 2019) (observing that defendant's coercive communication was "the first time many putative class members hear[d] about these lawsuits" and noting "it is difficult, and sometimes impossible, to correct laypersons' mistaken initial impressions"). *See also Marino v. CACafe, Inc.*, 2017 WL 1540717, at *2 (N.D. Cal. April 28, 2017) (noting that defendant "communicated with putative class members after the lawsuit was filed, but before they received any formal notice and before plaintiff's counsel had been given an opportunity to communicate with them" and requiring significant corrective action, including invalidation of settlement releases).

[66] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1064 (W.D. Wash. 2019) ("Convincing class members to take the steps necessary to secure recovery in a class action settlement or judgment is often difficult.").

opportunity to reflect and consider and pressuring them into an immediate response.[67] In part for these reasons, the ethical rules impose greater restrictions on "live person-to-person" communications than, for example, on communications sent by mail or email.[68]

Impact on absent class members' participation in the lawsuit. Communications from defense counsel may discourage absent class members from participating in a class action, potentially harming the absent class members or undermining the integrity of class proceedings. Courts often condemn as inappropriate communications that encourage class members to opt out or denigrate the merits of an action or plaintiffs' counsel.[69] They take special care to ensure that

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[67] *Camp v. Alexander*, 300 F.R.D. 617, 623 (N.D. Cal. 2014) (describing instances where defendants engaged in "coercive in-person meetings" with potential members of a collective action as "egregious behavior"); *Mevorah v. Wells Fargo Home Mortgage, Inc.*, 2005 WL 4813532, at *4-5 (N.D. Cal. Nov. 17, 2005) (requiring corrective notice and other measures where defense counsel contacted potential class members via telephone); *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) (limiting defense counsel's communications with absent class members where contact was made via telephone). *See also* 2 McLaughlin on Class Actions § 11:1 (18th ed.) ("In-person communications have received particularly close scrutiny because of the possibility that the absent class member may feel pressured to provide an immediate response.").

[68] *See, e.g.*, Model Rule of Professional Conduct 7.3 and Comments [2], [3], and [4].

[69] Courts have been particularly skeptical of communications that would "affect class members' decision to participate in [class] litigation" (or "undermine class plaintiffs' cooperation with or confidence in class counsel"). *In re School Asbestos Litigation*, 842 F.2d 671, 682 & n. 23 (3d Cir. 1988) (citing *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (inappropriate for defendant bank to solicit opt-outs from potential class members); *Erhardt v. Prudential Grp., Inc.*, 629 F.2d 843 (2d Cir. 1980) (inappropriate for defendant to send letters to class members encouraging them not to participate); *Burrell v. Crown Cent. Petroleum, Inc*., 176 F.R.D. 239, 243 (E.D. Tex. 1997) ("[T]he effect of a defendant attempting to influence potential plaintiffs not to join an embryonic class action would be just as damaging to the purposes of Rule 23 as a defendant that influences members of an already-certified class."); *Haffer v. Temple Univ. of Com. Sys. of Higher Educ.*, 115 F.R.D. 506 (E.D. Pa. 1987) (inappropriate for representatives of defendant university to mischaracterize litigation and to discourage them from meeting with class counsel); *Romano v. SLS Residential Inc.*, 253 F.R.D. 292, 296 (S.D.N.Y. 2008) ("Courts have found abusive communications…to include communications that affect class members' decisions regarding whether to participate in the litigation, communications that undermine class members' confidence in class counsel or the court, and communications that contain false or misleading statements about the litigation.") *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986) (inappropriate for defendant to send misleading letter, signed by class

the absent class members understand the allegations in a case and that opting out can prevent them from participating in litigation or obtaining any recovery from defendants.[70] Courts generally recognize their duty to ensure that absent class members receive clear, unbiased information in making decisions, such as whether to settle or agree to arbitration.[71]

Impact on absent class members' participation in the lawsuit: solicitation of opt-outs. Courts generally condemn defense counsel efforts to solicit absent class members to opt out of a class action as contrary to the purposes of Rule 23.[72] They view the class notice as ensuring that absent class members decide whether to opt out with the benefit of objective, court-approved information about the litigation.[73]

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member sympathetic to defendant, to class plaintiffs attacking class counsel and discouraging participation in class); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981) (inappropriate for defendant to communicate with class members about litigation in manner that appeared to result in a large number of opt-outs), *appeal dismissed*, 659 F.2d 1081 (6th Cir. 1981).

[70] *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) (criticizing defense counsel's communications with absent class members where, among other things, defense counsel failed to demonstrate that it explained "that providing defendant with an affidavit could affect [absent class members'] ability to participate in the lawsuit or to receive monetary compensation from defendant.").

[71] *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *7 (N.D. Cal. May 1, 2014) ("Courts have also found procuring waiver, settlement, or arbitration agreements without providing adequate information about the pending class action are misleading communications which the court may limit.") (citing cases).

[72] *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts without opportunity for rebuttal. The damage from misstatements could well be irreparable.").*Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010) ("Courts applying the *Gulf Oil* standard have found that *ex parte* communications soliciting opt-outs, or even simply discouraging participation in a case, undermine the purposes of Rule 23 and require curative action by the court.'); *id* at 518 ("Defendants have cited no case, and the Court is aware of none, where a defendant employer's ex parte solicitation of opt outs from its workers was upheld as a proper communication, regardless of whether the class was certified or not.").

[73] *Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010) ("Obtaining opt-out forms *ex parte* at this stage of the litigation—before a class has been certified by the Court—

Impact on absent class members' participation in the lawsuit: arbitration clauses.

Courts generally view defense counsel's requests to absent class members to agree to arbitration as undermining the integrity of the class action process and restrict them.[74] Courts worry that arbitration clauses will harm the interests of absent class members in a proposed class action and undermine the integrity of the class action process.[75]

Individual arbitration is highly inefficient—forcing plaintiffs to prove the same elements of their claims again and again based on the same common evidence. Absent class members will also likely have difficulty finding and retaining counsel to represent them in individual arbitrations. These points are related; lawyers are often reluctant to take individual cases that are difficult to prosecute efficiently and that standing alone offer only modest recoveries. The reality is that arbitration provisions and class action waivers are often fatal to plaintiffs' claims. For

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unquestionably frustrates the purposes of Rule 23. When and if a class is certified, the Court will approve a class notice and means for members to opt out, per Rule 23.").

[74] Courts in these cases have criticized defense counsel targeting of absent class members with arbitration agreements. *Degidio v. Crazy Horse Saloon & Rest. Inc*., 880 F.3d 135, 138, 140 (4th Cir.), *cert. denied sub nom., Crazy Horse Saloon & Rest. Inc. v. Degidio*, 138 S. Ct. 2666 (2018) (affirming trial court's rejection of arbitration agreements obtained by defendant years into class litigation and that attempted to "subvert the litigation process" in a class action); *Kater v. Churchill Downs Inc*., 423 F. Supp. 3d 1055, 1059 (W.D. Wash. 2019) (refusing to enforce arbitration agreements in part because they supplemented their general arbitration provision with a new one targeting absent class members after commencement of litigation); *Chen-Oster v. Goldman, Sachs & Co*., 449 F. Supp. 3d 216, 266-67 (S.D.N.Y. 2020) (noting arbitration clauses that target absent class members are suspect and enforcing arbitration agreements in part because they did not target class members); *see also Jimenez v. Menzies Aviation Inc.*, No. 15-CV-02392, 2015 WL 4914727 at *1, *6 n. 5 (N.D. Cal. Aug. 17, 2015) (concern about arbitration policy imposed after filing of proposed class action); *In re Currency Conversion Fee Antitrust Litig.* ("*Currency Conversion II*"), 224 F.R.D. 555, 569 (S.D.N.Y. 2004) (same).

[75] *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *7 (N.D. Cal. May 1, 2014) ("While it may be that employment can be conditioned on assenting to an arbitration agreement, the considerations are different when arbitration agreements are imposed in the midst of a pending class action in an attempt to limit participation in the suit.").

these reasons, courts have repeatedly ruled that a defendant's attempt to enter arbitration agreements with absent class members constitutes an improper communication.[76]

However, courts have stopped short of issuing blanket prohibitions on communications with absent class members concerning arbitration. Rather courts have developed factors to assess the propriety of entering an arbitration agreement after the commencement of the litigation:

- Whether arbitration is aimed at potential members of a class action lawsuit.[77]
- Whether the arbitration clause potentially exploit defendant's ongoing relationship with absent class members.[78]

[76] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1062 (W.D. Wash. 2019) ("Many courts have found that a defendant's attempt to foist a new arbitration provision on putative class members is an improper communication.") (citing cases); *Balasanyan v. Nordstrom, Inc.*, 2012 WL 760566, at *4 (S.D. Cal. Mar. 8, 2012) ("[B]ecause Nordstrom's communication constituted an improper attempt to alter the pre-existing arbitration agreement with putative class members during the litigation, this court invalidates the. . . agreement as to putative class members").

[77] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1059 (W.D. Wash. 2019) (ordering corrective communication where defendant imposed an arbitration clause "expressly directed at this lawsuit"); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *5 (C.D. Cal. April 6, 2018) (finding defendant's arbitration clause to be coercive where, among other things, it was disseminated "during the pendency of this class action, and after the Court denied [defendant's] motion to compel arbitration"); *Jimenez v. Menzies Aviation, Inc.*, 2015 U.S. Dist. LEXIS 108223, at *15 (N.D. Cal. Aug. 17, 2015) ("Courts routinely exercise their discretion to invalidate or refuse to enforce arbitration agreements implemented while a putative class action is pending if the agreement may interfere with members' rights.").

[78] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1062 (W.D. Wash. 2019) (finding defendant virtual casino's arbitration clause coercive given the "addictive nature" of defendant's games and "the fact that many players have already purchased chips that can only be accessed by agreeing to the terms"); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *6 (C.D. Cal. April 6, 2018) (finding an arbitration clause to be coercive where defendant online audio and podcast provider "asked putative class members to give up their ability to participate in the pending action (or any class action for that matter) in exchange for continued use of the [defendant's] service"); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 253 (S.D.N.Y. 2005) ("If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.") (arbitration clause imposed by defendant banks on absent class members was improper because absent class members were reliant on banks for access to credit).

• Whether arbitration is mandatory or optional[79] and, if optional, whether it is clear how an absent class member can opt out of arbitration.

• Whether the communication about arbitration provides sufficient information about the pending class action lawsuit to permit the absent class member to make an informed choice,[80] and, if so, whether that information is provided in clear and easily understood language.[81]

These factors help to determine whether absent class members may be induced to forfeit their rights in contravention of their interests without sufficient information.[82]

Impact on absent class members' participation in the lawsuit: settlement offers. While settlements are typically encouraged, settlements "cannot come at the expense of the class action

[79] *McKee v. Audible, Inc.*, 2018 WL 2422582, at *7 (C.D. Cal. April 6, 2018) (defendant's arbitration clause was deemed to be "even more coercive" than other arbitration clauses imposed on absent class members because "no opt outs were permitted at all"); *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *3 (N.D. Cal. May 1, 2014) (requiring defendant to "allow reasonable means for opting out of the arbitration provision (thereby allowing [absent class members] to participate in the suit"); *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1063 (W.D. Wash. 2019) (finding that the coercive nature of defendant's arbitration clause was not mitigated by an opt-out provision where, among other things, the agreeing to the arbitration provision was labeled as "mandatory").

[80] *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1059, 1063 (W.D. Wash. 2019) (ordering a corrective communication where defendant's newly imposed arbitration clause mentioned the pending lawsuits but did not provide information about "the current status of these cases, the type of relief being sought, the Court's previous decisions about arbitration…, or how to contact plaintiffs' counsel"); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *6 (C.D. Cal. April 6, 2018) (citing defendant's failure to provide notice of the pending action as a reason for finding defendant's arbitration clause coercive).

[81] *Id.* at 1063 (ordering a corrective communication where the terms of the arbitration clause and information about the pending lawsuits were "written in dense language, rather than in language designed for laypersons" and finding that "this is not enough to explain the stakes" of agreeing to the arbitration clause).

[82] *Id.* at 1062 ("[C]ourts focus on the potential to mislead and whether putative class members are at risk of forfeiting their rights without really knowing what they are."); *id.* at 1063 (finding defendant's arbitration clause was "clearly intended to steer putative class members away from participating in these cases").

mechanism itself to the detriment of putative class members."[83] Courts impose safeguards because settlements can affect absent class members' interests and participation in the lawsuit and can undermine class action litigation. Courts require communications from defense counsel to absent class members to include sufficient information for absent class members to evaluate the settlement offers.[84] Courts also require communications to set forth how the settlement offer was calculated and how that calculation compares to plaintiffs' alleged damages.[85] Courts generally require that settlement offers provide enough time for absent class members to assess the settlement and to consult proposed class counsel or their own counsel.[86]

Remedies. Courts have developed various remedies to address communications from defense counsel to absent class members that harm absent class members, undermine the integrity of the class proceedings, or mislead or coerce. They include forward-looking

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[83] *Keystone Tobacco Co. v. United States Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002). *See also Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *1 (N.D. Cal. July 19, 2019) ("[S]ettlements cannot come at the expense of the class action mechanism itself."). *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *2 (N.D. Cal. July 8, 2010) ("Settlements are to be encouraged. Settlements, however, cannot come at the expense of the class action mechanism itself to the detriment of putative class members.") (citation omitted).

[84] *Jubinville v. Hills' Pet Nutrition, Inc.*, 2019 WL 1584679, at *7 (D.R.I. Apr. 12, 2019) ("It is 'patently misleading' to 'induce putative class members into releasing claims without knowledge of the possibility of recovery through the current litigation; it also does not afford putative class members a meaningful chance to evaluate the claims and their likelihood of success with counsel.'") (quoting *Salmon v. Carrizo (Marcellus) LLC*, (2018 WL 3615989, at *3 (M.D. Pa. July 27, 2018)); *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *4 (N.D. Cal. July 8, 2010) ("[T]he putative class must have been given the necessary information to choose whether to accept the settlement checks."); *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *1 (N.D. Cal. July 19, 2019) (finding defendant's settlement offer to absent class members was coercive where "it is made without any indication of the strength or extent of plaintiffs' claims).

[85] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *4 (N.D. Cal. July 8, 2010) (finding that defendant's settlement offer should have explained the underlying calculation and "how closely the new calculations aligned with plaintiffs' allegations).

[86] *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *4 (N.D. Cal. July 19, 2019) (ordering defendant to provide at least 14 days for absent class members to consider a proposed settlement and release, including "to afford them ample time to contact Plaintiffs' counsel").

approaches, such as prohibiting certain future communications with absent class members, and remedial measures, including corrective communications and invalidation of opt-outs, settlements, or arbitration agreements. Courts tailor relief to specific factual situations, but the discussion below provides a broad overview of remedies that they have implemented.

Remedies: restrictions on future communications. Forward-looking remedies include blanket prohibitions on defense counsel communications with absent class members concerning litigation[87] or restrictions on the timing of such communications.[88] Courts sometimes require advance approval of future communications with absent class members.[89] Courts may also provide direction on the tenor and content of future communications with absent class members.[90] Additionally, courts may require ongoing disclosures concerning the communications.[91]

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[87] *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 467 (D. Md. 2014) (granting plaintiffs' motion for a protective order prohibiting defendant from communicating with absent class members about the pending lawsuit); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994) (prohibiting defendant's communication with absent class members concerning the lawsuit where "[i]t is difficult to conceive of any advice from [defendant] regarding the lawsuit that is not rife with the potential for confusion and abuse given [defendant's] interest in the lawsuit").

[88] *Marino v. CACafe, Inc.*, 2017 WL 1540717, at *1 (N.D. Cal. April 28, 2017) ("The Court also finds it appropriate to order [] Defendants to cease communications with absent class members to obtain releases of the claims at issue in this litigation until this Court has ruled on the motion for conditional certification of the collective action.").

[89] *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *1 (N.D. Cal. July 19, 2019) (ordering that defendant may not communicate with absent class members without first obtaining written permission from the court); *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) ("[T]he parties shall seek leave to contact putative class members for the purpose of supporting or opposing class certification. In applying for leave, the parties should detail their intended conversation or written communications with potential plaintiffs.").

[90] *See, e.g., Dial Corp. v. News Corp.*, 2015 WL 9256930, at *1 (S.D.N.Y. Nov. 16, 2015) (requiring defense counsel to provide absent class member corporations with a copy of the complaint and court order prior to initiating settlement discussions).

[91] *Id.* (requiring defendant to alert class counsel to any settlement discussions with absent class members fourteen days in advance); *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 564 (S.D. Fla.

Remedies: remedial measures for past communications. If a court learns that defense counsel has communicated with absent class members without its approval, it may require defense counsel to produce copies of those communications,[92] restrict future communications, nullify any agreements entered into between defense counsel and absent class members, or authorize plaintiffs' counsel to conduct its own communications with absent class members.[93] To remediate defense counsel's improper communications with absent class members, courts have ordered dissemination of corrective, court-approved communications, including at defendant's expense.[94] Courts have also nullified opt-out elections,[95] settlements,[96] and arbitration

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2008) (requiring defendant to disclose communications with absent class members to plaintiffs' counsel within 24 hours of the communication being made).

[92] *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 565 (S.D. Fla. 2008) (requiring defendant to produce prior communications sent to absent class members).

[93] *Camp v. Alexander*, 300 F.R.D. 617, 625-26 (N.D. Cal. 2014) (invalidating opt-out declarations obtained by defendant and ordering that a corrective notice be issued to potential members of a collective action); *Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 518 (N.D. Cal. 2010) (same).

[94] *O'Connor v. Uber Technologies, Inc.*, 2014 WL 1760314, at *7 (N.D. Cal. May 1, 2014) ("Courts may require corrective notices to remedy improper communications already made."); *Jubinville v. Hills' Pet Nutrition, Inc.*, 2019 WL 1584679, at *11 (D.R.I. Apr. 12, 2019) (requiring defendant to send a corrective communication); *Kater v. Churchill Downs, Inc.*, 423 F. Supp. 1055, 1064 (W.D. Wash. 2019); *Marino v. CACafe, Inc.*, 2017 WL 1540717, at *3 (N.D. Cal. April 28, 2017) (where defendant obtained releases from absent class members in a misleading and coercive manner, court drafted a corrective notice to be sent to absent class members at the expense of defendant); *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *1 (N.D. Cal. July 19, 2019) ("The Court ordered Defendant to transmit a statement to [absent class members] informing them of their right to speak with Plaintiffs' counsel and to join the case free from retaliation."); *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 469 (D. Md. 2014) ("The corrective notice is to inform those who signed opt-out forms that they are still a party to the litigation and instruct them to consult with their counsel if they have questions regarding this litigation…") (ordering the notice to be sent at defendant's expense).

[95] *See also Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *2 (D. Md. June 10, 2013) (striking affidavits obtained by defense counsel from absent class members that would be used to oppose class certification); *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 466 (D. Md. 2014) (invalidating opt-outs where evidence suggested defendant engaged in coercive tactics)

[96] *Marino v. CACafe, Inc.*, 2017 WL 1540717, at *3 (N.D. Cal. April 28, 2017) (invalidating settlement releases obtained through defendant's coercive and misleading communications with

agreements.[97] Absent class members who signed such agreements that were later nullified may be included in a class for purposes of assessing numerosity.[98]

Best practices for defense counsel communicating with absent class members before class certification. A survey of the relevant cases concerning defense counsel's communications with absent class members suggests best practices:

- Communicate in writing with absent class members.[99]
- Identify who you are and whom you represent at the outset of the communication.[100]

absent class members and prohibiting defendant from seeking reimbursement of settlement amount paid to absent class members but noting that defendant may be entitled to an offset at a later date); *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *6 (N.D. Cal. July 8, 2010) (invalidating settlement releases where defendant "omitted material information and misled the putative plaintiff class").

[97] *McKee v. Audible, Inc.*, 2018 WL 2422582, at *8 (C.D. Cal. April 6, 2018) (holding that defendant's arbitration agreements were "null and void… to the extent that it would lmit a class member's participation or recover in this action").

[98] *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *4 (N.D. Cal. July 19, 2019) (including absent class members who signed a coercive release for purposes of establishing numerosity).

[99] *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("In-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking…") (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 447, 457 (1978)).*Camp v. Alexander*, 300 F.R.D. 617, 623 (N.D. Cal. 2014) (describing instances where defendants engaged in "coercive in-person meetings" with potential members of a collective action as "egregious behavior"); *Mevorah v. Wells Fargo Home Mortgage, Inc.*, 2005 WL 4813532, at *4-5 (N.D. Cal. Nov. 17, 2005) (requiring corrective notice and other measures where defense counsel contacted potential class members via telephone).

[100] *See Bobryk v. Durand Glass Mfg. Co., Inc.*, 2013 WL 5574504, at *5 (D.N.J. Oct. 9, 2013) (defense counsel's communications with absent class members were not coercive where, among other things, defense counsel clearly identified themselves and their role in the lawsuit).

- Acknowledge that absent class members may already have representation and advise that they may consult with an attorney concerning the subject of the communication.[101]
- Explain that communicating with defense counsel is voluntary and that the absent class member will not suffer any adverse consequences from declining to engage in communications with defense counsel.[102]
    - Where the communication is occurring between a defendant-employer and absent class members-worker, make clear that absent class members-workers will not face retaliation for their participation in the lawsuit.[103] Conversely, any suggestion that participating in the action will have adverse consequences on employment may be deemed coercive.[104]

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[101] *Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *1 (D. Md. June 10, 2013) (criticizing defense counsel's solicitation of affidavits to oppose class certification where, among other things, defense counsel did not appear to advise absent class members "they could consult with a lawyer of their choosing").

[102] *See Law Offices of Leonard I. Desser, P.C. v. Shamrock Communications, Inc.*, 2013 WL 2552141, at *1 (D. Md. June 10, 2013) (criticizing defense counsel's solicitation of affidavits to oppose class certification where, among other things, defense failed to demonstrate it "explained to the customers that their provision of affidavits was completely voluntary and would not affect their business relationship with defendant").

[103] *Mitchell v. CoreLogic, Inc.*, 2019 WL 7171595, at *1 (N.D. Cal. July 19, 2019) ("The Court ordered Defendant to transmit a statement to [absent class members] informing them of their right to speak with Plaintiffs' counsel and to join the case free from retaliation."); *Bobryk v. Durand Glass Mfg. Co., Inc.*, 2013 WL 5574504, at *5 (D.N.J. Oct. 9, 2013) (defendant/employer's efforts to obtain declarations from absent class members/employees were not coercive where, among other things, the defense counsel explained that the absent class members/employees would not face retaliation and their responses would not be shared with managers). *See also Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 679 (N.D. Ga. 1999) (permitting the defendant/employer to state that it would be unlawful for the defendant/employer to retaliate against employees who chose to participate in the case in all communications with absent class members/employees regarding the litigation).

[104] *See Camp v. Alexander*, 300 F.R.D. 617, 623-24 (N.D. Cal. 2014) (finding "problematic" a communication from a defendant employer that "contains multiple predictions that the lawsuit, if

- Include the operative complaint and contact information for plaintiffs' counsel.[105]
- Summarize the current status of the litigation in a fair and objective manner.[106] Defense counsel would also be wise to highlight any material rulings in the case.[107] Courts generally treat the availability of information about litigation in the public domain as an inadequate substitute for providing information in the written communication to absent class members.[108]

2. After Class Certification and Before the Opt-Out Deadline

The majority position is that an attorney-client relationship forms between class counsel and absent class members as soon as a class is certified.[109] According to that view, after the

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successful, will cause the practice to close with the obvious consequence that employees would lose their jobs").

[105] *See Jubinville v. Hills' Pet Nutrition, Inc.*, 2019 WL 1584679, at *8 (D.R.I. Apr. 12, 2019) (requiring a corrective communication where the defendant's communication to absent class members did not mention the existence of the pending class action or that they have the ability to consult with an attorney); *Camp v. Alexander*, 300 F.R.D. 617, 624 (N.D. Cal. 2014) (invalidating opt-outs where, among other things, defendant's communication with absent class members had "no explanation of Plaintiffs' claims, copy of the complaint, or contact information for Plaintiffs' counsel"); *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *2 (N.D. Cal. July 8, 2010) (invalidating releases where defendant's letter "did not include a copy of the complaint, contact information for plaintiffs' counsel, or information about the current status of the case").

[106] *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("[I]t is critical that the class receive accurate and impartial information regarding the status, purposes, and effects of the class action.").

[107] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *4 (N.D. Cal. July 8, 2010) (invalidating releases where, among other things, defendant's written communication did not "include the important statement that the court of appeals had already vetted and approved the theory of the case, an important factor in examining the strength of the claim").

[108] *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *5 (N.D. Cal. July 8, 2010) (availability of case documents "though an online search" was not sufficient to overcome defendant's omission of material information in a settlement offer to absent class members). *See also Marino v. CACafe, Inc.*, 2017 WL 1540717, at *3 (N.D. Cal. April 28, 2017) ("Evidence that putative class members may have learned about the lawsuit in other ways does not mitigate the misleading nature of this communication.").

[109] *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985) ("At a minimum, class counsel represents all class members as soon as a class is certified."). *See also*

issuance of the class certification order, defense counsel must treat absent class members as if they are represented parties under applicable ethical rules and direct any communications to class counsel.[110] A minority of courts hold that the attorney-client relationship between class counsel and absent class members does not form until after expiration of the opt-out period.[111] The

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Restatement (Third) of the Law Governing Lawyers § 99 cmt, 1 (2000) ("[A]ccording to the majority of decisions, once the proceeding has been certified as a class action the members of the class are considered clients of the lawyer for the class."); *see also McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("A number of courts have held that this [attorney-client] relationship arises once the class has been certified and not only at the end of the opt-out phase.") (collecting cases).

[110] *Dial Corp. v. News Corp.*, 2015 WL 9256930, at *1 (S.D.N.Y. Nov. 16, 2015) ("Once a class has been certified, the rules governing communications apply as though each member is a client of class counsel….") (quoting Manual for Complex Litigation § 21.33 (2004)). *See also Gortat v. Capala Bros., Inc.*, No. 07-cv-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("[C]lass certification gives rise to an attorney-client relationship between potential class members and class counsel .... Therefore, upon certification, defense counsel is bound by New York Rule of Professional Conduct 4.2(a), which provides that 'a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.'") (citation omitted); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (holding that, during the opt-out period, defense counsel must treat absent class members as if they were represented by class counsel and refrain from communications with them in accordance with applicable rules of professional conduct); William B. Rubenstein et al., Newberg on Class Actions § 9:9 (5th ed. 2013) ("[T] the certification decision radically restricts the defendant's opportunities to so communicate for a simple reason: following certification, class counsel and absent class members have a formal, if unique, attorney-client relationship. Absent class members are therefore 'represented parties,' and ethics rules prohibit opposing counsel from contacting them directly. Defense counsel must therefore communicate with the opposing class members through class counsel after this point.") (footnotes omitted); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.33 (4th ed. 2014) ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel .... Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation. Communications with class members in the ordinary course of business, unrelated to the litigation, remain permitted.").

[111] *See, e.g., Gortat v. Capala Bros., Inc.*, 2010 WL 1879922, at *5 (E.D.N.Y. May 10, 2010) ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); American Bar Association, ABA Formal Op. 07-445 (opining that the attorney-client relationship does not begin until after expiration of the opt-out period).

majority position seems better suited to protect the interests of absent class members, shield them from misleading or coercive communications, and protect the integrity of the class action process.

First, after the class is certified, the stakes are heightened for defendant and defense counsel. Given the aggregate nature of class claims, defendants may face significant liability.[112] Meanwhile, the benefits of the litigation for absent class members are more tangible after class certification. Thus, after a court certifies a class and before the opt-out deadline, defense counsel's interests may be particularly misaligned with the interests of absent class members.

Second, during the opt-out period, the class notice functions as the primary method of communication with absent class members.[113] Rule 23(c)(2) ensures that the class notice is clear and concise and states in easily understood language the nature of the claims, the class definition, how an absent class member may exclude himself from the class, and the binding effect of proceeding as a member of the class. Permitting defense counsel to communicate with absent class members may dilute the impact of the class notice and confuse absent class members who receive multiple communications.

Regardless of whether the attorney-client relationship forms before or after the expiration of the opt-out period, courts generally bar defendants and their counsel from influencing a class

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[112] *Kleiner v. First Nat. Bank of Altanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("When confronted with claims pressed by a plaintiff class, it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests.") (holding that the district court "had ample discretion" to prohibit defendant's solicitation of exclusion requests); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) ("[I]t is beyond cavil that it is in defendant's interest for class members to elect to remove themselves from the action.").

[113] *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) ("It is essential the class members' decision to participate or to withdraw be made on the basis of independent analysis of its own self-interest…The mechanism selected for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format.").

member's decision whether to opt out of a class.[114] Where a defendant does improperly attempt to encourage absent class members to opt out, courts may void improperly obtained opt-outs, and require a corrective notice giving absent class members a second opportunity to assess whether to opt out. The second notice may be sent at the expense of defendant.[115] Monetary sanctions may be appropriate in egregious cases.[116]

3. After the Opt-Out Deadline

After class certification and expiration of the opt-out deadline, there is a consensus that class counsel represent the absent class members. Defense counsel ability to communicate with absent class members is then subject to the no contact rule. To the extent that defense counsel seeks to communicate with absent class members about the class action, those communications must be routed through class counsel.[117]

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[114] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.12 ("Defendants and their counsel. . . may not. . . attempt to influence the decision about whether to request exclusion from a class."); *Newberg* § 8:42 (4th ed. 2012) ("A defendant may be enjoined from communicating with class members where the purpose of the communication is to encourage exclusion from the suit or to discourage the filing of proofs of claim."); *Tedesco,* 629 F. Supp. at 1484 (accord).

[115] *Romano v. SLS Residential Inc.*, 253 F.R.D. 292, 299-300 (S.D.N.Y. 2008) (ordering that all opt-outs were voided and that a corrective notice be sent to absent class members at defendant's expense and that absent class members receive a second opportunity to determine whether to opt out) (observing that the second notice and opt-out opportunity may "allow for some of the corrosive effects of the defendant's behavior to dissipate"); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (restoring opt-outs to the class and providing a new opportunity to opt-out where defendant improperly solicited absent class members to opt-out after the court's grant of class certification).

[116] *Romano v. SLS Residential Inc.*, 253 F.R.D. 292, 299-300 (S.D.N.Y. 2008) (finding that defendant's solicitation of opt-outs after the class certification ruling warranted imposition of a $35,000 sanction where defendant's "abusive practices undermine[d] the purposes of class action lawsuits and violate[d] the integrity of the judicial process").

[117] *Dial Corp. v. News Corp.*, 2015 WL 9256930, at *1 (S.D.N.Y. Nov. 16, 2015) ("Once a class has been certified, the rules governing communications apply as though each member is a client of class counsel… .") (quoting Manual for Complex Litigation § 21.33 (2004)). *See also Gortat v. Capala Bros., Inc.*, No. 07-cv-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("[C]lass certification gives rise to an attorney-client relationship between potential class members and class counsel. . . . Therefore, upon certification, defense counsel is bound by New

B. A Note on Communications with Named Plaintiffs

Unlike absent class members, named plaintiffs are represented parties from the inception of the litigation (if not earlier), and, under the ethical rules, defense counsel may not communicate directly with them concerning the lawsuit.[118]

Defense counsel's attempts to communicate with named plaintiffs often arise in the context of a settlement offer. Of note, at least one court has held that defense counsel cannot make a settlement offer to the named class members because settlement could undermine the purposes of Rule 23,[119] destroying the efficiencies from class treatment,[120] risking successive, duplicative lawsuits,[121] and unfairly casting doubt on the named plaintiff's dedication to the

York Rule of Professional Conduct 4.2(a), which provides that 'a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.'") (citation omitted); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (holding that, during the opt-out period, defense counsel must treat absent class members as if they were represented by class counsel and refrain from communications with them in accordance with applicable rules of professional conduct).

[118] *See* Model Rules of Professional Conduct 4.2 ("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.").

[119] *Boles v. Moss Codilis, LLP*, 2011 WL 4345289, at *1 (W.D. Tex. Sept. 15, 2011) (observing that an offer to settle the named plaintiff's claim would "require dismissal of the case" and finding that "such an outcome would seriously undermine the purpose of Rule 23").

[120] *Id.* (noting that a settlement offer to the named plaintiff could negate the benefits a class or collective action, including the ability to pool litigation costs).

[121] *Id.* ("'[A] rule allowing plaintiffs to be 'picked off' at an early stage in a putative class action may waste judicial resources by 'stimulating successive suits brought by others claiming aggrievement.'") (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004)).

class.[122] Other courts, however, do permit settlement discussions between defendants and named plaintiffs, although defense counsel have to communicate through plaintiffs' counsel.[123]

IV. Plaintiffs' Counsel's Communications with Absent Class Members

Courts are most likely to constrain communications between plaintiffs' counsel and absent class members before class certification. True, courts tend to recognize that plaintiffs' counsel have a fiduciary duty to absent class members.[124] However, as noted above, they generally do not recognize an attorney-client relationship between plaintiffs' counsel and absent class members until class certification.[125] Still, plaintiffs' counsel's interests are typically aligned with the interests of absent class members—building a case against the defendant or defendants for alleged harms. Defense counsel, in contrast, have interests antagonistic to those of the absent class members. Courts thus tend to be less wary of communications between plaintiffs' counsel and absent class members than between defense counsel and absent class members.

As noted above, once a class is certified—and, especially, once the opt-out period ends—courts generally treat class counsel as representing absent class members. As a result, class counsel has far from latitude in communicating with absent class members than defense counsel. Still, courts have a duty to oversee communications with absent class members that does not generally exist outside of the class context. As a result, class counsel has less latitude in

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[122] *Id.* at *1 ("A class representative stands in a special relationship to members of the class, and there should be nothing that would cast doubt on the representative's ability to protect the interests of the class.") (invalidating a Rule 68 offer of settlement to the named plaintiff).

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[124] *In re Avon Secs. Litig.*, 1998 WL 834366, at *10, n.5 (S.D.N.Y. Nov. 30, 1998) ("Even before a class has been certified, counsel for the putative class owes a fiduciary duty to the class.").

[125] *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000) ("While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class.").

communicating with absent class members than do individual attorneys. For example, courts assess and approve the notice to absent class members once a class is certified under Federal Rule of Civil Procedure 23(c)(2)(B). Some constraints thus remain on class counsel's communications with their absent class member clients that may not exist in individual litigation, at least when the communications are *en masse*.

A. Before Class Certification

Before class certification, plaintiffs' counsel is permitted to speak with absent class members who affirmatively contact them concerning the litigation.[126] Plaintiffs' counsel may also have legitimate reasons for initiating communications with absent class members, including to inform them of the lawsuit and to advise them about their legal rights.[127] Plaintiffs' counsel also may want to obtain information relevant to the case from absent class members. Courts recognize that absent class members may have relevant information supporting plaintiffs' claims of liability or supporting class treatment.[128] As discussed above, any limitation on plaintiffs'

[126] *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 677 (N.D. Ga. 1999) ("Plaintiffs and their counsel are entitled to speak freely about this lawsuit with any potential class member that contacts them."); *A.R. ex rel. Root v. Dudek*, 2013 WL 5278668, at *11 (S.D. Fla. Sept. 19, 2013) (same). *See also Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *4 (E.D. Cal. Jan. 20, 2017) (declining to limit communications with absent class members where a potential class member created a Facebook group concerning the litigation and invited plaintiff's counsel to participate in it).

[127] *See Gulf Oil*, 452 U.S. 89, 101 (1981) (finding the district court abused its discretion where it prohibited communications between plaintiffs' counsel and absent class members before certification of a class, including because the district court's order interfered with plaintiffs' counsel's efforts to "inform potential class members of the existence of the lawsuit").

[128] *See Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 677 (N.D. Ga. 1999) (holding the plaintiffs' counsel may communicate with absent class members to "determine whether that potential class member possesses any evidence relating to the Complaint allegations" and to "prepare affidavits or other testimony in support of class certification or the merits of the case"); *A.R. ex rel. Root v. Dudek*, 2013 WL 5278668, at *11 (S.D. Fla. Sept. 19, 2013) (holding that plaintiffs' efforts to obtain declarations from absent class members to support class certification did not threaten the proper functioning of the litigation, citing safeguards to ensure that absent class members

counsel's ability to communicate with absent class members must weigh these legitimate interests and be based on a clear record of specific findings.[129] Courts review plaintiffs' counsel's planned or past communications with absent class members to ensure they are not misleading or coercive, or do not undermine the integrity of the class action litigation.[130]

Before class certification, plaintiffs' counsel may solicit absent class members if they do so in compliance with all applicable ethics rules.[131] Indeed, plaintiffs' counsel's communications with absent class members concerning participation in the lawsuit as class representatives may benefit the lawsuit and the interests of the proposed class as a whole.[132] To the extent that

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tailored the draft declarations to reflect their own experiences and language that made clear that providing the declaration was voluntary); *Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *5 (E.D. Cal. Jan. 20, 2017) (holding that plaintiff's counsel had a legitimate interesting in "uncovering information (unflattering or otherwise) about potential witnesses for [defendant]" and that such efforts were "within the realm of reasonable discovery under Rule 26").

[129] *Swelnis v. Universal Fidelity L.P.*, 2014 WL 1571323, at *2 (N.D. Ind. Apr. 17, 2014) ("And any limitation on communication between a plaintiff and a potential class member must be 'based on a clear record and specific findings that reflect a weighing of the need for a limitations and the potential interference with the rights of the parties.'") (quoting *Gulf Oil*, 452 U.S. 89, 1010 (1981)).

[130] *Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *5 (E.D. Cal. Jan. 20, 2017) ("While the Court acknowledges that Plaintiff's counsel's comments may consist of insinuations that cast Defendants and the supporting declarants in a negative light, those comments do not mislead employees about their rights as potential class members.").

[131] *Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 316 (N.D. Ohio 2009) ("Courts generally hold that there is nothing wrong with soliciting class members by advertisement."); *see also Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 677 (N.D. Ga. 1999) (permitting plaintiffs' counsel to "discuss with potential class members the possibility of representation by Plaintiffs' counsel and of providing legal services to them"); *Greinstein v. Granite Servs. Int'l, Inc.*, 2020 WL 10934898, at *3 (N.D. Tex. Aug. 25, 2020) (denying defendants' emergency motion to enjoin solicitations by plaintiffs counsel targeting defendant's employees via LinkedIn where the solicitations were "not misleading, coercive, or an improper attempt to undermine the collective action"). *But see Swelnis v. Universal Fidelity L.P.*, 2014 WL 1571323, at *2 (N.D. Ind. Apr. 17, 2014) (mentioning concerns about plaintiffs' counsel using discovery of contact information for absent class members as a "tool to identify potential clients").

[132] *Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 316 (N.D. Ohio 2009) ("[W]he a replacement class representative is required, it is appropriate, and perhaps even necessary to protect the interests of the whole class, for putative class counsel to make reasonable efforts to recruit a class representative"); *In re Avon Secs. Litig.*, 1998 WL 834366, at *10 (S.D.N.Y. Nov.

plaintiffs' counsel is using information obtained in discovery to solicit absent class members, they must comply with any operative protective order.[133]

Notably, plaintiffs' counsel's communications with absent class members may be protected by attorney-client privilege, even in the absence of a formal attorney-client relationship.[134] Whether communications are protected by the attorney-client privilege is a fact-specific inquiry.[135] The privilege attaches if an absent class member has a reasonable belief that he or she is communicating with an attorney for the purpose of obtaining representation or legal advice.[136] To make that determination, courts assess whether the communication states, either

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30, 1998) (rejecting defendant's claim that class representatives were improperly solicited by plaintiffs' counsel and observing "in a situation such as this involving the withdrawal of the sole class representative after a motion for class certification has been filed, solicitation of parties to intervene as substitute class representatives may be entirely appropriate, if not required as part of class counsel's fiduciary duty to the class").

[133] *Kaufman v. Am. Family Mutual Ins. Co.*,601 F.3d 1088, 1093 (10th Cir. 2010) (holding that the district court did not abuse its discretion in concluding that plaintiffs' counsel use of defendant's information produced in discovery to solicit clients violated the protective order); *In re Pella Corp. Architect & Designer Series Windows Marketing, Sales Practices & Product Liability Litig.*, 2014 WL 12622421, at *3 (D.S.C. Nov. 20, 2014) ("[P]laintiffs have not shown that they have any right to use confidential information produced in discovery for the purposes of solicitation.")

[134] *Vodak v. City of Chicago*, 2004 WL 783051, at *2 (N.D. Ill. Jan. 6, 2004) ("The Seventh Circuit has held that the existence of an attorney-client relationship is not dependent upon the payment of fees or upon the execution of a formal contract…Rather, the professional relationship for purposes of the privilege for attorney-client communications hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.") (quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978)).

[135] *Gates v. Rohm & Haas Co.*, 2006 WL 3420591, at *3 (E.D. Pa. Nov. 22, 2006) (observing that the decisions concerning application of attorney-client privilege to plaintiffs' counsel's pre-certification communications with absent class members are "very fact—and circumstance-specifc").

[136] *Gates v. Rohm & Haas Co.*, 2006 WL 3420591, at *3 (E.D. Pa. Nov. 22, 2006) ("[T]he dispositive factor typically is whether the putative class members were seeking legal advice or representation at the time they filled out the questionnaires."); *Vodak v. City of Chicago*, 2004 WL 783051, at *2 (N.D. Ill. Jan. 6, 2004) (finding attorney-client privilege precluded production of questionnaire responses where "the persons who completed the form questionnaires reasonably believed that they were consulting counsel in their capacity as lawyers and they

directly or indirectly, that proposed class counsel seeks to establish an attorney-client relationship.[137] Courts also consider whether the communication from proposed class counsel indicates that responses from absent class members will be kept confidential.[138] On the other hand, communications to both absent class members and individuals who are not be part of the proposed class are not privileged,[139] consistent with the general rule that there is no privilege for communications unless they are made confidentially.

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completed the questionnaire for the purpose of requesting legal representation"); *Schiller v. City of New York*, 245 F.R.D. 112, 116 (S.D.N.Y. 2007) (no attorney-client privilege existed where plaintiff offered no evidence that "any person who completed a questionnaire believed at that time that he or she was seeking representation").

[137] *Compare Taylor v. Waddell & Reed, Inc.*, 2011 WL 1979486, at *2 (S.D. Cal. May 20, 2011) (finding no attorney-client privilege existed where proposed class counsel's communications with absent class members did "not state directly, or even indirectly, that plaintiffs' attorneys are seeking to establish an attorney-client relationship or looking for clients") *with Barton v. U.S. Dist. Court for the Central District of California*, 410 F.3d 1104, 1110 (9th Cir. 2005) ("In all likelihood, a very high proportion of questionnaire submitters completed the questionnaire with a view to retention of the law firm, and thus submitted them in the course of an attorney-client relationship.") (holding that, where plaintiffs submitted questionnaires on a law firm's website about their medical history relevant to a mass tort case, the questionnaire responses were protected by attorney-client privilege). *See also Hudson v. General Dynamics Corp.*, 186 F.R.D. 271, 276-77 (D. Conn. 1999) (questionnaire responses completed by prospective clients were privileged, but questionnaires completed for the purpose of serving as witness statements were not privileged attorney-client communications).

[138] *Vodak v. City of Chicago*, 2004 WL 783051, at *2 (N.D. Ill. Jan. 6, 2004) (attorney-client privilege applied to questionnaires completed by absent class members where, among other things, the questionnaire indicated that responsive information would be "held in strict confidence and used only by attorneys providing legal representation"); *Taylor v. Waddell & Reed, Inc.*, 2011 WL 1979486, at *2 (S.D. Cal. May 20, 2011) (finding that questionnaire responses submitted by absent class members were not protected by attorney-client privilege where, among other things, "the letter does not indicate or promise that recipients' responses will be kept confidential"). *But see Barton v. U.S. Dist. Court for the Central District of California*, 410 F.3d 1104, 1110 (9th Cir. 2005) (finding questionnaires submitted by absent class members to proposed class counsel were protected by attorney-client privilege even where the nothing on the face of the questionnaire indicated that the responses would be kept confidential).

[139] *See Finder v. Leprino Foods Co.*, 2017 WL 1272350, at *3 (E.D. Cal. Jan. 20, 2017) ("Plaintiff [counsel] is cautioned that this communications and comments made generally to this Facebook group may waive future claims to attorney-client privilege. The voluntary and public nature of these communications to individuals that may ultimately have no connection to this lawsuit may destroy the privilege.").

B. After Class Certification and Before the Opt-Out Deadline

After certification but during the opt-out period, the class notice functions as the primary method of communication with absent class members.[140] However, the class notice typically provides contact information for class counsel, so that absent class members may ask questions about the litigation.[141] Class counsel must be able to communicate freely with absent class members concerning the litigation, including informing absent class members of their rights and options.

As discussed above, the majority position is that an attorney-client relationship forms between class counsel and absent class members as soon as the class is certified.[142] If so, after the issuance of the class certification order, class counsel may communicate with absent class members as though they are clients of class counsel.[143] A minority of courts hold that the

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[140] *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) ("It is essential the class members' decision to participate or to withdraw be made on the basis of independent analysis of its own self-interest…The mechanism selected for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format.").

[141] *See Harris v. Vector Marketing Corp.*, 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010) (holding that plaintiff's counsel's contact information should be included in the class notice but declining to include contact information for defense counsel and observing that "[i]ncluding contact information for defense counsel in the class notice risks violation of ethical rules and inadvertent inquiries, thus engendering needless confusion").

[142] *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985) ("At a minimum, class counsel represents all class members as soon as a class is certified."). *See also* Restatement (Third) of the Law Governing Lawyers § 99 cmt, 1 (2000) ("[A]ccording to the majority of decisions, once the proceeding has been certified as a class action the members of the class are considered clients of the lawyer for the class."); *see also McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("A number of courts have held that this [attorney-client] relationship arises once the class has been certified and not only at the end of the opt-out phase.") (collecting cases).

[143] *Dial Corp. v. News Corp.*, 2015 WL 9256930, at *1 (S.D.N.Y. Nov. 16, 2015) ("Once a class has been certified, the rules governing communications apply as though each member is a client of class counsel….") (quoting Manual for Complex Litigation § 21.33 (2004)). *See also Gortat v. Capala Bros., Inc.*, No. 07-cv-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010) ("[C]lass certification gives rise to an attorney-client relationship between potential class

attorney-client relationship between class counsel and absent class members does not form until after expiration of the opt-out period.[144]

The majority view—that an attorney-client relationship forms between class counsel and absent class members when the class certification order issues—would seem best suited to protect the interests of absent class members and ensure the integrity of the class action process. After the class certification order, the "passive benefits" to absent class members become more tangible.[145] During the opt-out period, defendants face significant aggregate class damages, and have an interest in diminishing the size of the class.[146] Defense counsel may seek to encourage absent class members to opt out or to enter individual settlements that are contrary to the interests of absent class members.[147] If an attorney-client relationship forms between class

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members and class counsel. . . . Therefore, upon certification, defense counsel is bound by New York Rule of Professional Conduct 4.2(a), which provides that 'a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.'") (citation omitted); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) (holding that, during the opt-out period, defense counsel must treat absent class members as if they were represented by class counsel and refrain from communications with them in accordance with applicable rules of professional conduct).

[144] *See, e.g., Gortat v. Capala Bros., Inc.*, 2010 WL 1879922, at *5 (E.D.N.Y. May 10, 2010) ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); American Bar Association, ABA Formal Op. 07-445 (opining that the attorney-client relationship does not begin until after expiration of the opt-out period).

[145] *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552 (1974).

[146] *Kleiner v. First Nat. Bank of Altanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("When confronted with claims pressed by a plaintiff class, it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests.") (holding that the district court "had ample discretion" to prohibit defendant's solicitation of exclusion requests); *Impervious Paint Indus., Inc. v. Ashland Oil*, 580 F. Supp. 720, 723 (W.D. Ky. 1981) ("[I]t is beyond cavil that it is in defendant's interest for class members to elect to remove themselves from the action.").

[147] *See infra at* ___.

counsel and absent class members at the issuance of the class certification order, then plaintiffs' counsel can protect absent class members from such communications.

To be sure, class counsel may have a financial incentive to discourage opt outs to maximize the class recovery and, thereby, their ultimate fees. That is a countervailing consideration. Still, defendants—and defense counsel—have an incentive to minimize the recovery of individual class members and the class as a whole that class counsel do not have. Courts thus should worry more about communications with absent class members by defendants and their counsel than by class counsel.

C. After the Opt-Out Deadline

As discussed above, after the expiration of the opt-out period, if there is one, the consensus is that class counsel have an attorney-client relationship with absent class members. After class certification, class counsel may communicate with absent class members, including seeking relevant information from absent class members.[148] That is true even if there lingering disputes about the class certification process, such as challenges to the adequacy of notice.[149] If class counsel conduct communications properly—including confidentially—they should be protected by attorney-client privilege.[150]

[148] *Good v. West Virginia-American Water Co.*, 2016 WL 6404006, at *2 (S.D.W.V. Oct. 26, 2016) ("[T]here is nothing improper in class counsel's attempts to collect information regarding damages suffered by class members.").
[149] *Good v. West Virginia-American Water Co.*, 2016 WL 6404006, at *2 (S.D.W.V. Oct. 26, 2016) ("[T]he court declines to accept movants' suggestion that due to the [] pending motion challenging the adequacy of notice, class counsel should not have proceeded with their efforts to gather information from the class.").
[150] *Harlow v. Sprint Nextel Corp.*, 2012 WL 646003, at *7 (D. Kan. Feb. 28, 2012) (holding that responses to questionnaires submitted to class counsel by absent class members after class certification were protected by attorney-client privilege).

On the other hand, class counsel should not communicate directly with opt-outs who are represented by separate counsel. That would violate the no contact rule in Rule 4.2. Class counsel thus should make reasonable efforts to remove opt-outs from any class-wide communications. However, where class counsel, acting in good faith, inadvertently includes opt-outs in a class-wide communication, corrective action typically is not warranted.[151]

If the class is decertified, the attorney-client relationship between plaintiffs' counsel and absent class members ends.[152]

V. Other Attorneys' Communications with Absent Class Members

A. Before Class Certification

Courts examine whether communications from attorneys who do not represent parties in a proposed or certified class action are coercive or misleading, contrary to the interests of absent class members, or undermine the integrity of the litigation.[153] The communications from attorneys to absent class members typically take the form of a solicitation to absent class members to opt out of the class.

Courts generally do not permit defense to solicit opt-outs before class certification. That solicitation undermines the integrity of the class action process. Multiple, duplicative lawsuits

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[151] *Good v. West Virginia-American Water Co.*, 2016 WL 6404006, at *2-3 (S.D.W.V. Oct. 26, 2016) ("While class counsel's communications with class members are themselves unproblematic, their inclusion of certain opt outs in that communication was unquestionably improper. However,…the court concludes that these improper communications were made unintentionally and in spite of class counsel's good faith efforts to exclude opt outs from the address list used.").

[152] *Daniels v. The City of New York*, 138 F. Supp. 2d 562, 564-65 (S.D.N.Y. 2001) (explaining that, upon decertification, the attorney-client relationship between class counsel and absent class members would end).

[153] *In re McKesson HBOC, Inc. Secs. Litig.*, 126 F. Supp. 2d 1239, 1244 (N.D. Cal. 2000) (finding that solicitation of absent class members to opt out of a securities class action were deceptive and misleading).

brought by opt-outs can frustrate the judicial economy of the class action device.[154] Further, opting out before certification is generally unnecessary given that absent class members will have an opportunity to opt out of the class if it is certified. At class certification, absent class members will have the benefit of a court-approved notice that provides a clear explanation of the litigation and the costs and benefits of class membership.[155] Also, the statute of limitations is tolled for absent class members during the pendency of a proposed class action.[156]

B. After Class Certification

After a class is certified, non-party attorneys may have a heightened interest in representing opt-outs, given the pressure on defense counsel to potentially settle the litigation. As one district court put it: "The Supreme Court has noted the potential for 'heightened susceptibilities of nonparty class members to solicitation amounting to barratry.' That is a polite way of saying that attorneys who want to cut into the class action may try to steal away class members and then bring separate, wasteful lawsuits."[157]

Solicitations by attorneys who seek opt-out plaintiffs often do not benefit the interests of absent class members and potentially undermine the integrity of the class action process. As the court in *McWilliams* explained, "Solicitations encouraging members of a certified class to opt-

[154] *Id.* (finding that solicitation of absent class members "would needlessly multiply this litigation and severely disrupt the effectiveness of the class action device").
[155] *Id.* (finding that solicitations of absent class members prior to certification "induce class members to opt out of the class without a clear understanding of the costs and benefits of class membership").
[156] *Id.* ("[T]here is no harm caused by delaying the opt-out decision until more complete information is available. The statute of limitations for absent class members is tolled during the pendency of a putative class action.").
[157] *McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 639-40 (S.D. Miss. 2016) (issuing a protective order to address attorney solicitations of class members after class certification).

out and bring separate lawsuits risk defeating the efficiency inherent in the class action form."[158] Further, under the majority approach, soliciting absent class members to opt-out of the class violates the attorney-client relationship between class counsel and absent class members.[159]

The same rules apply in the context of settlement classes. According to the majority view, an attorney-client relationship exists between class counsel once a class is certified for settlement purposes. Communications about the litigation with absent class members should be directed to class counsel.[160] Permitting attorneys who are not class counsel to communicate directly with absent class members can frustrate the court's management of the settlement and interfere with final approval of the settlement and settlement administration.[161] Soliciting named plaintiffs is, of course, always inappropriate given their representation by plaintiffs' counsel.[162]

Courts distinguish solicitations initiated by attorneys from communications initiated by class member seeking the advice from attorneys who are not class counsel.[163] Absent class

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[158] 176 F. Supp. 3d at 641.

[159] *McWilliams*, 176 F. Supp. 3d at 642 ("Upon certification, class counsel *does* represent absent class members. That is the point of being 'class counsel.' It follows that it *is* unethical for other attorneys to communicate with class members about representation after the class has been certified.") (collecting authorities).

[160] *Jacobs v. CSAA Inter-Insurance*, 2009 WL 1201996, at *3 (N.D. Cal. May 1, 2009) ("Here, the instant class was conditionally certified for settlement purposes, and the instant class members are represented by plaintiff's counsel. The rules of ethical conduct require that communications with class members relating to asserted claims in the federal class action are transmitted through counsel for the class.").

[161] *Id.* (finding that communications to absent class members from attorneys who were not settlement class counsel "may impede the court's management of the settlement or interfere with final approval and administration of the settlement").

[162] *McWilliams*, 176 F. Supp. 3d at 640 ("We begin with the obvious. An attorney who wishes to poach members of a certified class action should probably not attempt to poach the named plaintiff and class representative.") (issuing a protective order to address attorney solicitations of class members after class certification).

[163] *In re Community Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005) ("To be sure, there is a distinction between the unilateral action of a class member who seeks the advice of outside counsel, often his or her prior counsel, and the unsolicited communications from outside counsel designed to disrupt a proposed settlement."); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.

members are free to seek out legal advice about a class action or any other legal matter. (The same distinction applies outside of the class context.)

Potential remedies for a campaign to solicit absent class members include requiring the soliciting attorneys provide a detailed recitation of solicitation activities[164] and voiding of retainer agreements.[165] A court also may require a curative notice to be sent to absent class members at the expense of the soliciting attorneys.[166]

While communications from soliciting attorneys to absent class members are generally discouraged, certain safeguards may help the communications to survive scrutiny by the court:

- Identify court-appointed lead counsel.[167]
- Make clear that the communication is an advertisement (where applicable) and was not authorized by the court; attempts to mimic court-ordered notices pursuant to Rule 23(c) are strongly disfavored.[168]
- To the extent attorneys are soliciting opt outs, disclose the costs and benefits of class membership versus opting out, including in terms of costs of litigation, the prospects for recovery, and discovery obligations.[169]

Supp. 2d 1239, 1245, n. 6 (N.D. Cal. 2000) ("The court distinguishes between solicited clients and those clients (if any) who on their own initiative retained [soliciting law firm] prior to its solicitation campaign.").

[164] *McWilliams*, 176 F. Supp. 3d at 645.

[165] *Id*.

[166] *Id.* at 645; *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1247.

[167] *In re McKesson HBOC, Inc. Secs. Litig.*, 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) (finding a solicitation of absent class members in a securities class action to be deceptive where, among other things, it did not identify court-appointed lead counsel).

[168] *Id.* at 1244 ("The solicitations were labeled as 'notices.' This concerns the court, because the word 'notice,' particularly in the class action context, has an official meaning. Attorneys have a special obligation not to disguise their advertisements as official-sounding notices…")

[169] *Id.* at 1245 (finding that solicitations of absent class members provided inadequate information concerning the costs and benefits of proceeding in a class action, including that the

- Do not impose arbitrary deadlines, particularly when asking class members to make a decision that will affect their participation in the litigation.[170]

VI. Conclusion.

The ethical rules governing lawyer conduct play an important role in regulating communications between attorneys and absent class members. Arguably, however, Rule 23 and the policies it embodies play an even more important role. Savvy attorneys should take both into account. Otherwise, they risk running afoul of the law and antagonizing the court overseeing a proposed or certified class action. We have attempted to put together a structure for distinguishing permissible from impermissible communications, as well as to set forth best practices. Our hope is to provide guidance to legal practitioners, courts, and others about how courts contend in practice with attorney communications with absent class members. The relevant law, we submit, is a synthesis of ethics and procedure. Attention to either taken in isolation is apt to mislead.

class action may be more economical or that individual plaintiffs are subject to discovery requirements).

[170] *Id.* at 1245 (finding that solicitations of absent class members were deceptive where, among other things, they "communicate a gratuitous air of urgency…by directing prospective claimants to an arbitrary deadline for submitting their attorney retention agreements").