Essays

The Ethics of Defense Counsel's Communications with Absent Class Members Before Class Certification

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Attention to how courts address the ethics of defense counsel's communications with absent class members before class certification is valuable for two primary reasons. First, it provides insight into how courts approach ethics in class actions generally. In the class action context, courts tend to pay more attention to the relevant procedural rules—particularly to Federal Rule of Civil Procedure 23—than they do to codes of professional responsibility. Relatedly, they also seek to promote the policy goals that animate Rule 23 rather than to emphasize formalistic distinctions, such as when class counsel begin to represent absent class members or whether class counsel represent individual class members, the class as a whole, or both.

Second, this area of study can improve clarity and predictability in complex cases, which frequently involve significant damages. Disputes often arise from communications between defense counsel and absent class members before certification, yet the topic has received insufficient attention. This Essay offers a framework that may aid judges, lawyers, scholars, teachers, and others as they navigate an insufficiently charted legal doctrine.

We contend that the relevant ethical rules, taken on their own, provide an incomplete picture of how courts view communications with absent class members in proposed class actions. In this Essay, following the Supreme Court's decision in Gulf Oil Co. v. Bernard*, we suggest the following approach to communications with absent class members: rather than emphasizing the existence and timing of an attorney-client relationship as governing communications with absent class members, courts should focus on protecting the rights of absent class members and the integrity of the class action process. In other words, the ethics of communications with absent class members turns more on Rule 23—and the policies it embodies—than on ethical codes.*

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TABLE OF CONTENTS

INTRODUCTION 1333
I. GENERAL FRAMEWORK: PROTECTING THE INTERESTS OF ABSENT CLASS MEMBERS AND THE INTEGRITY OF THE CLASS ACTION LITIGATION 1337
II. DEFENSE COUNSEL'S COMMUNICATIONS WITH ABSENT CLASS MEMBERS 1340
A. RELATIONSHIP TO THE LITIGATION 1343
B. MISLEADING OR COERCIVE COMMUNICATIONS 1343
1. Who Is the Recipient of the Communication? 1344
2. Timing of the Communication 1345
3. Method of Communication 1345
C. IMPACT ON ABSENT CLASS MEMBERS' PARTICIPATION IN THE LAWSUIT 1346
1. Solicitation of Opt-Outs 1347
2. Arbitration Clauses 1347
3. Settlement Offers 1349
D. REMEDIES 1350
1. Restrictions on Future Communications 1350
2. Remedial Measures for Past Communications 1351
CONCLUSION 1351

INTRODUCTION

Attention to how courts address the ethics of defense counsel's communications with absent class members before class certification is valuable for two primary reasons. First, it provides insight into how courts approach ethics in class actions generally. In the class action context, courts tend to pay more attention to the relevant procedural rules—particularly to Federal Rule of Civil Procedure 23 ("Rule 23")—than they do to codes of professional responsibility. Relatedly, they also seek to promote the policy goals that animate Rule 23 rather than to emphasize formalistic distinctions, such as when class counsel begin to represent absent class members or whether class counsel represent individual class members, the class as a whole, or both.

Second, this area of study can improve clarity and predictability in complex cases, which frequently involve significant damages. Disputes often arise from communications between defense counsel and absent class members before certification, yet the topic has received insufficient attention. This Essay offers a framework that may aid judges, lawyers, scholars, teachers, and others as they navigate an insufficiently charted legal doctrine.

A natural way to think about the ethics of communications with absent class members is in terms of rules of professional conduct. On one hand, Model Rule of Professional Conduct 4.2 and similar state ethics rules codify the "no-contact" rule. The 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. On the other hand, Model Rule 7.3 and its state equivalents limit lawyers' abilities to solicit professional employment through communications with potential clients.

If these ethical rules alone governed precertification communications between attorneys and absent class members, then the precise moment when plaintiffs' lawyers in proposed class actions are deemed to represent absent class members would become of paramount importance. Before that moment, defense counsel might be relatively free to communicate with absent class members, and plaintiffs' counsel might be significantly constrained by limits on solicitation. In contrast, once the plaintiffs' lawyers represent the absent class members, the opposite would be true.

To some extent, reliance on the ethical rules 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] There are two minority positions: one that the plaintiffs' lawyers represent absent class members as soon as litigation

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1. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 99 cmt. l (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, e.g.*, McWilliams v. Advanced Recovery Sys., Inc., 176 F. Supp. 3d 635, 642 (S.D. Miss. 2016) ("Upon certification, class counsel does represent absent class members."); 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.").

is filed,[2] and another that the plaintiffs' lawyers do not represent absent class members until the opt-out period expires.[3] These rulings matter, but they fail to tell the full story.

The reality is that Rule 23 plays an essential part in shaping the ethics of communications with absent class members. Indeed, when the Supreme Court addressed the ethics of class communications over forty years ago in *Gulf Oil Co. v. Bernard*,[4] it emphasized the policies underlying Rule 23 and barely mentioned the rules of professional responsibility.[5]

Gulf Oil involved 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 of a full release of all discrimination claims within thirty days.[7] The notices asked the employees not to discuss the offer with others, although it proposed to arrange an interview with a government representative for any confused employees.[8] About a month after the signing of the conciliation agreement, the plaintiffs' attorney filed a proposed class action on behalf of the then-present and former African American employees of the refinery as well as rejected African American applicants.[9]

The controversy arose because the defendant, Gulf Oil Co., requested a protective order preventing parties and their counsel from communicating with potential class members.[10] The trial court issued the order but later permitted Gulf to continue its mailings about the conciliation agreement and its settlement process.[11] In the end, Gulf could communicate with class members about a potential settlement, but the named plaintiffs and their attorneys could not do the same regarding class litigation.[12]

In rejecting that approach, the Supreme Court's opinion provided a framework for permissible communications with absent class members before

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*, 2010 WL 1879922, at *5 ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); Bobryk v. Durand Glass Mfg. Co., No. 12-cv-5360, 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.*

8. *Id.* at 91 n.1.

9. *Id.* at 91–92.

10. *Id.* at 93. A subsequent court order had 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 Court expressed skepticism about the adequacy of allowing communications subject to potential sanctions. *Id.* at 103 n.17.

11. *Id.* at 93–94.

12. *Id.* at 95.

class certification by relying on Rule 23 alone. 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, analyzing the general purposes of Rule 23 instead. The Court explained that "the question for decision is whether the 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 barely mentioned any ethical codes.[15]

A corollary of its holding is that the Court crafted an approach based on the policies underlying Rule 23, without addressing its compatibility with the ethical rules. The Court directed lower courts to *balance* the harm from potential abuses in class action practice against the importance of the class action device.[16] The Court did not discuss any technical requirements of the ethical rules.

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—the Court 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 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]

Also notable is that the Court did not draw any distinction between communications that occur before a class is certified and those that occur after.

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13. *Id.* at 101–02 & n.15.

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 (citing MODEL CODE OF PRO. RESP. DR 7-104 (AM. BAR ASS'N 1980)).

16. *Id.* at 99–102 ("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. . . . Because of these potential problems [with 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." (emphasis added) (footnotes omitted)).

17. *Id.* at 103–04.

18. *Id.* at 104 ("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.").

19. *Id.* at 99.

Indeed, it recognized the importance of protecting communication—whether it could promote not only the "prosecution" of a class action, but also its "formation."[20] 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.[21]

The framework for the Court's reasoning in *Gulf Oil* continues to provide valuable guidance. It is true that 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 the provisions of Rule 23 and the policies underlying them 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 of how courts view communications with absent class members in proposed class actions. In this Essay, following *Gulf Oil*, we suggest the following approach to communications with absent class members: rather than emphasizing the existence and timing of an attorney-client relationship as governing communications with absent class members, courts should focus on protecting the rights of absent class members and the integrity of the class action process.[22] In other words, the ethics of communications with absent class members turns more on Rule 23—and the policies it embodies—than on ethical codes.

In exploring these issues, this Essay focuses on the ethics of communications by defense counsel with absent class members before class certification. It does so for two reasons. First, that situation casts in stark relief the importance of Rule 23 and its policies in shaping the ethical obligations of attorneys in class actions. Second, such communications have given rise to a disproportionate share of ethical controversies, perhaps in part because a straightforward application of ethical codes can be misleading.

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20. *Id.* at 104.

21. *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 from the persons they sought to represent.").

22. *Cf., e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1203 (11th Cir. 1985) ("[T]he district court . . . [has a] duty to protect both the absent class and the integrity of the judicial process . . . ." (internal quotation marks omitted)); *In re* Sch. Asbestos Litig., 842 F.2d 671, 683 (3d Cir. 1988) ("A district court's duty and authority under Rule 23(d) [is] to protect the integrity of the class and the administration of justice generally . . . ."); Finder v. Leprino Foods Co., No. 13-cv-2059, 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.").

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

The Court explained in *American Pipe & Construction Co. v. Utah* that before class certification, absent class members are "passive beneficiaries of the action brought on their behalf."[23] 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, the guiding forces protect the overall integrity of the litigation and the rights and interests of absent class members—both individually and as a group.

Courts derive authority to prohibit, limit, and remedy attorney communications with absent class members in significant part from Rule 23, *Gulf Oil*,[24] 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 provision 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.[25]

Similarly, Rule 23(c)(2) permits courts to direct notice to class members concerning certification, settlement, and other issues. Courts have concluded that it also empowers them to oversee communications with absent class members.[26]

Gulf Oil established that Rule 23 empowers courts to limit communications with absent class members. The Court observed that the district court's order prohibiting plaintiffs' counsel from communicating with absent class members in the proposed class action was contrary to the interests of the absent class members 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

23. 414 U.S. 538, 552 (1974).

24. 452 U.S. at 99.

25. *See, e.g.*, McKee v. Audible, Inc., No. CV 17-1941, 2018 WL 2422582, at *4 (C.D. Cal. Apr. 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 Techs., Inc., No. C-13-3826, 2014 WL 1760314, at *3 (N.D. Cal. May 2, 2014) ("The prophylactic power accorded to the court presiding over a putative class action under Rule 23(d) is broad . . . .").

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

release of liability for discriminatory acts."[27] However, the order prevented the employees from communicating with plaintiffs' counsel regarding the merits of the pending employment discrimination lawsuit.[28] The 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."[29] Further, an order restricting the parties' speech must be "carefully drawn" and limit speech "as little as possible."[30]

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 appropriate factual findings.[31] As the Eleventh Circuit explained in *Kleiner v. First National Bank*, "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 [those] concerns."[32]

Courts have since confirmed that they have the authority to oversee communications with absent class members before class certification.[33] That authority also extends to communications with future and potential members of the class.[34] 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.[35] 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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27. *Gulf Oil Co.*, 452 U.S. at 101.

28. *Id.*

29. *Id.* (emphasis added); *see also* Cox Nuclear Med. 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"); Crosby v. Stage Stores, Inc., 377 F. Supp. 3d 882, 888 (M.D. Tenn. 2019) (requiring that requests for a remedying effect on prior communications also be accompanied by a clear record and specific findings).

30. *Gulf Oil Co.*, 452 U.S. at 102.

31. *See, e.g.*, County of Santa Clara v. Astra USA, Inc., No. C 05-03740, 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, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (noting appropriateness of limiting communications with absent class members, which "were made solely to protect pecuniary interests" and did not involve "advancement of political beliefs or ideas").

32. 751 F.2d 1193, 1205 (11th Cir. 1985).

33. *See, e.g.*, 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., No. CV 17-1941, 2018 WL 2422582, at *4 (C.D. Cal. Apr. 6, 2018) ("This authority under Rule 23(d) to enjoin or control communications exists even prior to class certification.").

34. *See, e.g.*, O'Connor v. Uber Techs., Inc., No. C-13-3826, 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.").

35. 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 [for a court to restrict communications with absent class members]."); Randolph v. PowerComm Constr., 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.[36]

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[37] (although plaintiffs' counsel may have a fiduciary duty to absent class members before certification[38]). Other courts have held that the attorney-client relationship forms only after the period for opting out of the class has expired, if there is one.[39] Finally, a small number of courts have held that plaintiffs' counsel represent absent class members upon filing a proposed class action.[40]

Figure 1 summarizes the evolving nature of the attorney-client relationship between plaintiffs' counsel and absent class members.

36. Slavkov v. Fast Water Heater Partners I, L.P., No. 14-cv-04324, 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*, 2018 WL 2422582, at *5 ("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)).

37. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 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, e.g.*, 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.").

38. *See, e.g.*, *In re* Avon Secs. Litig., No. 91 CIV. 2287, 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.").

39. *See, e.g.*, *Gortat*, 2010 WL 1879922, at *5 ("[D]uring the opt-out phase, the contours of the attorney-client relationship are not fully formed."); Bobryk v. Durand Glass Mfg. Co., No. 12-cv-5360, 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).

40. *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).

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 Part, we discuss how courts assess the harm from actual communications with absent class members and the potential harm from threatened communications. To be sure, courts say that their analyses are fact-specific; whether a court limits or remedies communications with absent class members depends on the totality of the circumstances.[41] Still, there is some pattern 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.

II. DEFENSE COUNSEL'S COMMUNICATIONS WITH ABSENT CLASS MEMBERS

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.[42] In assessing communications with absent

41. *See, e.g.*, Talavera v. Leprino Foods Co., No. 15-cv-105, 2016 U.S. Dist. LEXIS 29633, at *14–15 (E.D. Cal. Mar. 8, 2016) ("[The analysis for] [w]hether a communication is misleading or coercive . . . 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. 3d 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))).

42. Potts v. Nashville Limo & Transp., LLC, No. 14-cv-1412, 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., No. 16-CV-6291, 2017 WL 1540717, at *3 (N.D. Cal. Apr. 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'l Bank, 751 F.2d 1193, 1203 (11th Cir. 1985) (citing the district court's "duty to protect both the absent class and the integrity of the judicial process" (internal quotation marks and citation omitted)); *In re* Sch. Asbestos Litig., 842 F.2d 671, 683 (3d Cir. 1988) ("A district court's duty and authority under Rule 23(d) [is] to protect the integrity of the class and the administration of justice generally . . . ."); Finder v. Leprino Foods Co., No. 13-cv-2059, 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.").

class members, courts focus on the *impact* on absent class members and the class action litigation, not on a defendant's intent.[43] Courts assessing the potential harm to absent class members consider how a reasonable person would respond to the communication at issue.[44] As discussed in detail below, defense counsel's interests, by their very nature, do not align with the interests of absent class members.[45]

Courts consider a non-exhaustive set of factors 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. Courts try 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 about the litigation only through class counsel.

It is also 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, such as 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, including communications that seek to obtain information about plaintiffs' allegations or to develop defenses.

The above spectrum can help situate the following factors that courts use to assess whether defense counsel's actual or threatened communications with absent class members may harm, mislead, or coerce absent class members, or undermine the integrity of the class action process.

Figure 2 summarizes defense counsel's diminishing ability to communicate with absent class members as class litigation advances.

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43. *See, e.g.*, Jones v. Jeld-Wen, Inc., 250 F.R.D. 554, 561 (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., No. 19-74WES, 2019 WL 1584679, at *8 (D.R.I. Apr. 12, 2019) (noting that defendant's intent in sending the communications to absent class members "[wa]s not conclusive").

44. *See, e.g.*, *Jones*, 250 F.R.D. at 563–64 (finding that defendant's communication to absent class members threatened the proper functioning of the litigation based on the court's interpretation of "a reasonable person reading" defendant's letter).

45. We set aside for current purposes the somewhat more complex situations involving past or present shareholders.

46. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974).

47. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2023).

FIGURE 2: DEFENSE COUNSEL'S DIMINISHING ABILITY TO COMMUNICATE 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	Majority: Only if the communication does not harm absent class members, undermine the integrity of the class action, or mislead or coerce. Small minority: Defense counsel may communicate with absent class members only through class counsel.	Majority: 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.

Defense counsel's primary duty is to promote their client's interests. Defendants' interests—and their counsel's interests—are generally antagonistic with those of the absent class members. To oversimplify a bit, the absent class members benefit by recovering as much as possible, and defendants benefit by paying as little as possible. That creates an incentive for defense counsel to communicate with absent class members in ways that can harm, coerce, or mislead them, or undermine the integrity of the class action.[48] Courts may limit or monitor the communications to prevent, limit, or remedy communications that have these effects. Note that attorneys cannot avoid judicial scrutiny by delegating potentially damaging communications to nonattorneys.[49]

In *Gulf Oil*, the 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 that courts consider in exercising their power under Rule 23(d) to

48. Note that communications are improper if they coerce *or* mislead. Both are not necessary. *See* Potts v. Nashville Limo & Transp., LLC, No. 14-cv-1412, 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.").

49. Law Offs. of Leonard I. Desser, P.C. v. Shamrock Comm., Inc., No. JKB-12-2600, 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, 508 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. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981).

prohibit, limit, or correct defense counsel's written communications with absent class members.

A. 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, then 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 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 would harm the interests of absent class members.

B. 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] Pursuant to Rule 23, courts require that notices sent to potential members of the class provide information in a neutral, objective, and easily understood manner. Courts generally hold other communications with class members to a similar standard.[53] Neutral, balanced, and complete

51. *See, e.g.*, *Law Offs. of Leonard I. Desser, P.C.*, 2013 WL 2552141, at *2 ("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., No. C 05-03740, 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., No. 16-cv-6291, 2017 WL 1540717, at *3 (N.D. Cal. Apr. 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. [Therefore,] the Court finds the [settlement] releases here were obtained by deceptive omissions of material information . . . ."); Friedman v. Intervet Inc., 730 F. Supp. 2d 758, 763 n.5, 765–66 (N.D. Ohio 2010) ("[D]espite defendants' protestations to the contrary, an act of omission may be just as culpable as one of commission. . . . [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[,] . . . defendant's misleading, but neither coercive nor abusive, behavior merits . . . minor limitation . . . ." (quoting Burrell v. Crown Cent. Petrol., Inc., 176 F.R.D. 239, 243 (E.D. Tex. 1997))).

53. *See, e.g.*, Camp v. Alexander, 300 F.R.D. 617, 621 (N.D. Cal. 2014) (citing the standards for a Rule 23 notice in finding that defendant's communications with employees in an FLSA action were coercive and misleading); Kleiner v. First Nat'l Bank, 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.").

communications with absent class members are the best practice.[54] To determine whether communication with absent class members is misleading or coercive, the substance of the communication and the context in which it occurs must be analyzed.[55] Below, we discuss factors courts consider in deciding whether communications with absent class members are misleading or coercive.

1. *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, 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 the 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

54. *See, e.g.*, *Law Offs. of Leonard I. Desser, P.C.*, 2013 WL 2552141, at *2 ("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., No. 15-cv-105, 2016 U.S. Dist. LEXIS 29633, at *14–15 (E.D. Cal. Mar. 8, 2016) ("Whether a communication is misleading or coercive . . . 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. 3d 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))).

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

57. *See, e.g.*, *Kleiner*, 751 F.2d at 1202 ("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)); *id.* (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., 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. . . . The fact that the members must rely upon the defendant for crucial information as to pricing renders potential class members particularly vulnerable to coercion.").

58. *See* Dial Corp. v. News Corp., No. 13-CV-06802, 2015 WL 9256930, at *2 (S.D.N.Y. Nov. 16, 2015) (noting that the absent class members were "large and sophisticated entities . . . with their own in-house legal teams" but, even so, recognizing an "imbalance of information" concerning the litigation between defense counsel and in-house counsel for absent class members).

therefore may condemn attempts by defense counsel to leverage the economic power of their clients.[59]

2. *Timing of the Communication*

If defense counsel's communication with absent class members is litigation related, then the timing of the communication may matter.[60] For instance, if defense counsel seeks to communicate with absent class members while a class certification motion is pending, then that may indicate an intent to undermine a forthcoming certified class. Courts may also consider whether the communication from defense counsel would likely inform absent class members of the litigation. To the extent that this first communication about the litigation is misleading or coercive, it may do significant, ongoing harm to the absent class members.[61] This point is particularly important because, as a general matter, motivating absent class members to take steps toward benefitting from a recovery is often difficult.[62]

3. *Method of Communication*

Courts consider the medium when determining whether a communication with absent class members is misleading or coercive. 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 pressuring them into an immediate response and depriving them of the opportunity to reflect.[63] For these reasons, in part, the ethical rules impose

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59. *See, e.g.*, *id.* (imposing restrictions on defendant's communications with absent class members to "level the playing field" where defendant and absent class members had "ongoing business relationships").

60. *See, e.g.*, *O'Connor*, 2014 WL 1760314, at *4 (finding that the timing of defendant's communication with absent class members was motivated as a response to the class action suit); Degidio v. Crazy Horse Saloon & Rest. Inc., 880 F.3d 135, 138, 140 (4th Cir. 2018) (affirming trial court's rejection of arbitration agreements obtained by defendant years into class litigation that attempted to subvert the litigation process in a class action); *Kater*, 423 F. Supp. 3d at 1059 (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).

61. *See, e.g.*, *Kater*, 423 F. Supp. 3d at 1064 (observing that defendant's coercive communication was "the first time many putative class members hear[d] about these lawsuits" and noting that "it is difficult, and sometimes impossible, to correct laypersons' mistaken initial impressions"); Marino v. CACafe, Inc., No. 16-cv-6291, 2017 WL 1540717, at *2 (N.D. Cal. Apr. 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).

62. *Kater*, 423 F. Supp. 3d at 1064 ("Convincing class members to take the steps necessary to secure recovery in a class action settlement or judgment is often difficult.").

63. MCLAUGHLIN ON CLASS ACTIONS § 11:1, Westlaw (database updated Jan. 2023) ("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."); *see* Camp v. Alexander, No. C-13-03386, 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 Mortg.,

greater restrictions on "live person-to-person" communications than, for example, on communications sent by mail or email.[64]

C. 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 communications that encourage class members to opt out or denigrate the merits of an action or plaintiffs' counsel.[65] They take special care to ensure that 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.[66] 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.[67]

Inc., No. C-05-1175, 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 Offs. of Leonard I. Desser, P.C., No. JKB-12-2600, 2013 WL 2552141, at *1 (D. Md. June 10, 2013) (limiting defense counsel's communications with absent class members where contact was made via telephone).

64. *See, e.g.*, Model Rules of Pro. Conduct r. 7.3 cmts. 2–4 (Am. Bar Ass'n 2023).

65. 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* Sch. Asbestos Litig., 842 F.2d 671, 682 n.23 (citing Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985) (holding that it was inappropriate for defendant bank to solicit opt-outs from potential class members)); *see, e.g.*, Erhardt v. Prudential Grp., Inc., 629 F.2d 843, 846 (2d Cir. 1980) (finding it inappropriate for defendant to send letters to class members encouraging them not to participate); Burrell v. Crown Cent. Petrol., 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, 511 (E.D. Pa. 1987) (finding it inappropriate for representatives of defendant university to mischaracterize litigation and to discourage absent class members 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, 1478 (S.D.N.Y. 1986) (finding it inappropriate for defendant to send misleading letter, signed by class 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, 720 (W.D. Ky. 1981) (finding it inappropriate for defendant to communicate with class members about litigation in a manner that appeared to result in a large number of opt-outs).

66. *Law Offs. of Leonard I. Desser, P.C.*, 2013 WL 2552141, at *1 (criticizing defense counsel's communications with absent class members where, among other things, defense counsel failed to demonstrate that it had explained "that providing . . . an affidavit could affect [absent class members'] ability to participate in the lawsuit or to receive monetary compensation from defendant").

67. O'Connor v. Uber Techs., Inc., No. C-13-3826, 2014 WL 1760314, at *7 (N.D. Cal. May 2, 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.").

1. Solicitation of Opt-Outs

Courts generally condemn defense counsel's efforts to solicit absent class members to opt out of a class action as contrary to the purposes of Rule 23.[68] The class notice ensures that absent class members can decide whether to opt out with the benefit of objective, court-approved information about the litigation.[69]

2. Arbitration Clauses

Courts generally restrict defense counsel's requests to absent class members to agree to arbitration as undermining the integrity of the class action process.[70] Courts worry that arbitration clauses will harm the interests of absent class members.[71]

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, standing alone, offer only modest recoveries. The reality is that arbitration provisions and class action waivers are often fatal to plaintiffs' claims. For these reasons, courts have repeatedly ruled that a

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68. *See, e.g.*, *Kleiner*, 751 F.2d at 1203 ("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, 517–18 (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. . . . 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.").

69. *Li*, 270 F.R.D. at 517–18 ("Obtaining opt-out forms *ex parte* at this stage of the litigation—before a class has been certified by the Court—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.").

70. Courts in these cases have criticized defense counsel for targeting absent class members with arbitration agreements. *See, e.g.*, Degidio v. Crazy Horse Saloon & Rest. Inc., 880 F.3d 135, 138, 140 (4th Cir. 2018) (affirming trial court's rejection of arbitration agreements obtained by defendant years into class litigation 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 defendants 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) (expressing concern about arbitration policy imposed after the filing of proposed class action); *In re* Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555, 569 (S.D.N.Y. 2004) (same).

71. *See, e.g.*, *O'Connor*, 2014 WL 1760314, at * 8 ("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.").

defendant's attempt to enter arbitration agreements with absent class members constitutes an improper communication.[72]

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 litigation:

- whether arbitration is aimed at potential members of a class action lawsuit;[73]
- whether the arbitration clause potentially exploits the defendant's ongoing relationship with absent class members;[74]
- whether arbitration is mandatory or optional,[75] and, if optional, whether it is clear how an absent class member can opt out of arbitration; and
- whether the communication about arbitration provides sufficient information about the pending class action lawsuit to permit the

72. *See, e.g.*, *Kater*, 423 F. Supp. 3d at 1062 ("Many courts have found that a defendant's attempt to foist a new arbitration provision on putative class members is an improper communication."); Balasanyan v. Nordstrom, Inc., No. 11-cv-2609, 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.").

73. *See, e.g.*, *Kater*, 423 F. Supp. 3d at 1059 (ordering corrective communication where defendant imposed an arbitration clause "expressly directed at th[e] lawsuit"); McKee v. Audible, Inc., No. CV 17-1941, 2018 WL 2422582, at *5 (C.D. Cal. Apr. 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*, 2015 WL 4914727, at *6 ("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.").

74. *See, e.g.*, *Kater*, 423 F. Supp. 3d at 1062 (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*, 2018 WL 2422582, at *5–6 (finding defendant's arbitration clause misleading and coercive in part because defendant's online audio and podcast provider "asked putative class members to waive their ability to participate in the pending action . . . in exchange for continued use of [defendant's] service"); Kleiner v. First Nat'l Bank, 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."); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 253 (finding arbitration clause imposed by defendant banks on absent class members was improper because absent class members were reliant on banks for access to credit).

75. *See, e.g.*, *McKee*, 2018 WL 2422582, at *7 (deeming defendant's arbitration clause to be "even more coercive" than other arbitration clauses imposed on absent class members because "no opt outs were permitted at all"); *O'Connor*, 2014 WL 1760314, at *8 (requiring defendant to "allow reasonable means for opting out of the arbitration provision" so that absent class members could participate in the suit); *Kater*, 423 F. Supp. 3d at 1063 (finding that the coercive nature of defendant's arbitration clause was not mitigated by an opt-out provision where, among other things, agreeing to the arbitration provision was labeled as "mandatory").

> absent class member to make an informed choice,[76] and, if so, whether that information is provided in clear language.[77]

These factors help to determine whether absent class members may be induced to forfeit their rights in contravention of their interests without sufficient information.[78]

3. Settlement Offers

While settlements are typically encouraged, settlements "cannot come . . . at the expense of the class action mechanism itself to the detriment of putative class members."[79] Courts impose safeguards because settlements can affect absent class members' interests and participation in the lawsuit and undermine class action litigation. Courts require that communications from defense counsel to absent class members include sufficient information for absent class members to evaluate the settlement offers.[80] Courts also require that communications set forth how a settlement offer was calculated and how that calculation compares to plaintiffs' alleged damages.[81] Courts generally require

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76. *See, e.g.*, *Kater*, 423 F. Supp. 3d at 1059, 1063 (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*, 2018 WL 2422582, at *6 (citing defendant's failure to provide notice of the pending action as a reason for finding defendant's arbitration clause coercive).

77. *See, e.g.*, *Kater*, 423 F. Supp. 3d 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 the language insufficient to explain the stakes of agreeing to the arbitration clause).

78. *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 that defendant's arbitration clause was "clearly intended to steer putative class members away from participating" in the litigation).

79. Keystone Tobacco Co. v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 154 (D.D.C. 2002); *see, e.g.*, Mitchell v. CoreLogic, Inc., No. SA CV 17-2274, 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., No. C 05-03740, 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.").

80. *See, e.g.*, Jubinville v. Hills' Pet Nutrition, Inc., No. 19-74WES, 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, No. 16-CV-2187, 2018 WL 3615989, at *3 (M.D. Pa. July 27, 2018))); *Astra USA, Inc.*, 2010 WL 2724512, at *4 ("[T]he putative class must have been given the necessary information to choose whether to accept the settlement checks."); *Mitchell*, 2019 WL 7171595, at *1 (finding defendant's settlement offer to absent class members coercive where "it is made without any indication of the strength or extent of plaintiffs' claims").

81. *See, e.g.*, *Astra USA, Inc.*, 2010 WL 2724512, at *4 (finding that defendant's settlement offer should have explained the underlying calculation and "how closely the new calculations aligned with plaintiffs' allegations").

that settlement offers provide enough time for absent class members to assess the settlement and consult proposed class counsel or their own counsel.[82]

D. 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 class proceedings, or mislead or coerce. They include forward-looking 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 the remedies they have implemented.

1. Restrictions on Future Communications

Forward-looking remedies include blanket prohibitions on defense counsel's communications with absent class members concerning litigation[83] or restrictions on the timing of such communications.[84] Courts sometimes require advance approval of future communications with absent class members.[85] Courts may also provide direction on the tenor and content of future communications with absent class members.[86] Additionally, courts may require ongoing disclosures concerning the communications.[87]

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82. *See, e.g.*, *Mitchell*, 2019 WL 7171595, at *4 (ordering defendant to provide at least fourteen days for absent class members to consider a proposed settlement and release, as well as "to afford them ample time to contact Plaintiffs' counsel").

83. *See* Randolph v. PowerComm Constr., 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., 156 F.R.D. 630, 633 (N.D. Tex. 1994) (prohibiting defendant's communication with absent class members concerning the lawsuit where it was "difficult to conceive of any advice from [defendant] regarding the lawsuit that [would] not [be] rife with the potential for confusion and abuse given [defendant's] interest in the lawsuit").

84. *See* Marino v. CACafe, Inc., No. 16-cv-6291, 2017 WL 1540717, at *1 (N.D. Cal. Apr. 28, 2017) ("The Court also finds it appropriate to order . . . [d]efendants 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.").

85. *See, e.g.*, *Mitchell*, 2019 WL 7171595, at *1 (ordering that defendant may not communicate with absent class members without first obtaining written permission from the court); Law Offs. of Leonard I. Desser, P.C., No. JKB-12-2600, 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.").

86. *See, e.g.*, Dial Corp. v. News Corp., No. 13-CV-06802, 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).

87. *See, e.g.*, *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. 2008) (requiring defendant to disclose communications with absent class members to plaintiffs' counsel within twenty-four hours of the communication being made).

2. *Remedial Measures for Past Communications*

If a court learns that defense counsel has communicated with absent class members without its approval, then it may require defense counsel to produce copies of those communications,[88] restrict future communications, nullify any agreements entered into between defense counsel and absent class members, or authorize plaintiffs' counsel to conduct their own communications with absent class members.[89] 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.[90] Courts have also nullified opt-out elections,[91] settlements,[92] and arbitration agreements.[93] Absent class members who signed such agreements that were later nullified may be included in a class, including for purposes of assessing numerosity.[94]

CONCLUSION

The ethical rules governing lawyer conduct play an important role in regulating communications between attorneys and absent class members.

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88. *See, e.g.*, *Jones*, 250 F.R.D. at 565 (requiring defendant to produce prior communications sent to absent class members).

89. *See, e.g.*, Camp v. Alexander, No. C-13-03386, 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).

90. *See, e.g.*, O'Connor v. Uber Techs., Inc., No. C-13-3826, 2014 WL 1760314, at *7 (N.D. Cal. May 2, 2014) ("Courts may require corrective notices to remedy improper communications already made."); Jubinville v. Hills' Pet Nutrition, Inc., No. 19-74WES, 2019 WL 1584679, at *11 (D.R.I. Apr. 12, 2019) (requiring defendant to send a corrective communication); Marino v. CACafe, Inc., No. 16-cv-6291, 2017 WL 1540717, at *3 (N.D. Cal. Apr. 28, 2017) (drafting a corrective notice to be sent to absent class members at defendant's expense where defendant obtained releases from absent class members in a misleading and coercive manner); *Mitchell*, 2019 WL 7171595, at *1 (ordering defendant to issue 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 Constr., Inc., 41 F. Supp. 3d 461, 469 (D. Md. 2014) ("The corrective notice [to be sent at defendant's expense] 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 . . . ."); *see also* Kater v. Churchill Downs Inc., 423 F. Supp. 3d 1055, 1065 (W.D. Wash. 2019) (not requiring corrective notice, but setting out parameters for any future communications by defendant to potential class members).

91. *See, e.g.*, Law Offices of Leonard I. Desser P.C. v. Shamrock Comms., Inc., No. JKB-12-2600, 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*, 41 F. Supp. 3d at 466 (invalidating opt-outs where evidence suggested defendant engaged in coercive tactics).

92. *See, e.g.*, *Marino*, 2017 WL 1540717, at *3 (invalidating settlement releases obtained through defendant's coercive and misleading communications with 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., No. C-05-03740, 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").

93. *See, e.g.*, McKee v. Audible, Inc., No. CV 17-1941, 2018 WL 2422582, at *8 (C.D. Cal. Apr. 6, 2018) (holding that defendant's arbitration agreements were "null and void . . . to the extent that [they] would limit a class member's participation or recovery in th[e] action").

94. *See, e.g.*, *Mitchell*, 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).

However, Rule 23 at times plays a more important role. That tends to be true for defense counsel's communications with absent class members before class certification. We have tried to substantiate that point and provide guidance so that ethical transgressions occur less frequently and can be properly corrected when they do occur.