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Class Actions and Ex Parte Communications: Can We Talk

Douglas R. Richmond

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Class Actions and Ex Parte Communications: Can We Talk?

Douglas R. Richmond

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I. INTRODUCTION

Class action litigation has grown exponentially in recent years. According to some reports the number of class actions filed in all federal courts increased by 338 percent between 1988 and 1998, and rose by 1,042 percent in all state courts during the same period. Furthermore, there is no sign that the recent growth in class action litigation will slow significantly in the near future.
It is easy to understand why class actions have proliferated; most involve claims that individually would not justify the cost of litigation, but that in the aggregate can generate substantial settlements or damage awards, and astronomical fees for plaintiffs' counsel. Even class actions of questionable merit can be prosecuted relatively inexpensively. As a result, entrepreneurial plaintiffs' lawyers have repeatedly assembled classes of plaintiffs to sue many businesses in a variety of industries.

For most businesses—if not all—class action litigation is a high stakes challenge. A business sued in a class action often finds its reputation as well as a great deal of money on the line. Businesses are understandably concerned when their customers report receiving correspondence from counsel for a putative class of plaintiffs that allege misconduct by the target company or that allude to the financial benefits that potential class members are sure to gain as a result of the related litigation. They become even more concerned when their employees are putative class members, and perhaps managers and supervisors are the intended targets of communications by plaintiffs’ counsel. Yet plaintiffs’ counsel have many ostensibly legitimate reasons to communicate with potential class members. They may want to survey potential class members’ interest in joining a class action, interview absent class members about potential claims or grievances relevant to the action, or educate potential class members about their rights or the potential for relief. In cases in which the court does not promptly resolve class certification issues, plaintiffs’ counsel may want to communicate with putative class members simply to keep them apprised of the status of the litigation.

3. See Meachum v. Outdoor World Corp., 654 N.Y.S.2d 240, 252 (N.Y. Sup. Ct. 1996) ("It has been recognized that legal fees have been a prime motivation for the filing of class actions. In most cases, the financial benefit to counsel far exceeds the individual benefit to class members.") (internal citations omitted).

4. See, e.g., Jennifer Mann & Dan Margolies, Unclassy Actions: Dubious Tactics Characterize Many Lawsuits, KAN. CITY STAR, Mar. 25, 2003, at D1, D32 (stating that a “tactic used by some law firms is to ride on the coattails of another law firm’s work product, waiting until a lawsuit has been filed and then putting out a news release suggesting shareholders contact them,” and otherwise describing how some class action plaintiffs’ firms drum up class representatives and plagiarize other lawyers’ work product).


6. Steiner & Opsahl, supra note 1, at 430.


A defendant may need or wish to communicate with potential class members who are its customers or employees in contexts related to allegations or claims made in a pending class action. Such communications may have the effect of dissuading some potential plaintiffs from suing or joining in a lawsuit. Defense counsel may also want to communicate with potential class members in an attempt to gather information intended for use in opposing class certification. Defense counsel may want to survey potential class members to determine their interest in pursuing relief, or to attempt to persuade them of the defendant's view of the allegations being made against it. After a class action lawsuit is filed but before a class is certified, a defendant may want to communicate with putative class members to settle individual claims, to persuade them to opt out of the class, or to otherwise compromise their claims. In a rare case, a defendant may even attempt to gain some litigation advantage by communicating with class members after a class is certified. Not surprisingly, class action plaintiffs' lawyers are threatened by, resist and condem class communication efforts by defendants or their counsel.

Most lawyers believe that they understand their ethical obligations when it comes to ex parte communications in litigation. These obligations are not so clear, however, in class actions. To the extent lawyers sometimes think that their obligations are clear or their actions immune to serious challenge, they are often mistaken.

Communications issues become clouded from defense attorneys' perspective because of uncertainties about the existence of an attorney-client relationship between class counsel and putative class members, and are further claued by...

9. See, e.g., Payne v. Goodyear Tire & Rubber Co., 207 F.R.D. 16 (D. Mass. 2002) (rejecting plaintiffs' challenge to statements on defendants' web page concerning hose used in floor heating systems and free inspections of potential class members' homes containing such systems by defendants' consultant); Lewis v. Bayer, A.G., No. 2353 AUG.TERM 2001, 2002 WL 1472339 (Pa. C.P. June 12, 2002) (holding in Baycol litigation that defendant's communications with putative class members to obtain information for reports mandated by the FDA were proper).

10. See Mullenix, supra note 7, at B11.


12. See, e.g., Cobell v. Norton, 212 F.R.D. 14, 17-24 (D.D.C. 2002) (restricting defendants' communications with members of certified class and referring defense counsel to disciplinary authorities; defendants sent written communication to class members that purported to extinguish their rights to a full and accurate accounting of potential benefits).

13. See CONSUMER CLASS ACTIONS, supra note 11, § 5.3.1, at 71.

14. See, e.g., Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985) (affirming district court decision disqualifying and fining defense lawyer who wrongly believed after reading Supreme Court case on class communications that the defendant could secretly solicit exclusion requests from potential members of a plaintiff class).
complicated by timing issues peculiar to class action litigation.\textsuperscript{15} From the perspective of plaintiffs' counsel, the suggestion that there are limits on their communications with potential class members may initially appear to be absurd.\textsuperscript{16} In fact, the limitations that courts place on plaintiffs' counsel are well-reasoned.

The subject of ex parte communications with class members is a murky one. Here the rules of civil procedure and professional responsibility overlap as in no other area,\textsuperscript{17} and case law is relatively scarce. Insofar as class actions are litigated in federal courts, another problem is that many of the decisions on this subject are district court decisions, which lack precedential force.\textsuperscript{18} In sum, lawyers' need for guidance in this area is significant and seems destined to grow in importance as class action litigation continues to expand.

\section*{II. The Rules}

The American Bar Association's ("ABA") Model Rules of Professional Conduct\textsuperscript{19} govern lawyers' conduct in the vast majority of jurisdictions. Rule 4.2, which addresses lawyers' communications with persons represented by counsel, provides:

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.\textsuperscript{20}

Rule 4.2 is intended to prevent lawyers from taking advantage of laypersons through undisclosed communications.\textsuperscript{21} Rule 4.2 also serves to preserve the

\begin{thebibliography}{99}
\bibitem{15} See Steiner & Opsahl, supra note 1, at 430-31.
\bibitem{17} Of course, "the abuse or misuse of any rule of civil procedure is a violation of the spirit of the rules of professional ethics on the most basic level." Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 304 (N.D. Ill. 1997) (discussing \textit{Fed. R. Civ. P.} 23).
\bibitem{18} See FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) ("The reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent. The law's coherence could not be maintained if district courts were deemed to make law for their circuit, let alone for the nation, since district courts do not have circuit-wide or nationwide jurisdiction.") (internal citations omitted).
\bibitem{19} MODEL RULES OF PROF'L CONDUCT (2003).
\bibitem{20} \textit{Id.} R. 4.2.
\bibitem{21} Sanifill of Ga., Inc. v. Roberts, 502 S.E.2d 343, 344 (Ga. Ct. App. 1998); \textit{In}
\end{thebibliography}
positions of the parties in an adversarial proceeding and to prevent the disruption of the attorney-client relationship.\(^{22}\) Finally, the rule generally promotes ethical behavior by lawyers.\(^{23}\)

To determine whether Rule 4.2 applies or has been violated it is first important to ascertain if the person with whom communication is desired is in fact represented by another lawyer in the matter. The existence of an attorney-client relationship is a question of fact.\(^{24}\) Whether an attorney-client relationship exists does not necessarily depend on an express agreement; the relationship may be implied from the parties’ conduct.\(^{21}\) The key factor in determining whether an attorney-client relationship exists typically is the rendering of legal advice by the attorney.\(^{26}\) A person may communicate with an attorney in connection with

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\(^{22}\) Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000); see also In re Baker, 758 N.E.2d 56, 58 (Ind. 2001) (noting that one purpose of Rule 4.2 is to preserve “the integrity of the lawyer-client relationship”).

\(^{23}\) Sanfill, 502 S.E.2d at 344.


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a matter, but that does not necessarily mean that the person is being represented by the attorney.27

In a class action, however, the creation and existence of an attorney-client relationship on the plaintiffs' side may stray from these basic tenets. While the existence of an attorney-client relationship between class counsel and the representative plaintiffs can be analyzed under traditional principles,28 that is not true with respect to putative class members. Certainly, the mere filing of the lawsuit to be prosecuted as a class action does not create an attorney-client relationship between plaintiffs' counsel and putative class members.29 Instead, the attorney-client relationship between class counsel and putative class members "is one of court creation,"30 necessitated by the representative nature of the litigation.31 The relationship is created when the court decides that the case may proceed as a class action, referred to as "certifying" the class.32

From plaintiffs' counsel's perspective, it is most important to understand how Rule 4.2 applies to organizational litigants,33 as class action defendants often are business organizations.34 "Because an organization functions only


27. See Humco, 31 S.W.3d at 919.
28. See In re Chicago Flood Litig., 682 N.E.2d 421, 425 (Ill. App. Ct. 1997) (noting that an attorney-client relationship generally is a "voluntary, contractual relationship" and that the relationship "between the class representative plaintiff and class counsel is one of private contract").
30. Chicago Flood Litig., 682 N.E.2d at 425.
31. See id. ("[T]he class action permits a representative party, a lawyer, and a court to initiate a mass action on behalf of similarly situated class members without their consent. In certifying a class action, the court confers the status of litigant upon class plaintiffs and creates an attorney-client relationship between those plaintiffs and a court-designated lawyer.").
32. See infra notes 84-89 and accompanying text.
33. An organizational litigant may be a corporation, partnership, sole proprietorship, or not-for-profit entity. State ex rel. Pitts v. Roberts, 857 S.W.2d 200, 201 n.2 (Mo. 1993).
34. Not all class action defendants are organizations, of course; individuals also may be sued in class actions. See, e.g., Shaffer v. Eden, 209 F.R.D. 460 (D. Kan. 2002) (suing corporate officers in a class action under ERISA). When the defendants are individuals, however, the Rule 4.2 analysis is much easier from plaintiffs' counsel's perspective. See Holdren v. Gen. Motors Corp., 13 F. Supp. 2d 1192, 1194 (D. Kan. 1998) ("In those cases in which the parties are individuals, [Rule 4.2] is easily applied.
through its people, the question is which people affiliated in some way with the organization occupy a status or play a role sufficient to take on the attributes of the party itself.\textsuperscript{35} This can be a complicated inquiry.\textsuperscript{36}

Most courts have rejected view that Rule 4.2 prevents an attorney from communicating with all employees of a represented organization.\textsuperscript{37} Courts have typically looked to the comments to Rule 4.2 for guidance when trying to decide which employees are off limits. For years the commentary to the rule provided:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a [1] managerial responsibility on behalf of the organization, and [2] with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or [3] whose statement may constitute an admission on the part of the organization.\textsuperscript{38}

The 2003 version of Rule 4.2 takes a different approach. The commentary to the new version of Rule 4.2 provides in pertinent part:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.\textsuperscript{39}

\textsuperscript{35} Holdren, 13 F. Supp. 2d at 1194.


\textsuperscript{37} Messing, 764 N.E.2d at 830.

\textsuperscript{38} MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (2001); see also Sanifill, 502 S.E.2d at 344; Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000); State ex rel. Pitts v. Roberts, 857 S.W.2d 200, 202 (Mo. 1993).

\textsuperscript{39} MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2003).
At least one court has considered this new comment an inappropriate test.\textsuperscript{40} A few jurisdictions have departed from Rule 4.2 and its commentary to craft their own approach to ex parte communications with employees of organizational parties. These courts have adopted the so-called “managing-speaking agent test.”\textsuperscript{41} Under this test, communication is prohibited with those employees who have “speaking authority” for the corporation who “have managing authority sufficient to give them the right to speak for, and bind, the corporation.”\textsuperscript{42}

Among the most hotly contested issues surrounding Rule 4.2 is whether the rule prohibits ex parte communications with an organizational litigant’s \textit{former} employees. It is now well-settled that Rule 4.2 generally does not bar \textit{ex} parte communications with former employees.\textsuperscript{43} This freedom does have some limits, however. An attorney cannot communicate \textit{ex} parte with former employees who have their own counsel in a matter.\textsuperscript{44} Some jurisdictions prohibit \textit{ex} parte communications with former employees who had managerial responsibility in the matter being litigated,\textsuperscript{45} who have an on-going relationship with the organization.

\textsuperscript{40} Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 1248 (Nev. 2002).
\textsuperscript{41} See, e.g., Messing, 764 N.E.2d at 833; Palmer, 59 P.3d at 1247-48.
\textsuperscript{42} Messing, 764 N.E.2d at 833 (quoting Wright by Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984)).
\textsuperscript{43} See, e.g., Lang v. Superior Court, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); Cont’l Ins. Co. v. Superior Court, 37 Cal. Rptr. 2d 843, 858-59 (Cal. Ct. App. 1995) (discussing California counterpart to Rule 4.2); DiOssi v. Edison, 583 A.2d 1343, 1345 (Del. Super. Ct. 1990); H.B.A. Mgmt., Inc. v. Estate of Schwartz, 693 So. 2d 541, 544-46 (Fla. 1997); Sanifill, 502 S.E.2d at 345 (“This interpretation has been adopted by a majority of the courts which have considered the issue.”); P.T. Barnum’s Nightclub v. Duhamell, 766 N.E.2d 729, 737 (Ind. Ct. App. 2002) (“We join with the majority of jurisdictions that have analyzed this issue and hold that Indiana’s Rule 4.2 does not prohibit an attorney from contacting the former employee of a party adverse to the attorney’s client in litigation.”); \textit{Humco}, 31 S.W.3d at 920 (observing that this approach “has been adopted by the majority” of jurisdictions); Schmidt v. Gregorio, 705 So. 2d 742, 743-44 (La. Ct. App. 1993); Patriarca v. Ctr. for Living & Working, Inc., 778 N.E.2d 877, 881-82 (Mass. 2002); Smith v. Kan. City S. Ry., 87 S.W.3d 266, 274 (Mo. Ct. App. 2002) (“We agree with the overwhelming majority of other states that [Rule 4.2] simply does not apply to former employees who are not expressly represented by their own counsel or counsel for the organization.”); Neil S. Sullivan Assocs., Ltd. v. Medco Containment Servs., Inc., 607 A.2d 1386, 1390 (N.J. Super. Ct. Law Div. 1992); Fulton v. Lane, 829 P.2d 959, 960 (Okla. 1992); State \textit{ex rel.} Charleston Area Med. Ctr. v. Zakaib, 437 S.E.2d 759, 763-64 (W. Va. 1993) (“There is little question that a majority of jurisdictions that have had occasion to consider whether Rule 4.2 restrictions are applicable to former employees have concluded that they are not applicable.”); Strawser v. Exxon Co., U.S.A., 843 P.2d 613, 622 (Wyo. 1992).
\textsuperscript{44} \textit{See Smith}, 87 S.W.3d at 274; \textit{Charleston Area Med. Ctr.}, 437 S.E.2d at 762.
\textsuperscript{45} Patriarca, 778 N.E.2d at 882.
in connection with the litigation,\textsuperscript{46} or whose acts or omissions gave rise to the litigation.\textsuperscript{47} Other courts hold that Rule 4.2 prohibits attorneys from asking former employees about privileged information.\textsuperscript{48}

Several additional points about Rule 4.2 bear mention. First, the rule does not protect a party's right to counsel; it protects counsel's right to be present during any communication between his client and opposing counsel.\textsuperscript{49} The right to invoke Rule 4.2 thus belongs to the attorney; only the attorney can approve ex parte communications with his client or waive the right to be present during communications between his client and an opposing attorney—the client cannot consent to ex parte contact.\textsuperscript{50} Second, a lawyer cannot circumvent the rule by directing another person to communicate with a represented party.\textsuperscript{51} Third, Rule 4.2 applies even where the represented person initiates the communication.\textsuperscript{52} In that circumstance the lawyer must immediately terminate the communication as soon as the lawyer learns that communication with the person is improper.\textsuperscript{53} Fourth, Rule 4.2 "protects parties from contacts that are well meaning but misguided as well as those that are intentionally improper."\textsuperscript{54} Thus, an attorney may violate Rule 4.2 through ex parte communications made innocently or negligently.\textsuperscript{55} The fact that an improper ex parte communication was inadvertent

\textsuperscript{46} Lang, 826 P.2d at 1233; see also Humco, 31 S.W.3d at 920 ("A former employee with no present relationship with the organizational party is not a 'party' under [Rule 4.2], and thus the individual is not adverse in the sense that his interests are at stake in the litigation.") (emphasis added).

\textsuperscript{47} Lang, 826 P.2d at 1233.


\textsuperscript{49} State v. Miller, 600 N.W.2d 457, 464 (Minn. 1999).

\textsuperscript{50} United States v. Lopez, 4 F.3d 1455, 1461-62 (9th Cir. 1993) (discussing local federal court equivalent of Rule 4.2); Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 301-02 (N.D. Ill. 1997); Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (discussing Nevada counterpart to Model Rule 4.2); Miller, 600 N.W.2d at 464.


\textsuperscript{52} MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 3 (2003).

\textsuperscript{53} Id.

\textsuperscript{54} Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 918 (Md. 1995).

\textsuperscript{55} Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (discussing Nevada Supreme Court Rule 182, which is nearly identical to Model Rule 4.2); see, e.g., In re Capper, 757 N.E.2d 138, 139-40 (Ind. 2001) (holding that lawyer who communicated with represented adverse party based on client's statement that adversary was no longer represented by counsel without confirming the truth of that assertion violated Rules 4.2 and 8.4(d)).
rather than intentional bears only on the remedy selected or sanction imposed; it does not negate the violation.\textsuperscript{56} Finally, a lawyer who violates Rule 4.2 may also violate other ethics rules. Chief among these is Rule 8.4(d),\textsuperscript{57} which provides that it is professional misconduct for a lawyer "to engage in conduct that is prejudicial to the administration of justice."\textsuperscript{58}

A few jurisdictions have not adopted the Model Rules, preferring continued adherence to the predecessor Model Code of Professional Responsibility.\textsuperscript{59} The Model Code deals with ex parte communications in DR 7-104(A)(1), which provides that during the course of representing a client a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."\textsuperscript{60}

Like Rule 4.2, DR 7-104(A)(1) is intended to prevent situations in which a represented party may be taken advantage of by opposing counsel and to preserve the proper functioning of the adversary system.\textsuperscript{61} Although DR 7-104(A)(1) refers to communications with a "party" rather than a "person," the rule is not limited to plaintiffs or defendants in a lawsuit; rather, it prohibits nonconsensual ex parte communications with any represented person.\textsuperscript{62} And, like Rule 4.2, the right to invoke DR 7-104(A)(1) is the lawyer's alone. Thus, the rule is not waived simply because the represented person consents to or initiates the communication.\textsuperscript{63} Finally, as with Rule 4.2, a lawyer cannot circumvent DR 7-104(A)(1) by directing another person to make a communication that the lawyer would be prohibited from making.\textsuperscript{64}

Regardless of whether communications are judged under Rule 4.2 or DR 7-104(A)(1), lawyers handling class actions receive scant guidance. Neither rule

\textsuperscript{56} United States v. Franklin, 177 F. Supp. 2d 459, 466 (E.D. Va. 2001); Faison, 863 F. Supp. at 1214.

\textsuperscript{57} See, e.g., Capper, 757 N.E.2d at 140 (holding that lawyer who violated Rule 4.2 engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)); Kent, 653 A.2d at 918 (finding that lawyer who violated Rule 4.2 also violated Rule 8.4(d)).

\textsuperscript{58} MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003).

\textsuperscript{59} MODEL CODE OF PROF'L RESPONSIBILITY (1969).

\textsuperscript{60} Id. DR 7-104(A)(1) (footnote omitted).

\textsuperscript{61} Monceret v. Bd. of Prof'l Responsibility, 29 S.W.3d 455, 459 (Tenn. 2000).

\textsuperscript{62} Id. at 460.

\textsuperscript{63} Id. at 461.

mentions class actions; indeed, there is no indication that the rules ever were intended to apply to class actions.

In cases in which the person with whom a lawyer communicates is unrepresented by counsel, Model Rule 4.3 generally applies. The version of Rule 4.3 in effect in most jurisdictions provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.3 recognizes that when a person is unrepresented the danger that a lawyer will overreach is great, and the rule thus restricts counsel's ability to unfairly exploit the situation. The rule focuses on the lawyer's position in the matter, rather than on the exact nature of the communication, because a lawyer's unfair influence may be difficult to characterize. By requiring a lawyer to disclose his interest or position in a matter, the reasoning goes, an unrepresented person will be warned of the risks attending communication and will know to keep silent until he can consult his own counsel. In the case of written communications, Rule 4.3 requires a lawyer to disclose on the face of any document his interest in the matter.

Rule 4.3 was amended by the ABA as part of the Ethics 2000 Commission's revision of the Model Rules. The new version of Rule 4.3 provides:


68. Id. § 39.4, at 39-4.1.

69. Id.

70. See In re Air Crash Disaster, 909 F. Supp. 1116, 1123 (N.D. Ill. 1995) (discussing cover letter from lawyer accompanying a questionnaire).

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.  

New Model Rule 4.3 distinguishes between situations involving unrepresented persons whose interests may be adverse to the lawyer's client and those in which there is no conflict. The problem is that the new rule prohibits a lawyer only from giving "legal advice" to an unrepresented person whose interests may be adverse. As some scholars have observed, "If a lawyer were interviewing a prospective defendant in a civil suit . . . the lawyer might very well be unfairly laying traps for his future opponent, but he would not be giving 'advice' in the usual meaning of the term." The new rule does not address this problem, and it appears that the Ethics 2000 Commission did not even appreciate it. The question now, of course, is whether individual states will adopt the new version of Rule 4.3.

The Model Code addresses communications with unrepresented persons in DR 7-104(A)(2), which provides that in representing a client a lawyer shall not: "Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." As with the new version of Rule 4.3, the fact that DR 7-104(A)(2) only prevents a lawyer from giving "advice" is troublesome. If there is any question as to whether a lawyer's remarks constitute "advice," the issue should be decided by focusing on what the person may reasonably have thought or understood, rather than on the attorney's intent.

73. Id. R. 4.3 cmt. 2.
74. 2 HAZARD, JR. & HODES, supra note 67, § 39.4, at 39-4.1.
75. See ABA REPORT, supra note 71, at 328 (noting "the difficulty of determining what constitutes impermissible advice-giving," but ignoring related problems).
76. See generally Mark Hansen, Hot off the Press: Revised Model Ethics Rules Are Nearly Ready for State Scrutiny, A.B.A. J., June 2002, at 37, 37-38 (explaining briefly the state adoption process, and noting that it "could prove to be at least as lengthy and difficult as it was for the ABA").
78. See, e.g., Attorney Q v. Miss. State Bar, 587 So. 2d 228, 233 (Miss. 1991)
Communications with putative class members and members of a certified class are also subject to regulation by the court in which the case is pending under the broad supervisory authority conferred by Federal Rule of Civil Procedure 23(d) and state equivalents.\textsuperscript{79} As will be discussed later, a court may even limit communications between class counsel and putative class members.\textsuperscript{80} Courts must have the discretion to intervene to limit communications between attorneys for both plaintiffs and defendants and class members to prevent misleading or otherwise improper communications, and to ensure the adequacy and fairness of representation by class counsel.\textsuperscript{81} Lawyers who disregard court orders regulating communications with class members risk violating Rule 3.4(a) and DR 7-106(A), which generally obligate lawyers to obey the rules of a tribunal.\textsuperscript{82} A lawyer's violation of a court order limiting class communications

(holding that lawyer's statement, "don't worry about it," constituted legal advice under the circumstances).


In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

\textsuperscript{80} See infra Part III.

\textsuperscript{81} MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.24, at 233.

\textsuperscript{82} MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2003) (stating that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists"); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(A) (1969) (stating that a lawyer "shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling").
may also implicate Rule 8.4(d) and DR 1-102(A)(5), which prohibit conduct that is prejudicial to the administration of justice.83

III. CLASS COMMUNICATIONS BY PLAINTIFFS’ COUNSEL

A trial court must determine as soon as practicable whether a lawsuit can be maintained as a class action.84 A court’s decision to allow a case to be maintained as a class action is referred to as “certifying” the class.85 It is certification that “gives birth to ‘the class as a jurisprudential entity,’” and which “changes the action from a mere individual suit with class allegations into a true class action.”86

Although class certification is important for a number of reasons, it has special meaning in the professional responsibility context. This is because courts generally take the position that, before certification, there is no attorney-client relationship between an attorney and putative class members other than the named class representatives.87 Indeed, before certification there is no reason to believe that an unnamed member of a putative class has an attorney-client relationship with would-be class counsel.88 The unnamed putative class member

83. MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2003) (stating that it is “professional misconduct” for a lawyer to “engage in conduct that is prejudicial to the administration of justice”); MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5) (1969) (stating that a lawyer shall not “[e]ngage in conduct that is prejudicial to the administration of justice”).

84. FED. R. CIV. P. 23(c)(1).

85. MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.11, at 213.

86. Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978) (quoting Satterwhite v. City of Greenville, 557 F.2d 414, 425 (5th Cir. 1977) (Gee, J., dissenting)).


surely has not sought legal advice from the lawyer; he almost certainly does not know the lawyer’s identity and it is equally likely that he does not know of the action to which he may some day become a party. The court’s certification of a class is deemed to create an attorney-client relationship between class counsel and all class members.89

Even if there is no formal attorney-client relationship between class counsel and putative class members prior to certification, they do at least share an “incipient fiduciary relationship.”90 The existence of this incipient fiduciary relationship gives class counsel some class communication rights. For example, they may provide information to putative class members beyond that given in notices supervised by the court, respond to inquiries, and seek information necessary to their representation of the class.91

Class counsel do not have unlimited communication rights regardless of whether their relationship with putative class members is characterized as an attorney-client relationship or something else. The “imperative of protecting absent class members’ interests” subjects class counsel to substantial judicial scrutiny and regulation.92 Under Rule 23(d) a court “has inherent jurisdiction to supervise any person or entity seeking to act on behalf of prospective members of [a] class.”93 Courts considering whether to regulate communications between class counsel and putative class members should act principally because inaccuracies or other problems with the challenged communications may impair the fairness or adequacy of the putative class’ representation under Rule 23(a)(4).94

It is sometimes necessary for a court to reconsider its decision certifying a class. The discovery of new facts, changes in the parties, or substantive legal developments may compel a court to de-certify a class.95 De-certification terminates the attorney-client relationship between class counsel and unnamed putative class members.

89. Chicago Flood Litig., 682 N.E.2d at 425; see also Johnson, supra note 88, at 505-06.

90. Manual for Complex Litigation, supra note 79, § 30.24, at 233; see also Dondore, 152 F. Supp. 2d at 665 (stating that “putative class members stand at least in a fiduciary relationship with class counsel”) (citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)).


92. 3 Newberg & Conte, supra note 8, § 15.03, at 15-9.


94. Manual for Complex Litigation, supra note 79, § 30.24, at 233. Rule 23(a)(4) provides that one or more members of a class may sue or be sued as representative parties on behalf of all only if they “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).

95. See Manual for Complex Litigation, supra note 79, § 30.18, at 223.
class members. The unnamed class members then revert to being non-party witnesses, and counsel for any party who wish to communicate with them may do so, subject to ethics rules governing communications with unrepresented persons, and to rules mandating honesty.

A. Restrictions on Plaintiffs' Counsel and the Issue of Prior Restraint

Courts clearly have the authority under Rule 23(d) to enjoin communications between counsel and class members, although that authority has limits. The leading case on the subject of class communications is *Gulf Oil Co. v. Bernard.* In *Gulf Oil,* the Equal Employment Opportunity Commission ("EEOC") and Gulf Oil Company entered into a conciliation agreement involving Gulf's alleged discrimination against African-American and female employees at one of its Texas refineries. Approximately one month later, several plaintiffs sued Gulf and another defendant on behalf of all present and former African-American employees and rejected applicants for employment at the refinery. In suing under several civil rights statutes, the plaintiffs sought to enforce the alleged rights of many employees and applicants who were receiving settlement offers from Gulf under its conciliation agreement with the EEOC.

Gulf filed a motion in the district court seeking to limit communications by the parties and class counsel with class members. Many of the employees who were entitled to back pay under the conciliation agreement had been paid and signed releases by the time the class action was filed. After being served with the class action, Gulf stopped sending back pay offers and releases to class members. Gulf then alleged that one of the plaintiffs' lawyers had attended

97. Id.
98. See supra notes 65-78 and accompanying text.
99. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2003) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . ."); id. R. 8.4(c) (stating that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1969) (stating that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); id. DR 7-102(A)(5) ("In his representation of a client, a lawyer shall not . . . . [k]nowingly make a false statement of law or fact.").
102. Id. at 91-92.
103. Id. at 92.
104. Id.
105. Id.
a meeting of class members at which he discussed the case and recommended that the employees return any back pay checks that they had received and not sign the releases sent under the conciliation agreement because they would “receive at least double the amounts involved through the class action.”\textsuperscript{106}

The district court entered a temporary order prohibiting all counsel for all parties from having any communications concerning the case with actual or potential class members. The court did not, however, make any related findings of fact.\textsuperscript{107}

Gulf moved to modify the order to allow it to continue sending mailings to class members soliciting releases in exchange for back pay awards set pursuant to the conciliation agreement. The plaintiffs opposed Gulf’s motion, arguing that the district court’s “ban on their communications with class members violated the First Amendment.”\textsuperscript{108} The court heard arguments on the motion but took no evidence. Additional briefing, including the submission of affidavits by plaintiffs’ counsel, followed.\textsuperscript{109}

The district court ultimately issued an order along the lines requested by Gulf with some modifications.\textsuperscript{110} More particularly:

This order imposed a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court. It gave examples of forbidden communications, including any solicitation of legal representation of potential or actual class members, and any statements “which may tend to misrepresent the status, purposes and effects of the class action” or “create impressions tending without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice.” The order exempted attorney-client communications initiated by the client, and communications in the regular course of business. It further stated that if any party or counsel “assert[ed] a constitutional right to communicate . . . without prior restraint,” and did so communicate, he should file with the court a copy or summary of the communication within five days. The order, finally, exempted communications from Gulf involving the conciliation agreement and its settlement process.\textsuperscript{111}
In issuing this order the district court made no findings of fact, nor did it explain its decision.\textsuperscript{112}

Pursuant to this order plaintiffs' counsel prepared a leaflet that they proposed to send to class members subject to court approval. The leaflet urged class members to consult with a lawyer before signing the releases offered by Gulf. The leaflet referred to the class action and identified plaintiffs' counsel.\textsuperscript{113} The plaintiffs argued that the notice provided in the leaflet enjoyed constitutional protection and was necessary to the continued prosecution of the class action.\textsuperscript{114} Gulf opposed the motion. The court did not rule on the motion until after a court-imposed deadline for acceptance of Gulf's offer by class members expired. The court denied the motion without explanation.\textsuperscript{115} As a result, the named plaintiffs and their counsel were prevented from communicating with the class before the deadline expired.\textsuperscript{116}

Following summary judgment, the plaintiffs appealed to the Fifth Circuit, arguing that the various limitations on their communications imposed by the district court exceeded the authority granted to it by Federal Rule of Civil Procedure 23(d) and violated the First Amendment.\textsuperscript{117} A divided Fifth Circuit panel affirmed the district court.\textsuperscript{118} The Fifth Circuit then granted a rehearing en banc, and reversed the panel decision, holding that the district court order was an unconstitutional prior restraint on speech protected by the First Amendment.\textsuperscript{119} The court held that there was "no sufficient particularized showing of need to justify such a restraint, that the restraint was overbroad, and that it was not accompanied by the requisite procedural safeguards."\textsuperscript{1120} Eight judges concurred specially on the theory that the order was not appropriate under Rule 23(d), such that it was unnecessary to reach the constitutional issue.\textsuperscript{1121} Gulf appealed to the United States Supreme Court.

The Supreme Court framed the issue as whether the limiting order entered in the district court was "consistent with the general policies embodied in Rule 23."\textsuperscript{1122} In addressing this issue the \textit{Gulf Oil} Court noted at the outset that because class actions present "opportunities for abuse," district courts have and need broad authority to control them and to enter "appropriate orders governing

\textsuperscript{112} \textit{Id.} at 96.
\textsuperscript{113} \textit{Id.} at 97.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 98.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 98-99.
\textsuperscript{122} \textit{Id.} at 99.
the conduct of counsel and parties.” The Court further observed, however, that district courts do not enjoy unlimited discretion in shepherding class actions, and that their exercise of discretion is subject to appellate review.

The Gulf Oil Court had no doubt that the district court order created at least potential difficulties for the plaintiffs in their efforts to vindicate the legal rights of the class. As the Court explained:

The order interfered with their 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 respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent.

Because of these problems, the Court reasoned, 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.” Such a determination is required to “ensure that the court is furthering, rather than hindering, the policies embodied in” Rule 23. Any order that results from this weighing should limit speech as little as possible, consistent with the parties’ rights under the circumstances.

The Gulf Oil Court found no indication that the district court ever weighed any competing factors. The Court recognized that class action litigation carries with it the potential for abuse, and that such abuses may implicate or involve communications with 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 the prosecution of a class action” in accordance with Rule

123. Id. at 99-100.
124. Id. at 100-01.
125. Id. at 101.
126. Id. (internal citations omitted).
127. Id.
128. Id. at 101-02.
129. Id. at 102.
130. Id.
The *Gulf Oil* Court thus concluded that the district court abused its discretion.\(^{132}\)

Not surprisingly, courts have scrupulously followed *Gulf Oil*, as *Williams v. Chartwell Financial Services, Ltd.*\(^{133}\) illustrates. The plaintiffs in *Williams* brought a class action against Chartwell Financial Services under the federal Truth in Lending Act.\(^{134}\) The district court entered a protective order prohibiting the plaintiffs from communicating with members of the putative class, all of whom were Chartwell's customers.\(^{135}\) The district court was concerned about the potential for abuse if the plaintiffs were allowed to communicate with Chartwell's customers and expressed concern about the effect such communications might have on Chartwell's business.\(^{136}\) These were legitimate concerns, the *Williams* court noted, and certainly presented potential justifications for the district court's entry of the protective order.\(^{137}\)

Although the district court's concerns were justified, its entry of the protective order was an abuse of discretion. This was not because the district court was necessarily wrong.\(^{138}\) Rather, as the *Williams* court pointed out:

> After examining the district court's decision to grant a protective order against the backdrop of the competing concerns at work in this area, it is apparent that the district court did not develop a sufficient appellate record for us to determine whether the interests of both parties were adequately considered. The Supreme Court was clear in [*Gulf Oil*] stating that when a protective order such as the one in these cases is entered, that order should be based on a clear record and specific findings. Other than the district court's concern over the impact the plaintiffs' contact with putative class members would have on Chartwell's business, it is not clear from the record what factors the district court considered. This is not to say that the district court was wrong. As we have stated, given the potential for abuse in class actions a protective order is permissible under certain circumstances. However, we cannot determine from the record below and from the district court's findings whether those circumstances were present [here].\(^{139}\)

\(^{131}\) *Id.* at 104.

\(^{132}\) *Id.*

\(^{133}\) 204 F.3d 748 (7th Cir. 2000).

\(^{134}\) *Id.* at 749 (citing 15 U.S.C. §§ 1601-2003 (2001)).

\(^{135}\) *Id.* at 759.

\(^{136}\) *Id.*

\(^{137}\) *Id.*

\(^{138}\) *Id.*

\(^{139}\) *Id.* (internal citation omitted).
The court thus vacated the protective order and remanded the case to the district court.\footnote{Id.}

Legitimate though First Amendment concerns may be, courts have limited plaintiffs' communications with putative class members in appropriate circumstances. In \textit{Jackson v. Motel 6 Multipurpose, Inc.},\footnote{130 F.3d 999 (11th Cir. 1997).} two race discrimination cases were filed against Motel 6 in the Middle District of Florida. Both were pleaded as class actions. In the first case, known as the \textit{Jackson} case, five Motel 6 patrons alleged that Motel 6 had a nationwide practice of discriminating against its customers based on their race.\footnote{Id. at 1001.} In the second, known as the \textit{Petaccia} case, five former Motel 6 employees alleged that Motel 6's racially discriminatory practices created a hostile work environment.\footnote{Id. at 1002.}

The two cases were consolidated. The plaintiffs then sought relief from the Middle District of Florida's Local Rule 4.04(e), which provides:

\begin{quote}
In every case sought to be maintained by any party as a class action, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such actions with any potential or actual class member, not a formal party to the case, without approval by the Court.\footnote{Id. (quoting M.D. FLA. R. 4.04(e)).}
\end{quote}

The district court granted the plaintiffs' relief from the local rule, entering an order that authorized the plaintiffs to establish an 800 number for potential plaintiffs to call; to publish notices about the litigation nationwide and to solicit information about potential class members and their experiences with alleged discrimination at Motel 6 properties; to respond to requests for information from those who responded to the notices or who called the toll free number; to make mass mailings to Motel 6 employees soliciting information concerning the plaintiffs' allegations; and to further communicate ex parte with anyone who might know of the alleged discrimination except for current Motel 6 managers and supervisors.\footnote{Id.} The district court entered this order even though it had not certified a class in either case.\footnote{Id.}

After repeated attempts by Motel 6 to obtain appellate relief, the case finally reached the Eleventh Circuit on Motel 6's second petition for a writ of mandamus.\footnote{Id. at 1003.} The \textit{Jackson} court held that Motel 6's petition warranted relief by

\begin{flushright}
140. \textit{Id.} \\
141. 130 F.3d 999 (11th Cir. 1997). \\
142. \textit{Id.} at 1001. \\
143. \textit{Id.} at 1002. \\
144. \textit{Id.} (quoting M.D. FLA. R. 4.04(e)). \\
145. \textit{Id.} \\
146. \textit{Id.} \\
147. \textit{Id.} at 1003. \\
\end{flushright}
way of mandamus because the district court's order allowing the plaintiffs to communicate with potential class members was an abuse of discretion.\textsuperscript{148} The order was entered months before a class was certified in either case. While the \textit{Jackson} court was unwilling to go so far as to state that plaintiffs should never be allowed to communicate with putative class members prior to certification, it was clear to it that district courts should "strive to avoid authorizing injurious class communications that might later prove unnecessary."\textsuperscript{149} As the court further explained:

An order authorizing class communications prior to class certification is likely to be an abuse of discretion when (1) the communication authorized by the order is widespread and clearly injurious and (2) a certification decision is not imminent or it is unlikely that a class will in fact be certified. In such circumstances, the danger of abuse that always attends class communications—the possibility that plaintiffs might use widespread publication of their claims, disguised as class communications, to coerce defendants into settlement—is not outweighed by any need for immediate communications.\textsuperscript{150}

The plaintiffs' communications authorized by the district court's order were widespread because they were nationwide in scope. There was also no doubt that they were clearly injurious to Motel 6.\textsuperscript{151} The \textit{Petaccia} case was nowhere near certification at the time the order was issued.\textsuperscript{152} The \textit{Jackson} case could not be certified as a class for several reasons, including the fact that the plaintiffs were not suitable class representatives.\textsuperscript{153} The two factors suggesting that the district court's order was an abuse of discretion were satisfied. The court thus vacated the district court's order and granted Motel 6 other relief.\textsuperscript{154}

In summary, pre-certification communications with potential class members by plaintiffs and their counsel are opportunities for abuse.\textsuperscript{155} Courts may limit plaintiffs' communications with putative class members even if the challenged communication is not false, misleading or deceptive.\textsuperscript{156} Courts have the

\begin{itemize}
  \item \textsuperscript{148} \textit{Id.} at 1004.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.} at 1004-05.
  \item \textsuperscript{154} \textit{Id.} at 1008-09.
  \item \textsuperscript{155} \textit{See} Howard Guntz Profit Sharing Plan v. Superior Court, 105 Cal. Rptr. 2d 896, 902 (Cal. Ct. App. 2001) (scrutinizing plaintiff's communications and stating that "[p]recertification communication carries the potential for abuse").
  \item \textsuperscript{156} \textit{Id.} at 903.
\end{itemize}
"authority and duty" to control class actions to protect all parties' rights and "to prevent abuses which might undermine the proper administration of justice."

Courts called upon to exercise their discretion should be cautious when placing prior restraints on communications with potential class members. Perhaps more accurately, trial courts should be careful to detail the reasons for any restraints they impose so that appellate courts may appropriately study their exercise of discretion. Regardless, in determining whether to limit class communications prospectively, courts may wish to consider the severity and likelihood of the perceived harm if communications are not limited, the availability of less restrictive alternatives, and the duration of the proposed limitation. Plaintiffs and their counsel clearly should not be allowed to communicate with potential class members before certification when (1) the intended communication is or will be widespread and clearly injurious, and (2) a decision on certification is not imminent, or it is unlikely that a class will be certified.

B. Places the First Amendment Does Not Always Reach

Although it ought to be clear from the language of the case itself, Gulf Oil Co. v. Bernard does not turn the First Amendment into a class communication trump card for class action plaintiffs and their counsel. The First Amendment only prohibits certain prior restraints on class communications; it does not immunize plaintiffs or their counsel against sanctions or any number of corrective measures should they engage in improper communications with potential class members. Meek v. Gem Boat Services, Inc. is an illustrative case.

157. Id. (citing Gulf Oil Co. v. Bernard, 452 U.S. 89, 100-03 (1981)).
158. See, e.g., Gates v. Cook, 234 F.3d 221, 227 (5th Cir. 2000) (overturning district court's "no contact order" barring all communications between inmate class members and class counsel without sufficient factual finding justifying the order or its breadth).
159. See Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 759 (7th Cir. 2000).
163. For example, if parties or their counsel convey misinformation or misrepresent matters to class members, a court may require them to send curative notices at their expense. MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.24, at 234; see, e.g., EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869 (7th Cir. 1996) (declining to review district court order requiring EEOC to send curative letter to class members).
In *Meek*, David Pheils, the attorney for the class, twice sent notice to the class without being directed to do so by the court. Pheils thus violated the Ohio version of Rule 23(c)(2), which contains mandatory language indicating that the court must order that a notice be sent. Additionally, Pheils sent the second notice as an enclosure to his own personal cover letter and questionnaire, both of which contained misleading information. The trial court sanctioned Pheils by removing and barring him from further representation in the case, and ordering him to pay several costs associated with his misconduct.

The plaintiffs appealed, contending that Pheils should not have been sanctioned because he was merely communicating with his clients and those communications were protected by the First Amendment. The *Meek* court disagreed. The court held that the trial court’s sanctions did not constitute a prior restraint on Pheils’ communications because the offending notices preceded the sanctions. Furthermore, the trial court did not sanction Pheils for communicating with his clients, but instead imposed the sanctions because Pheils “had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent class members.” Finally, the trial court did not sanction the plaintiffs; it only sanctioned Pheils. In doing so, it “acted responsibly, protecting the rights and interests of the class.”

The decision in *Meek* should not surprise the class action bar. Responsibility for the content, form and timing of notices to the class rests with the court; neither litigants nor their counsel may usurp the court’s role. Furthermore, the challenged notice was misleading. Courts routinely sanction lawyers for misleading class communications.

165. Id. at 984-85.
166. Id. at 986.
167. Id. at 985.
168. Id. at 986.
169. Id. at 985.
170. Id. at 986.
171. Id.
172. Id. at 987. The trial court never prohibited Pheils from communicating with potential class members generally. Rather, the court prohibited him from sending improper notices to class members that also included misleading statements. Id. at 987 n.2.
173. Id. at 987. The *Meek* court thus affirmed the trial court’s order. It also ordered Pheils to pay the costs of the appeal. Id.
174. Rule 23 regulates notice to class members and provides for related court supervision. See FED. R. CIV. P. 23(c)(2) (discussing notice in class actions maintained under subdivision (b)(3)); FED. R. CIV. P. 23(d)(2) (granting authority to regulate notice in the conduct of any action to which Rule 23 applies).
175. See, e.g., *In re* McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239,
The problems that plagued the attorney in Meek are not the only sort of communication issues with which plaintiffs' counsel must be concerned. Plaintiffs' counsel must be especially careful when communicating with defendants' agents and employees in their case investigation and preparation, as Meachum v. Outdoor World Corp.176 demonstrates.

The plaintiffs in Meachum purported to represent over 5,000 New York residents to whom Outdoor World had allegedly made misrepresentations and otherwise deceived in order to induce them to enter into vacation contracts.177 Before suit was filed, one of the plaintiffs, Adrian Montanez, and one of the lawyers who intended to serve as class counsel, Peter Kutil, called Outdoor World and tape-recorded a conversation with a supervisor in its financial department, Corine Baird, to confirm that Outdoor World would not allow Montanez to cancel his contract without an attorney's involvement.178 It was Kutil's idea to tape the conversation, and he dialed the telephone and listened to the call without acknowledging his presence.179 Kutil and Montanez taped the call "to acquire information to be used in framing and to fortify allegations to be made" in the forthcoming class action complaint.180 A review of the transcript of the conversation by the court revealed "a carefully planned strategy to obtain specific information from Ms. Baird and a concession by her on behalf of Outdoor World."181

The plaintiffs and Kutil contended that they did not know that Outdoor World was represented in the matter when they made the call, an argument that the court rejected for a number of reasons.182 The court also rejected all of the plaintiffs' other arguments aimed at justifying the call and its taping.183 The Meachum court concluded that Kutil had violated the New York version of DR 7-104(A)(1).184 In doing so, the court branded Kutil's conduct "highly improper," further describing it as "sharp, if not unethical practice."185

The problem for the Meachum court was determining what to do about the misconduct. Kutil's misconduct, coupled with an alleged conflict of interest involving the class representatives, cast a pall over the entire case.186 The court

1243-45 (N.D. Cal. 2000) (sanctioning for misleading communications by two law firms whose bids to serve as lead class counsel had been rejected).
177. Id. at 243, 244.
178. See id. at 245-46, 247.
179. Id. at 250.
180. Id. at 246.
181. Id. at 247.
182. Id. at 247-49.
183. Id.
184. Id. at 248-50.
185. Id. at 250.
186. See id. at 254 ("The totality of the circumstances, including the complicity of
reasoned that the "dark cloud" over the case would never be lifted so long as the litigation continued under the control of Kutil and his fellow class counsel.\textsuperscript{187} The court accordingly found that the named plaintiffs through their counsel could not fairly and adequately protect the interests of the class.\textsuperscript{188} In so finding, the court focused again on Kutil's telephone call to Outdoor World, stating:

[T]he palpably improper and unethical conduct by counsel, in surreptitiously tape recording the telephone conversation with [Baird], at a time when counsel knew or should have known that [Outdoor World] was represented by or acting through its attorneys . . . was improper and unethical. It was deceptive, most unprofessional and demonstrates a lack of judgment, sufficient to hold, as a matter of law, that counsel is unfit to proceed further in the proper representation of the class in this action.\textsuperscript{189}

The Meachum court accordingly denied the plaintiffs' motion to certify the case as a class action despite the fact that the case was in all other ways suitable for class treatment.\textsuperscript{190} The court did deny the motion without prejudice, however, thus allowing the plaintiffs to renew it when and if they secured new class counsel.\textsuperscript{191}

The importance of class certification, and the related issue of the existence of an attorney-client relationship between plaintiffs' counsel and putative class members, is demonstrated by Hammond v. City of Junction City.\textsuperscript{192} In Hammond, plaintiff Marcus Hammond sued the city of Junction City and several city officials on behalf of himself and current and former African-American employees of the city. He alleged a variety of race discrimination claims under state and federal statutes.\textsuperscript{193} Trouble started when Al Hope, the city's Human Relations Director, called one of the plaintiff's attorneys, Glenn Brown, to discuss a race discrimination suit that Hope wanted to file against the city.\textsuperscript{194} At the time, the plaintiff had yet to file his motion for class action determination, such that the case had not been certified as a class action.\textsuperscript{195} Hope, as an

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  \item certain of the plaintiffs in the improper and unethical tape recording of a conversation with one of defendants' supervisory employees, has cast a dark cloud upon the proposed representation of the class by class counsel."
\end{itemize}

\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id. (emphasis added).
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 254-55.
\textsuperscript{192} 167 F. Supp. 2d 1271 (D. Kan. 2001).
\textsuperscript{193} Id. at 1275.
\textsuperscript{194} Id. at 1276.
\textsuperscript{195} Id. at 1274.
African-American city employee, was a potential member of the putative class.\textsuperscript{196}

Brown and Hope discussed a number of matters during their initial telephone conference. Shortly thereafter they met in person. They were joined in this meeting by Brown's employer and plaintiff's lead counsel, Denise Anderson.\textsuperscript{197} At the meeting it became clear that Hope was seeking legal representation as an individual and as a potential representative of a class of similarly situated minority city employees. Hope appeared to be contemplating his individual rights and whether he would join the looming class action.\textsuperscript{198} Anderson presented Hope with a copy of her firm's standard retainer agreement, which he signed.\textsuperscript{199}

After this meeting, Brown called one of the attorneys for the defendants in Hammond's suit and left a voicemail message telling him that he and Anderson had been retained by Hope in another race discrimination suit against the city. Brown also indicated that Hope might be named as an additional class representative.\textsuperscript{200} Returning the call, defense counsel left Brown a voicemail message saying that the defendants objected to Hope being named as a class representative.\textsuperscript{201} Just one day later, however, Brown met again with Hope. During this meeting they discussed alleged discovery misconduct by the city about which Hope claimed to know.\textsuperscript{202} Hope's involvement in the city's efforts at responding to discovery could not have surprised Brown; the city listed Hope in its interrogatory answers as one of three individuals who assisted in preparing the responses.\textsuperscript{203}

The defendants ultimately moved for a protective order, alleging that Hope's ex parte communications with Brown and Anderson violated Rule 4.2.\textsuperscript{204} The defendants sought to prevent further communications between Hope and plaintiff's counsel, to exclude evidence obtained from Hope through the ex parte communications, and to disqualify Brown and Anderson from representing Hammond or any other class members in the pending case.\textsuperscript{205} In deciding the defendants' motion, the magistrate judge assigned to the case noted that the case presented "special issues" because it involved a putative class action.\textsuperscript{206}

\begin{itemize}
  \item \textsuperscript{196} Id.
  \item \textsuperscript{197} Id. at 1277.
  \item \textsuperscript{198} Id.
  \item \textsuperscript{199} Id.
  \item \textsuperscript{200} Id.
  \item \textsuperscript{201} Id.
  \item \textsuperscript{202} Id. Hope alleged that temporary workers hired by the city were shredding relevant documents from employees' personnel files. Id.
  \item \textsuperscript{203} Id. at 1278.
  \item \textsuperscript{204} Id. at 1274.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id. at 1275.
\end{itemize}
Following the Supreme Court's dictates in *Gulf Oil*, the magistrate received briefs from the parties and held an evidentiary hearing, and made detailed findings of fact.

There was considerable debate about whether Hope fell within the category of persons with whom ex parte communications were prohibited under Rule 4.2 given that the city was an organizational litigant, and whether the challenged communications otherwise violated Rule 4.2. The magistrate resolved those issues in favor of the defendants. The court was then left to decide whether the communications should be excepted from Rule 4.2's application because (1) Hope was a potential member of the putative class, (2) Hope and plaintiff's counsel shared an attorney-client relationship with respect to Hope's individual claims of discrimination, or (3) it was Hope who initiated the ex parte communications, not plaintiff's counsel.

Plaintiff's counsel argued that Rule 4.2 should not apply to their communications with Hope because he was a potential member of the putative class of African-American employees that they would be representing as class counsel. The court reasoned that to accept this argument it would have to find that Hope and plaintiff's counsel had "an attorney-client or other special relationship." This the court declined to do, stating that it "is fairly well-settled that prior to class certification, no attorney-client relationship exists between class counsel and the putative class members." Furthermore, it was only speculation that a class would be certified. Even were a class certified, it might be defined so as not to include Hope, or Hope might decide to opt out of the class. For these reasons, the court decided that no exception to Rule 4.2 should apply based on an attorney-client or other special relationship between Hope and plaintiff's counsel derived from Hope's status as a potential class member.

The court also concluded that no exception to Rule 4.2 applied based on an attorney-client relationship formed as a result of Hope's desire to have plaintiff's

207. Id. at 1274.
208. See id. at 1276-81.
209. See id. at 1281-86.
210. Id. at 1286.
211. Id.
212. Id.
214. Id.
215. Id.
counsel represent him on his individual claims of discrimination. As the Hammond court explained:

Admittedly, Mr. Hope and Plaintiff’s counsel did eventually form an attorney-client relationship in connection with Mr. Hope’s individual claims of race discrimination. But that relationship was only created as a result of the improper ex parte communications with Mr. Hope. From the very first conversation with Mr. Hope, Mr. Brown knew, or at the very least, should have known, that Mr. Hope had managerial responsibilities on behalf of the City that rendered him off-limits. At that point, no further ex parte communications should have ensured. Had no further ex parte communications taken place, no attorney-client relationship would have been created.

Finally, the magistrate made short work of Brown’s and Anderson’s argument that Rule 4.2 should not apply because it was Hope that initiated the communications. The court pointed out that nothing in Rule 4.2 restricts its application to solicitation or to the initiation of communications. Rather, the Rule and its commentary are concerned with all communications—not just those that are initiated or solicited by counsel.

Having found that plaintiff’s counsel violated Rule 4.2, the magistrate then proceeded to determine the appropriate remedy for the misconduct. In doing so, the court again noted its responsibilities under Gulf Oil:

This Court also has “both the duty and the broad authority” to exercise control over a putative class action and “to enter appropriate orders governing the conduct of counsel and parties.” As noted above . . . Gulf Oil requires that the Court carefully weigh the need to limit communications between class counsel and potential class members against the potential interference with the rights of the parties and to make a specific finding of the particular abuse or threatened abuse before entering an order that limits communication between class counsel and any putative class members.

The magistrate disqualified plaintiff’s counsel from representing Hammond and any class members in the pending case; Anderson and Brown were allowed

216. Id. at 1287.
217. Id.
218. Id.
219. Id.
220. Id. at 1288 (quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981)).
to represent Hope in a separate, individual action against the city.\textsuperscript{221} The court also entered a number of other orders designed to remedy plaintiff's counsel's misconduct.\textsuperscript{222} The plaintiff and plaintiff's counsel, who by now had secured their own lawyers, then sought review of the magistrate's orders by the district court pursuant to Federal Rule of Civil Procedure 72(a).\textsuperscript{223} They were joined by the National Employment Lawyers Association ("NELA") as amicus curiae.\textsuperscript{224}

The primary argument advanced by the movants and NELA was that counsel's communications fell within the "authorized by law exception" to Rule 4.2 by virtue of Hope's status as a potential class member.\textsuperscript{225} The movants and NELA also argued that the magistrate judge disregarded the Supreme Court's directions set forth in \textit{Gulf Oil}.\textsuperscript{226} The district court addressed the second claim first, pointing out that the magistrate in fact paid special attention to his special obligations under \textit{Gulf Oil}.\textsuperscript{227} Indeed, the argument that the magistrate ignored the special issues posed by a class action or his special procedural responsibilities under \textit{Gulf Oil} was laughable.

The movants and NELA cited a number of cases, all of which, they claimed, supported their argument that class counsel can have ex parte communications with putative class members without running afoul of Rule 4.2.\textsuperscript{228} The district court found all of the cases to be "easily and significantly distinguished."\textsuperscript{229}

Those cases did, however, suggest the course of conduct that plaintiff's counsel should have followed:

In short, a reading of the cases proffered by the movants and NELA clearly suggests that if the Law Firm desired to speak with Mr. Hope or any other potential class member, then the Law Firm should have filed a motion with the court seeking guidance on that issue before engaging in any communications. This reasoned approach would have permitted the court, consistent with \textit{Gulf Oil}, to assess the need for any limitation on such communications, the potential for any abuse, and

\begin{itemize}
  \item \textsuperscript{221} \textit{Id.} at 1291.
  \item \textsuperscript{222} See \textit{id.} at 1294-95.
  \item \textsuperscript{224} Hammond, 2002 WL 169370, at *1.
  \item \textsuperscript{225} \textit{Id.} at *3.
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.} at *3-4.
  \item \textsuperscript{229} Hammond, 2002 WL 169370, at *4.
\end{itemize}
any interference with the rights of the parties. By engaging in such communications without first seeking guidance from the court—communications that the Law Firm clearly knew were at least potentially violative of Rule 4.2—the Law Firm ran the risk that its conduct would be challenged and, ultimately, the basis for appropriate sanctions.\footnote{230}{Id. at *6.}

The movants and NELA made a number of other arguments, only some of which bear mention here. First, they contended that Rule 4.2 was inapplicable because plaintiff's counsel and Hope shared an attorney-client relationship by virtue of the fact that Hope called plaintiff's counsel about representing him in connection with his individual claims against the city.\footnote{231}{Id. at *7.} According to plaintiff's counsel and NELA, "plaintiff's counsel cannot be logically accused of having ex parte communications with their own client."\footnote{232}{Id. (quoting parties' court papers).} As the district court pointed out, however, the magistrate had quite logically rejected this argument, reasoning that no attorney-client relationship existed at the time of the initial ex parte contact:

Admittedly, Mr. Hope and Plaintiff's counsel did eventually form an attorney-client relationship in connection with Mr. Hope's \textit{individual} claims of race discrimination. But that relationship was only created as a result of the improper ex parte communications with Mr. Hope. From the \textit{very first conversation} with Mr. Hope, [the Law Firm] knew, or at the very least, should have known, that Mr. Hope had managerial responsibilities on behalf of the City that rendered him off-limits. At that point, no further ex parte communications should have ensued. Had no further ex parte communications taken place, no attorney-client relationship would have been created.\footnote{233}{Id. (quoting Hammond v. City of Junction City, 167 F. Supp. 2d 1271, 1287 (D. Kan. 2001)).}

There simply was no basis for the district court to conclude that the magistrate's decision on this point was clearly erroneous.\footnote{234}{Id. at *8.}

Second, plaintiff's counsel contended that the city consented to their ex parte communications with Hope because it knew or should have known that Hope was a potential adversary.\footnote{235}{Id.} The court found this argument unpersuasive, reasoning that "it would be unjust on the part of the city (and potentially

\begin{footnotes}
\item 230. \textit{Id.} at *6.
\item 231. \textit{Id.} at *7.
\item 232. \textit{Id.} (quoting parties' court papers).
\item 233. \textit{Id.} (quoting Hammond v. City of Junction City, 167 F. Supp. 2d 1271, 1287 (D. Kan. 2001)).
\item 234. \textit{Id.} at *8.
\item 235. \textit{Id.}
\end{footnotes}
discriminatory in and of itself) if the city assumed that its African American managers suddenly became 'the enemy' just because a class action race discrimination suit was filed against it. As noted previously, Hope had assisted the city with responding to discovery in the putative class action, and prior to assisting with the production of documents in the case allegedly had told the city attorney that he "believed he would be involved in the lawsuit." Even that statement, however, was insufficient to establish that the city had somehow consented to Hope’s ex parte communications with plaintiff’s counsel.

In the end, the movants could not establish that the magistrate had erred in applying Rule 4.2 to Hope’s communications with plaintiff’s counsel. The district court overruled their objections to the magistrate’s orders.

Hammond teaches that which should be obvious: plaintiffs’ counsel should proceed cautiously when seeking to communicate with defendants’ employees. Plaintiffs’ counsel who wish to communicate with defendants’ employees—especially managerial or supervisory employees—should seek leave of court to do so. A court presented with such a motion can then balance the plaintiffs’ interests with those of the defendant and, if necessary, tailor an order that will protect the parties’ respective rights.

236. Id.
237. Hope’s participation in responding to discovery on behalf of the city was an issue in the magistrate’s Rule 4.2 analysis. See Hammond, 167 F. Supp. 2d at 1282.
239. Id.
240. Id. at *9.
241. There is good reason to question why plaintiff’s counsel ever thought that it was acceptable to communicate with Hope without the city’s consent. Hope’s title was “Director of Human Relations,” and he had been identified in interrogatory answers as having assisted in preparing the city’s discovery responses. Hammond, 167 F. Supp. 2d at 1276-78. While it is true that Hope downplayed his managerial responsibilities when talking to Brown, see id. at 1277, all of the other facts known to Brown and Anderson clearly suggested that their communications with Hope were fraught with peril.
242. See, e.g., EEOC v. Dana Corp., 202 F. Supp. 2d 827, 830 (N.D. Ind. 2002) (allowing plaintiff to have ex parte communications with former managerial employee of defendant; both plaintiff and defendant filed motions seeking to conduct ex parte interviews); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 677-78 (N.D. Ga. 1999) (sustaining plaintiffs’ motion for leave to interview prospective class members and thus allowing defendant’s upper level employees to communicate with plaintiffs’ counsel about potential discrimination claims).
243. See Abdallah, 186 F.R.D. at 677 (allowing plaintiffs’ counsel to communicate with defendant’s upper level employees about their discrimination claims, but not permitting any other communications, and further preventing plaintiffs’ counsel from communicating with employees at work unless the employees had retained plaintiffs’ counsel).
IV. CLASS COMMUNICATIONS BY DEFENDANTS AND THEIR COUNSEL

Defendants can sometimes anticipate that they will be the target of a class action. Before suit is filed, a prospective defendant is free to fairly and honestly communicate with potential class members in an effort to head off litigation. Even after a suit is filed, if it is not pleaded as a class action, defense counsel may communicate with potential claimants to try to prevent a class action from developing. Once a class action is filed or a lawsuit on file is amended to become a class action, however, the rules change.

A. An Introduction and Some Fundamentals

Class action plaintiffs sometimes suggest that the protections afforded by Gulf Oil apply only to them, and that courts can restrain defendants' communications with class members without making detailed factual findings or weighing the potential interference with defendants' rights. This simply is not so. Before restricting a defendant's communications with prospective class members, a court must make a clear record and specific findings in accordance with Gulf Oil that reflect "a weighing of the need for limitation and the potential interference with the rights of the parties." And, just as when plaintiffs or their counsel are sought to be restrained or enjoined, any order restraining speech on the defendant's side must be narrowly drawn to limit speech as little as possible, consistent with the parties' rights. Indeed, courts presented with motions to limit defendants' communications with putative class members routinely analyze the issues in light of the rules established in Gulf Oil.

244. 3 NEWBERG & CONTE, supra note 8, § 15.11, at 15-37 ("When no class action is filed, a prospective defendant is free to communicate with potential class members in order to remedy alleged grievances and obtain releases from liability . . . Threatening potential class members with legal, economic, or political sanctions should they join the class or initiate litigation would, however, raise serious ethical questions of propriety.").

245. See Gillespie v. Scherr, 987 S.W.2d 129, 132 n.6 (Tex. App. 1999) (explaining that until a court certifies a case as a class action, the case proceeds as an ordinary lawsuit brought by the named plaintiffs on their own behalf, and that potential class members do not have an interest in the case unless and until a class is certified).

246. See Abdallah, 186 F.R.D. at 675 n.1.

247. Id. ("[T]he Supreme Court's opinion [in Gulf Oil] clearly addresses communications between all parties and potential class members, as it should.").


249. Id. (citing Gulf Oil, 452 U.S. at 102).

Defendants typically want to communicate with putative class members about settlement. As a general rule, a defendant has the right to communicate settlement offers to putative class members before a class is certified.\(^{251}\) Once a class is certified, however, a defendant may only negotiate settlements through class counsel.\(^{252}\) Defendants should scrupulously avoid ex parte communications with class representatives at any time, for class representatives clearly are represented by class counsel for purposes of Rule 4.2 and DR 7-104(A)(1).\(^{253}\) Blanchard v. EdgeMark Financial Corp.\(^{254}\) illustrates the hazards that attend defense attorneys' contact with class members after certification and with class representatives.

Blanchard was a securities class action. Joseph Beale was the sole class representative. Throughout the course of the litigation Beale was represented by attorney Paul Carroll, but, for purposes of the class action, he was represented


\(^{252}\) MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.24, at 233; see, e.g., Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 300-05 (N.D. Ill. 1997) (holding that defense lawyer who negotiated settlement with class representative's personal attorney instead of class counsel violated Rule 4.2, disqualifying defense lawyer, and imposing other sanctions); Larry James Oldsmobile-Pontiac-GMC Truck Co. v. Gen. Motors Corp., 175 F.R.D. 234, 240-46 (N.D. Miss. 1997) (sanctioning defense lawyer who negotiated settlement through class representative's corporate counsel rather than negotiating through class counsel; court held that lawyer violated Rule 4.2).

\(^{253}\) Blanchard, 175 F.R.D. at 301 (ultimately disqualifying defense attorney for violating Rule 4.2 and imposing other sanctions) (quoting MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.2, at 234).

\(^{254}\) 175 F.R.D. 293 (N.D. Ill. 1997).
by an attorney from another firm, Reuben Hedlund. The class was certified in August 1995, and Hedlund clearly was class counsel. In 1996, Carroll approached the defendants on Beale’s behalf to discuss a possible settlement. The defendants’ attorney, Daniel Gravelyn, negotiated a settlement with Beale. Hedlund did not participate in the settlement negotiations. Gravelyn ignored Hedlund even though he knew that Hedlund was class counsel.

Although the settlement provided that the class action would continue and provided for a reasonable time for Beale to be replaced as class representative, the plaintiffs moved to vacate the settlement and sought sanctions. Among other things, the plaintiffs alleged that Gravelyn violated Rule 4.2 by negotiating a settlement with Beale without Hedlund’s permission. The Blanchard court agreed.

The defendants first argued that Gravelyn’s conduct did not violate Rule 4.2 because he never spoke directly with Beale, instead negotiating with Carroll. Conjunctively, they argued that Gravelyn did not violate Rule 4.2 because Carroll was Beale’s chosen counsel for purposes of settlement negotiations. The Blanchard court rejected both arguments. With respect to the first, Carroll undoubtedly conveyed Gravelyn’s communications to Beale. Gravelyn’s use of Carroll as a conduit to Beale, while admittedly indirect contact, implicated many of the same concerns and posed many of the same risks that would have been present had Gravelyn communicated directly with Beale. As for the second argument, Beale’s consent to have Carroll represent him in settlement negotiations did not change the fact that as class counsel Hedlund had the right to control communications with Beale about the subject of his representation. Furthermore, it appeared to the court that Carroll was not capable of representing the absent class members’ interests, and Gravelyn’s ex parte communications clearly impaired the attorney-client relationship between Beale and Hedlund.

255. Id. at 297.
256. Id.
257. Id. at 300.
258. Id. at 301.
259. Id. at 300-01, 304.
260. Id. at 297-98.
261. Id. at 298.
262. Id. at 300.
263. Id. at 301.
264. Id.
265. Id.
266. Id. at 302 (stating that “it is only the consent of the adverse party’s counsel that allows an attorney to communicate with the adverse party with ethical impunity”).
267. Id.
Finally, the defendants argued that Gravelyn did not violate Rule 4.2 because, although Hedlund was aware of the negotiations, he did not attempt to become involved in or halt them. In other words, Hedlund had acquiesced to the communications, and had thus consented to them within the meaning of Rule 4.2. The court also rejected this argument, stating:

Contrary to Defendants' contentions, Mr. Hedlund did not consent to the communications because failure to intervene is not equivalent to affirmative consent. Rule 4.2 places the burden of obtaining consent on the attorney who wishes to speak with the adverse party. This Court will not turn the rule on its head and thereby read it to require the represented party's counsel to take active steps toward preventing opposing counsel's communication with his client before a violation of the rule will be deemed to have occurred. It is the individual responsibility of each attorney to ensure that his or her conduct is in compliance with the relevant RULES OF PROFESSIONAL CONDUCT and Defendants cannot seriously contend that, because they were not prevented from violating Rule 4.2, they cannot be held accountable for the unethical nature of their conduct.

The Blanchard court concluded that Gravelyn's violation of Rule 4.2 was both "serious and intentional." Accordingly, the court disqualified Gravelyn and imposed other sanctions on the defendants.

Could Gravelyn have avoided the calamity that befell him? Certainly. When approached by Carroll, he should have alerted Hedlund, and declined to speak further with Carroll unless and until Hedlund consented to their communication. If he did not want to deal with Hedlund, or if Hedlund refused to consent to Gravelyn's ex parte communications with Beale or with Carroll as Beale's agent, Gravelyn could have sought the court's permission to discuss settlement with Beale or Carroll in Hedlund's absence.

Defendants may want to communicate ex parte with potential class members for reasons other than settlement, though still with an eye toward gaining a litigation advantage. In class actions certified under Rule 23(b)(3), a court must give class members the option to exclude themselves from the litigation, and they typically are given this option in other kinds of class actions.

268. Id.
269. Id.
270. Id. at 304.
271. Id. at 305.
272. See RONALD D. ROTUNDA, LEGAL ETHICS § 32-2, at 555 (2002-03) (stating that "in a class action, defense attorneys may secure a court order allowing communication with members of the plaintiff class in appropriate circumstances").
as well. A class member’s decision to withdraw from the litigation is known as “opting out,” and the time that a court gives class members to do that typically is known as the “opt out” period. Defendants may want to encourage class members to opt out, perhaps in an effort to defeat class certification by destroying numerosity, and perhaps simply to minimize their potential damage exposure. Courts take an especially dim view of defendants’ attempts to persuade class members to opt out of litigation. Such communications are believed to reduce the effectiveness of class actions as an economic means of litigation and to otherwise undermine the purposes of Rule 23.

Regardless of whether a defendant’s ex parte communications with putative class members are directed at settlement or at persuading members to opt out of the litigation, courts are particularly concerned about the potential for coercion. “The test for coercion is whether the [defendant’s] conduct somehow overpowers the free will or business judgment of the potential class members.”

B. Pre-Certification Settlements and Efforts to Discourage Participation in Litigation

Although courts routinely hold that defendants may communicate with putative class members about the resolution of their individual claims before a class is certified, they often appear to do so grudgingly. This is because improper communications threaten the fair resolution of the litigation. Even so, courts must be careful not to overstep their bounds when supervising defendants’ conduct. This is especially true where a defendant has an on-going business relationship with potential class members. Defendants may need to

273. MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.231, at 231.
274. See id. ("[C]lass members should be afforded a reasonable time to exercise their option. Courts usually establish a period of thirty to sixty days following mailing of the notice, or if appropriate, for filing the election.").
275. See, e.g., Kleiner v. First Nat’l Bank, 751 F.2d 1193 (11th Cir. 1985) (affirming district court decision disqualifying and fining defense lawyer who helped formulate scheme to persuade class members to opt out).
276. Id. at 1202, 1202 n.19 (discussing Rule 23(b)(3) actions).
277. Id. at 1202 (observing that "[a] unilateral communications scheme . . . is rife with potential for coercion").
279. See id. at *2-3.
280. See id. at *2.
281. See In re Winchell’s Donut Houses, L.P. Sec. Litig., 1988 WL 135503, at *1 (Del. Ch. Dec. 12, 1988) ("Particularly where the class is comprised of persons with whom the defendant has an ongoing commercial relationship, it would seem distinctly
communicate with class members as part of their regular business activities. Beyond that, putative class members may be interested in receiving settlement offers or in hearing a defendant’s perspective on the litigation. Putative class members may have interests or needs that are different from those of the class representatives, and courts are wrong to discount or disregard that possibility, or to assume that putative class members always need protection from defendants. After all, “class members do not become wards, incompetent to deal with their own property, by reason of the unilateral filing of class action complaints by one of their number.”

Courts should nonetheless limit pre-certification class communications by defendants where those communications pose a serious potential for harm to class members’ interests. A defendant may not deceive or mislead class members through otherwise permissible communications. Hampton Hardware, Inc. v. Cotter & Co. illustrates the kind of coercive communications by a defendant that courts seek to prohibit.

Hampton Hardware was a potential class action brought by Hampton Hardware, Inc., which operated a True Value hardware store in Oak Cliff, Texas. Hampton sued Cotter, a member-owned hardware wholesaler. Cotter operated on a cooperative basis for the benefit of its members, including Hampton. Hampton, on behalf of itself and other owners of other True Value hardware stores in Texas, alleged that Cotter improperly assessed monthly service charges. Shortly after the lawsuit was filed, Cotter’s president wrote three letters to potential class members urging them not to participate in the lawsuit. The first letter, written in July 1993, provided:

While we believe that Cotter will win this case for many reasons, it is important that you understand the enormous potential cost to your Company due to this class action. Your team in Chicago will spend thousands of hours on this lawsuit, pulling old documents, reconstructing records, traveling to Dallas and explaining the service charge policy and how your Company operates. Teams of lawyers

ill-advised to attempt to require the defendant to deal with what may be an important aspect of a commercial relationship only through the channel of a self-appointed class action plaintiff.”).
will be required, all at a huge cost. These and other expenses needed to protect your company in this suit will be endless. All of this will cost you precious dollars and us time from our mission which is to make you succeed in the hardware and variety business.

What can you do to avoid this waste of time and money? Decide not to participate in this lawsuit. Under the law you may be given the opportunity to join the class. By refusing to join the class, you save your Company time and expenses which ultimately will be returned to you in the form of your patronage dividend. Every member who joins the class adds to the expense and time needed to protect your Company and you. The expense will, ultimately, come out of your pocket.  

The second letter, written in August 1993, stated:

It is extremely important that you are fully aware of the class action lawsuit that one Texas Member is filing against Cotter & Company. Considering the expense and potentially negative impact on your Company, awareness of this case and your support are vital. . . . [The plaintiff] and his lawyer want to represent all Texas Members against Cotter & Company. By not participating in this suit, you will help save your Company expense in dollars and time.  

The third and final letter, sent in October 1993, stated:

As many of you know one East Texas Member is so supportive of his Company, and so strongly believes that this case is improper and without justification, he began sending releases and waivers to several other Members. He has been forwarding back to us copies of these waivers which many of you have signed.

I believe the support you are showing your Company, after having invested so much of your time and money in it, is sensible and proper. By asking you to join the class, Hampton is asking you to sue yourself.

Hampton contended that the letters were improper and sought an order prohibiting Cotter from communicating further with prospective class members.

289. Id.
290. Id. at 631-32.
291. Id. at 632.
Cotter countered that the letters were protected speech under the First Amendment. It also argued that the letters were required by SEC disclosure rules and were nothing more than the routine dissemination of information to its members.\(^{292}\)

The *Hampton Hardware* court reasoned that the first issue to be determined was whether the three letters were misleading communications that justified judicial intervention.\(^{293}\) This they clearly were. Regardless of Cotter's stated purpose in sending them, the letters obviously were intended to prevent member participation in the class action.\(^{294}\) Furthermore, because Cotter and the class members shared an on-going business relationship, the potential for coercion justified the court's intervention.\(^{295}\) As the court explained:

Members must necessarily rely upon the defendant for dissemination of factual information regarding hardware goods and for lower prices in purchasing those goods. They are therefore particularly susceptible to believing the defendant's comments that the lawsuit will cost them money. Cotter, on the other hand, an interested party in the litigation faces a conflict of interest in advising members on the merits of participation in the lawsuit due to its direct pecuniary interest in the outcome.\(^{296}\)

Testimony by the owner of a member hardware store established a serious potential for harm to class members' interests flowing from the three letters.\(^{297}\) The court reasoned that the potential for serious abuse was sufficient for it to act; the plaintiff was not required to prove actual harm attributable to the letters in order to justify limiting defense communications.\(^{298}\)

Having determined that Cotter's communications with potential class members were improper and thus had to be limited, the next question was how to fashion appropriate relief drawn as narrowly as possible. In framing its order, the court looked first at the severity and likelihood of the perceived harm posed by the letters.\(^{299}\) The court easily determined that the relationship between Cotter and cooperative members justified the prohibition of future communications, stating:

\(^{292}\) *Id.*  
\(^{293}\) *Id.*  
\(^{294}\) *Id.* (citing *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985)).  
\(^{295}\) *Id.* at 633.  
\(^{296}\) *Id.*  
\(^{297}\) *Id.*  
\(^{298}\) *Id.* (citing *In re Sch. Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988)).  
\(^{299}\) *Id.*
With respect to the first factor, the perceived harm, the fact that the members must rely upon the defendant for crucial information as to pricing renders potential class members particularly vulnerable to coercion. Cotter determines pricing for its members and is now warning them that prices will go up if the lawsuit continues. Members are thus less likely to feel that participation in the lawsuit is in their best interest. This in turn undermines the goals of Rule 23. Thus all communications regarding the suit should be prohibited.\(^{300}\)

The court next considered the breadth of its order prohibiting communications between Cotter and potential class members. In doing so, it attempted to strike a balance between protecting class members from making decisions based on biased communications from Cotter, while at the same time trying not to interfere with the on-going business relationship between Cotter and the class members.\(^{301}\) The court thus prohibited all communications concerning the litigation while permitting regular business communications.\(^{302}\)

The *Hampton Hardware* court then had to consider the availability of alternatives less onerous than an absolute ban on communications. Quite simply, there were none.\(^{303}\) The court could not "conceive of any advice from Cotter regarding the lawsuit that [was] not rife with the potential for confusion and abuse given Cotter’s interest in the suit."\(^{304}\)

Finally, the court determined that its order limiting defense communications with potential class members should run through trial.\(^{305}\) Any shorter duration would prove unnecessarily troublesome. Because the court had already determined that Cotter could communicate with its members about business matters unrelated to the litigation, an order of such lengthy duration was unlikely to disrupt their business relationship.\(^{306}\)

The plaintiffs also sought a court order directing Cotter to send a corrective notice to prospective class members at its expense. The court declined to enter such an order. Although the plaintiff had demonstrated a clear potential for abuse, there was little evidence of actual harm.\(^{307}\) Moreover, because the court had yet to certify a class, any corrective notice would be potentially confusing and premature.\(^{308}\) If the court ultimately were to certify the class, its notice to

\(^{300}\) *Id.* at 633-34.

\(^{301}\) *Id.* at 634.

\(^{302}\) *Id.*

\(^{303}\) *Id.*

\(^{304}\) *Id.*

\(^{305}\) *Id.*

\(^{306}\) *Id.*

\(^{307}\) *Id.* at 635.

\(^{308}\) *Id.*
class members would provide the objective information required by Rule 23(c).\footnote{Id. Rule 23(c) governs notice to class members in any class action maintained under Rule 23(b)(3), and provides: The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel. \textit{Fed. R. Civ. P. 23(c)(2)}.} For these reasons a corrective notice was not required.\footnote{Id. at 436.}

\textit{Fraley v. Williams Ford Tractor \\& Equipment Co.}\footnote{Id. \textit{at} 436.} is another case in which a defendant’s allegedly coercive and misleading communications were challenged. \textit{Fraley} was a class action filed under the Truth in Lending Act.\footnote{Id. \textit{at} 435-36.} The plaintiffs alleged that when Williams Ford sold equipment it financed premiums for property and credit life insurance as part of the related installment sales contracts and security agreements.\footnote{Id. \textit{at} 435.} If a customer paid the full purchase price of the equipment early, the insurance company refunded any unearned premium to Williams Ford, but Williams Ford allegedly never passed along that refund to the customer.\footnote{Id. \textit{at} 426.}

Before two proposed classes could be certified, Williams Ford began calling all of the potential class members. Williams Ford representatives attempted to discourage customers’ participation in the lawsuit, discussed the merits of the case with customers, and persuaded most customers that they had consented to Williams Ford’s retention of their unearned insurance premiums.\footnote{Id. \textit{at} 426.} Williams Ford was able to obtain releases from the overwhelming majority of the potential class members.\footnote{Id. \textit{at} 426.} However, its representatives never told the potential class members the amount of any refunds they might get if the class action were successful, nor did they tell them about the potential for a punitive damage award, and the communications were otherwise confusing and misleading.\footnote{Id. \textit{at} 426.} With a few exceptions, Williams Ford gave no consideration for the releases it obtained.\footnote{Id. \textit{at} 426.}

Williams Ford’s pre-certification campaign proved to be a success. The trial court denied the plaintiffs’ class certification motion, holding that they could...
not satisfy the numerosity and predominance requirements. The trial court specifically approved Williams Ford’s pre-certification communications with potential class members. The plaintiffs eventually appealed the trial court’s denial of class certification to the Arkansas Supreme Court.

The propriety of a defendant’s pre-certification communications with potential class members was a question of first impression for the court. The parties took polar opposite positions: the plaintiffs urged the court to prohibit all unsupervised, ex parte communications between defendants and potential class members, while Williams Ford argued that defendants’ pre-certification communications with potential class members are always proper. The Fraley court rejected both positions. The court instead was persuaded that a defendant’s pre-certification communications with potential class members should be restricted or prohibited when they are intended to “substantially reduce member participation in the class action,” or when they “otherwise indicate a likelihood of coercion or a serious potential for harm to the interests of the class action.”

Guided by these principles, the Fraley court easily concluded that Williams Ford’s pre-certification communications with potential class members were improper. The court held that the trial court abused its discretion by considering the communications and the resulting releases in declining to certify the proposed classes. The court further held that the trial court erred in deciding the numerosity and predominance requirements against the plaintiffs.

Arriola v. Time Insurance Co. stands at the opposite end of the pre-certification communication spectrum. In Arriola, the defendant, Time Insurance Company, was sued in a class action in an Illinois state court. Before the plaintiff moved to certify the class, Time obtained releases from forty-four of the forty-six Illinois policyholders in an effort to defeat the numerosity required for class certification and thus avoid liability to a larger group of policyholders in other states. The plaintiff alleged that Time’s efforts to obtain

319. Id.
320. Id.
321. Id. at 432.
322. Id. at 434.
323. Id.
324. Id. at 434-35 (citing Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994)).
325. See id. at 436.
326. Id.
327. Id. at 436-38. The Fraley court reversed the trial court and remanded the case for further proceedings. Id. at 439.
329. Id. at 224-26.
these releases constituted impermissible communications with putative class members.330

The plaintiff did not challenge the validity of the releases. There was no evidence of coercion by Time, nor was there any evidence that it misrepresented facts to potential class members in obtaining the releases.331 For this reason, and because the plaintiff had not moved to certify the class when Time obtained the releases, the Arriola court held that Time's communications with the putative class members were proper.332

Although they are the exception rather than the rule, cases such as Hampton Hardware333 and Fraley334 demonstrate that courts do have some reason to be concerned about defendants' ex parte communications with potential class members. Courts are most concerned about potential coercion in cases in which the defendant has an ongoing business relationship with potential class members,335 and in cases in which the potential class members are employed by the defendant.336 In the business relationship context, the potential for coercion is greatest where the defendant is the putative class members' principal or sole supplier, or represents the dominant market for the putative class members' products or services.337 The potential for coercion is also great where the putative class members depend on the defendant for credit or financing.338

While courts must be sensitive to potential coercion, the mere potential for coercion does not justify courts' prior restraint of defendants' ex parte communications, as would be necessary if the potential for coercion is sufficient to justify the permanence of the class releases.

330. Id. at 226.
331. Id.
332. Id. at 230-31.
335. See, e.g., Ralph Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 CIV. 4567 (AGS), 2001 WL 1035132, at *4 (S.D.N.Y. Sept. 7, 2001) (finding potential for coercion because GM dealers making up the potential class depended on the defendant for credit, information and supplies, and were solely dependent upon the defendant to supply them with vehicles).
336. See, e.g., Bublitz v. E.I. duPont de Nemours & Co., 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation."); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999) (observing that "simple reality suggests that the danger of coercion is real" when potential class members are employed by the defendant).
337. See, e.g., Ralph Oldsmobile, 2001 WL 1035132, at *4 (noting potential class members' dependence on the defendant for credit, information and supplies); Hampton Hardware, 156 F.R.D. at 633 (finding that potential class members were susceptible to coercion because they relied on the defendant for low-priced supplies and for information).
communications with putative class members. Speculation about coercive communications will not suffice. Rather, to justify prior restraint there must be "actual or threatened misconduct of a serious nature." Where actual harm cannot be shown, plaintiffs must offer evidence that a potential for serious abuse exists. Absent such evidence, a court cannot intervene. This is true even in the context of employment litigation, where the potential for coercion arguably is greatest.

A defendant is free to tell potential class members that it has been sued and even to express its views on the litigation, so long as it does not make explicit or implicit threats, or attempt to mislead potential class members. The mere fact that a defendant chooses to keep its customers or employees informed about litigation affecting the company does not evidence an improper motive. Similarly, a defendant is free to communicate with putative class members about business transactions that may in some way be related to the subject of the class action provided that the transactions are fair. A defendant’s business cannot grind to a halt simply because it is the target of a class action. Of course, a defendant is always free to communicate with potential class members about business or employment matters unrelated to the litigation.

In conclusion, plaintiffs’ concerns about potential coercion are as a general rule exaggerated, overblown and overstated. Plaintiffs’ counsel typically want

342. Basco, 2002 WL 272384, at *3; Burrell, 176 F.R.D. at 244.
343. Basco, 2002 WL 272384, at *3-4; Burrell, 176 F.R.D. at 244-45.
344. Burrell, 176 F.R.D. at 244-45; see, e.g., Lee v. Am. Airlines, Inc., No. CIV.A. 3:01-CV-1179-P, 2002 WL 226347, at *2 (N.D. Tex. Feb. 12, 2002) (declining to limit defendant’s communications with potential class members where plaintiff “failed to allege or prove any instances of targeted letters or announcements designed to threaten or intimidate potential class members if they were to join the litigation”).
347. MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.24, at 234.
348. See, e.g., Basco, 2002 WL 272384, at *4 (declining to rule for plaintiffs who could “only state that they believe[d]” that the defendant might communicate with potential class members); Lee, 2002 WL 226347, at *2 (finding no basis to limit defendant’s communications with potential class members); Jenifer, 1999 WL 117762, at *8 (holding that plaintiffs did not offer sufficient evidence of potential coercion or
to limit or prohibit defendants' communications with putative class members not because they truly fear coercion, but because they fear truthful communications and reasonable individual settlements that will have the effect of reducing the expected fee awards.\(^{349}\) For this reason alone courts should be reluctant to restrain defendants' communications with putative class members. In the event challenged communications actually are coercive, a court can always send a curative notice at the defendant's expense.\(^{350}\)

V. THE ATTORNEY-CLIENT RELATIONSHIP AFTER CERTIFICATION BUT BEFORE OPT OUT: WHAT THE LAW IS AND WHAT IT SHOULD BE

A class is in a state of flux between the time it is certified by the court and the time the opt out period expires.\(^{351}\) The putative class may contain members who will choose to exclude themselves from the class. Accordingly, some courts hold that while certification changes the relationship between plaintiffs' counsel and the putative class members, it creates only a "potential attorney-client relationship."\(^{352}\) Other courts recognize that class certification creates an attorney-client relationship between class counsel and class members (as compared to a "potential" attorney-client relationship), but still discount the relationship during the opt out period. The court in *Tedesco v. Mishkin*,\(^{353}\) for example, described the relationship between class counsel and absent class members during this time as "a limited attorney-client relationship."\(^{354}\) The court

\[^{349}\] See *supra* note 3.

\[^{350}\] See *supra* note 3.

\[^{351}\] Great Rivers Coop. v. Farmland Indus., Inc., 59 F.3d 764, 766 (8th Cir. 1995) (citing MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.24, at 232 (1985)).

\[^{352}\] Great Rivers Coop. v. Farmland Indus., Inc., 59 F.3d 764, 766 (8th Cir. 1995) (citing MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.24, at 232 (1985)).

\[^{353}\] In *re* Potash Antitrust Litig., 162 F.R.D. 559, 561 n.3 (D. Minn. 1995).


\[^{355}\] Id. at 1483.
in *In re Chicago Flood Litigation* expressed the view that class counsel do not "fully represent all class members" until after a court has certified the class and the opt out period has expired. Still other courts appear to have simply thrown up their hands, saying that before the opt out period expires "the status of plaintiffs' counsel in relation to the class members cannot be stated with precision." It is wrong to say that the attorney-client relationship between class counsel and putative class members during the time between certification and the expiration of the opt out period is less than "full," for such a description is not materially different from the timeless analogy to a woman being "a little pregnant." The description of the relationship between certification and opt out as being a "potential attorney-client relationship" is similarly flawed. Either class counsel share an attorney-client relationship with absent class members during this time or they do not. If they do, then a class member who opts out is simply terminating his attorney-client relationship with class counsel, as is always his right. If they do not share an attorney-client relationship during this period, then assuming that they do not attempt to coerce or mislead class members, defense counsel ought to be able to unilaterally communicate with them without running afoul of Rule 4.2 or DR 7-104(A)(1).

But the courts that question the relationship between class counsel and putative class members during the time between certification and expiration of the opt out period are on to something. An attorney-client relationship ought to be a voluntary, consensual relationship. Before the opt out period expires, any attorney-client relationship between class counsel and unnamed class members is almost exclusively class counsel’s doing, albeit with some help from the court in the form of the certification order. This is not acceptable. Competent adults

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356. *Id.* at 426 (emphasis added); see also Potash, 162 F.R.D. at 561 n.3 (agreeing that class counsel do not fully represent putative class members prior to expiration of the deadline for opting out).
358. *See Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 58 (Mo. 1982) (recognizing the "modern rule" that a client may "discharge his attorney, with or without cause, at any time").
359. *But see Impervious Paint*, 508 F. Supp. at 722-23 (stating that while before the close of the opt out period "the status of plaintiffs’ counsel in relation to the class members cannot be stated with precision," defense counsel must treat class members as being represented by counsel for DR 7-104 purposes).
360. *See Chicago Flood Litig.*, 682 N.E.2d at 425 ("The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client.").
361. *See id.* (stating that an attorney-client relationship "cannot be created by an
ought not have attorney-client relationships foisted upon them. Class members are not incompetent wards of the court who require appointed counsel, yet that is exactly how they are treated when a court’s decision to certify a class is deemed to create an attorney-client relationship between class counsel and the unnamed members of the class.

Class certification alone should not be deemed to create an attorney-client relationship between class counsel and unnamed class members. Rather, an attorney-client relationship should be recognized only upon the expiration of the opt out period following certification. Waiting until the time for opting out has expired to declare that class counsel represent unnamed class members supports the attorney-client relationship by restoring it to a voluntary and consensual arrangement in class actions as in all other civil matters involving competent clients. Class members who do not opt out by the deadline for doing so presumably have chosen to pursue litigation as part of the class, and have likewise chosen to be represented by class counsel. On the other side of the coin, potential class members who do opt out presumably did not want an attorney-client relationship with class counsel.

Critics of this approach will surely argue that delaying the recognition of an attorney-client relationship between class counsel and unnamed class members until the time for opting out has run will expose putative class members to more potentially coercive or misleading communications. Freed from the shackles of Rule 4.2 and DR 7-104(A)(1) for an additional sixty to ninety days, defense lawyers will use that time to undermine the purposes of Rule 23 by wrongly persuading potential class members to opt out and by negotiating unfair settlements with individual class members. This is, of course, complete nonsense. Courts always have the ability to step in and prevent or remedy serious misconduct by defendants or their counsel. Defense lawyers who attempt to mislead, coerce, intimidate or otherwise take advantage of class members are subject to professional discipline under a variety of ethics rules.

attorney alone and generally the duty falls upon a potential client to initiate contact with the attorney).

362. MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.24, at 232 (“Under the broad supervisory authority granted by Rule 23(d), the court may enter appropriate orders to regulate communications with members of the class.”); see, e.g., Cobell v. Norton, 212 F.R.D. 14, 17-24 (D.D.C. 2002) (restricting defendants’ communications with class members and referring defense counsel to disciplinary authorities for communication sent to class members without court’s permission that purported to extinguish class members’ right to recovery).

363. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2003) (prohibiting knowingly false statements of material fact or law to third persons); id. R. 8.4(c) (stating that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”); id. R. 8.4(d) (banning conduct that is prejudicial to the administration of justice); MODEL CODE OF PROF’L RESPONSIBILITY DR
They therefore have every incentive to conduct themselves appropriately. Finally, under Rule 23(e) any post-certification settlement must be submitted to the court for review and approval before execution.\textsuperscript{364} Defendants and their counsel who violate Rule 23(e) risk serious sanctions.\textsuperscript{365}

Given the relative dearth of law on class counsels’ relationship with unnamed putative class members, and given that many cases on the subject do not count as controlling authority, it is reasonable to ask what should the law be. When should class counsel be held to have an attorney-client relationship with putative class members? As demonstrated here, class counsel should be found to have an attorney-client relationship with putative class members only after the period for opting out of the class action expires.

Of course, the position articulated here—like the majority rule that class certification creates an attorney-client relationship between class counsel and unnamed class members—is a default position. That is, it assumes that class counsel have not in fact established a consensual, contractual attorney-client relationship with unnamed class members. Although the existence of such relationships is unlikely in most cases, the possibility always exists and cannot be totally ignored.\textsuperscript{366} If class counsel in fact have attorney-client relationships with potential class members, they should disclose those relationships to defense counsel so that defense counsel may avoid improper ex parte communications and the accompanying risk of sanctions and professional discipline.\textsuperscript{367}

VI. CONCLUSION

Class action litigation has proliferated in recent years. Among the issues that have gained importance in the developing law of class actions is ex parte communication between counsel and putative class members, and between parties and putative class members. From lawyers’ perspective, the difficulty in

\textsuperscript{364} See FED. R. CIV. P. 23(e) (stating that a class action “shall not be dismissed or compromised without the approval of the court”); MANUAL FOR COMPLEX LITIGATION, supra note 79, § 30.42, at 238-40 (describing and explaining the court’s role in settlement).


\textsuperscript{367} See id. ("The court strongly urges both parties to communicate with one another on the issue of which individuals have established an attorney-client relationship before any [ex parte] communication with these individuals takes place.")


determining whether they can communicate with potential class members is chiefly attributable to uncertainty about the existence of an attorney-client relationship between class counsel and potential class members. Even plaintiffs’ counsel must be concerned about communicating with potential class members because of the special rules that govern class action litigation.

The majority position is that a court’s decision to certify a class creates an attorney-client relationship between class counsel and putative class members. Thus, once a class is certified, defense counsel must treat unnamed class members as represented parties for purposes of Rule 4.2 and DR 7-104(A)(1). Whether the majority approach is the correct approach, however, is debatable. A better approach—and one much more consistent with the long-established principle that an attorney-client relationship should be a voluntary, consensual relationship—would be to hold that class counsel and class members do not share an attorney-client relationship until the period for class members to opt out of the litigation has expired.

There are many ex parte communications issues in class action litigation. Even lawyers who think that they understand the professional responsibility implications of communicating with parties and others can err in the murky arena that is the modern class action. With luck, this Article will assist lawyers who must deal with the fact-specific problems and ethical ambiguities that characterize class actions.