Ethical Considerations in Class Action Settlements – What In-House Counsel Need to Know

Pre-Certification Communications and Settlements with Absent Class Members

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December 2014

Today, courts generally permit pre-certification communications and settlements with absent class members. Indeed, courts recognize that defendants, as much as plaintiffs, need pre-certification communications with absent class members to prepare their cases. However, since such communications often implicate a complex mixture of professional conduct and civil procedure rules, free speech doctrine, and evolving court-made guidelines, in-house counsel should proceed carefully when communicating with absent class members. With this in mind, following a summary of general principles and authorities applicable to pre-certification communications, this article reviews recent court decisions and then offers pointers for consideration by in-house counsel in connection with pre-certification communications, including settlement offers.

I. General Authorities and Principles Applicable to Communications and Settlements with Absent Class Members

There are at least four general authorities and principles that underlie and inform the subject of pre-certification communications with absent class members. The first authority concerns professional conduct rules regulating contact with represented parties. Rule 4.2 of the Model Rules of Professional Responsibility, for example, restricts certain lawyer communications with persons known to be represented by other lawyers. While early decisions reflected confusion as to whether absent class members are clients of plaintiffs’ counsel prior to certification and covered by Rule 4.2, the overwhelming majority of courts now hold that plaintiffs’ counsel does not represent absent class members prior to certification and Rule 4.2 generally does not apply to pre-certification communications with those members.

The second authority is Rule 23(d) of the Rules of Civil Procedure, which authorizes courts to require “notice” to class members, impose “conditions” on the parties, and deal with “procedural matters.” In Gulf Oil Co. v. Bernard, the Supreme Court emphasized that Rule 23 gives courts “both the duty and the broad authority to exercise control over a class” and held that Rule 23 empowers courts to enter appropriate orders governing communications between parties.

1 See, e.g., Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (maintaining pre-certification communication ban where there was evidence of improper communications); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (holding “mere initiation of a class action” prohibits defense counsel from contacting or interviewing potential class members).

2 See, e.g., Castaneda v. Burger King Corp., 2009 WL 2382688, at *7 (N.D. Cal. July 31, 2009) (“[t]he weight of authority seems unwilling to adopt the Dondore view”).
and potential class members. Accordingly, courts routinely cite Rule 23 as a principle authority for supervising pre-certification communications, with the often stated purpose of ensuring that “potential members receive accurate and impartial information regarding the status, purposes, and effects of the class action.”

The third principle is the freedom of speech. The judiciary’s broad discretion to limit communications under Rule 23 can constitute government regulation of speech and, therefore, trigger First Amendment concerns. Given the potential for improper infringement of speech, the Supreme Court in Gulf Oil explained that pre-certification communication restrictions must be based on a “clear record and specific findings” and “carefully drawn” so speech is restricted as little as possible. In practice, courts deciding whether to limit communications in the First Amendment context often consider: (1) the severity and likelihood of the perceived harm; (2) the precision with which the order is drawn; (3) the availability of less onerous alternatives; and (4) the duration of the order.

Finally, although pre-certification communication considerations are innately case- and fact-specific, a few general guidelines can be drawn from the accumulation of the judiciary’s application of the above authorities. These include:

- Defendants and defense counsel may communicate directly with absent class members prior to class certification concerning the litigation
- Defendants and defense counsel may negotiate and enter individual litigation settlements directly with absent class members prior to class certification

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4 Hinds Cty. Miss. v. Wachovia Bank N.A., 790 F. Supp. 2d 125, 134 (S.D.N.Y. 2011 (“primary purpose in supervising communications is...to ensure that potential members receive accurate and impartial information regarding the status, purposes, and effects of the class action”); see also Kleiner v. First Nat’l Bank of Atlanta, 751 F. 2d 1193, 1203 (11th Cir. 1985) (same).
6 Gulf Oil, 452 U.S. at 101-02; see also Longcier v. HL-A Co., Inc., 595 F. Supp. 2d 1218, 1226-27 (S.D. Ala. 2008) (requiring that parties seeking to limit speech prove (1) a particular communication has occurred or is threatened to occur and (2) the communication is abusive or threatens the proper functioning of the litigation).
7 See, e.g., Kleiner, 751 F. 2d at 1205-06.
8 See, e.g., Reid v. Unilever United States, Inc., 964 F. Supp. 2d 893, 925 (E.D. Ill. 2013) (“Generally, either side has the right to communicate with putative class members.”)
9 See, e.g., Austen v. Catterton Partners V, LP, 831 F. Supp. 2d 559, 567 (D. Conn. 2011) (“mere ex parte communications – even ex parte settlement negotiations – are not abusive communications that warrant limitations absent indications in the record of the need for limitations”).
• Courts may restrict only those pre-certification communications that are misleading, deceptive, coercive,\textsuperscript{10} or are otherwise undertaken in bad faith to undermine the class action or avoid liability\textsuperscript{11}

These parameters have evolved over time. For instance, early decisions held that the employer-employee relationship was inherently coercive and sufficient grounds for judicial regulation of defendant-employer communications,\textsuperscript{12} while recent decisions hold that an employment relationship is insufficient, in and of itself, to support communication regulations.\textsuperscript{13} With the fact-specific and evolving nature of these guidelines, any consideration of pre-certification communications should be informed by recent decisions.

II. Recent Decisions on Pre-Certification Communications and Settlements with Absent Class Members

In the past few years, courts have issued numerous decisions on pre-certification communications and settlements. These decisions not only reflect courts’ prevailing views on the subject, but also helpfully illustrate the types of communications that are appropriate as well as potentially problematic. These decisions include:

• \textit{Slavinski v. Columbia Assoc., Inc.}\textsuperscript{14} – Plaintiff claimed defendant’s interviews of 14 of its employees who were prospective class members was improper; court held that defendant’s interviews were proper, defendant had no obligation to notify plaintiff’s counsel of interviews, and employer-employee relationship is not inherently coercive absent actual evidence of improper conduct

• \textit{Austen v. Catterton Partners V, LP}\textsuperscript{15} – After defense counsel interviewed an employee who was a prospective class member, defendants moved for permission to contact

\textsuperscript{10} See \textit{Gulf Oil}, 452 U.S. at 100.
\textsuperscript{11} See id; see also \textit{Wright v. Adventures Rolling Cross Country, Inc.}, 2012 WL 2239797, at *5 (N.D. Cal. June 15, 2012) (“The critical question is whether there is a realistic danger that the communications will chill participation in the class action”).
\textsuperscript{12} See, e.g., \textit{Abdallah v. Coca-Cola Co.}, 166 F.R.D. 672, 678 (N.D. Ga. 1999) (“simply reality suggests that the danger of coercion is real and justifies imposition of limitations…”); \textit{Bublitz v. E.I. duPont de Nemours and Co.}, 196 F.R.D. 545 (D. Iowa 2000) (regulating communication because, “[w]here 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”).
\textsuperscript{13} See, e.g., \textit{Slavinski v. Columbia Assoc., Inc.}, 2011 WL 1310256, at *4 (D. Md. Mar. 30, 2011); \textit{Longcrier}, 595 F. Supp. 2d at 1227 (“In tracing out the fault line between conduct which warrants restrictions and conduct which does not, it bears emphasis that mere inherent coerciveness in the employment relationship is insufficient, in and of itself, to warrant imposition of limitations on employers' ability to speak with potential class members prior to certification.”).
\textsuperscript{14} \textit{Slavinski}, 2011 WL 1310256, at *1.
\textsuperscript{15} 831 F. Supp. 2d at 559.
putative class members; court confirmed defendants’ right to contact putative class members (including defendants’ employees) but faulted defense counsel for failing to disclose who they represented and purpose of the interview

- **Zamboni v. Pepe West 48th St. LLC**\(^{16}\) – Court ordered a curative notice to inform employees that statements that they have no claim were invalid when obtained in one-on-one meetings with defendant-employer, employee was not permitted time to read statement, employee and employer refused to provide copy of statement to employee

- **Bobryk v. Durand Glass Manufacturing Co., Inc.**\(^{17}\) – Court denied plaintiff’s motion to limit communications where defense counsel had obtained 20 declarations from its employee/putative class members while following a written script that introduced counsel, explained the allegations and defendants’ response, summarized the class process, and asked for voluntary declarations

- **Filby v. Windsor Mold USA, Inc.**\(^{18}\) – Plaintiff challenged settlement package sent by defendant-employer; court found no flaws with settlement package that included a written description of the lawsuit, release forms, and the consequences of accepting or rejecting the proposed settlement

- **Reid v. Unilever United States, Inc.**\(^{19}\) – Plaintiffs moved to vacate settlement releases obtained from putative class members because the communications failed to identify class counsel, provide claim details, or explain class procedure; court ruled that communication’s disclosure of case name, number, and court was sufficient information

- **Camp v. Alexander**\(^{20}\) – Court invalidated opt-out forms signed by employee/putative class members as misleading by omission due to failure to explain plaintiff’s claims in full, enclose the complaint, or provide contact information for plaintiff’s counsel

Not surprisingly, these recent decisions show that common sense usually prevails when courts assess pre-certification communications, including settlements. Accurate, impartial, and reasonably comprehensive communications tend to withstand scrutiny. In contrast, misleading, one-sided, forced, or incomplete communications, whether originating from defendants or plaintiffs, likely will draw judicial ire and may call for corrective actions.

### III. Pre-Certification Communication and Settlement Considerations

In-house counsel considering pre-certification communications are confronted with a host of strategic decisions. For example, at what stage in the litigation should settlement offers be communicated? Before communicating, should opposing counsel be informed or permission


\(^{19}\) 964 F. Supp. 2d at 893.

\(^{20}\) 300 F.R.D. 617 (N.D. Cal. 2014).
requested of the court? Should the communications be in oral or written form? Should communicated settlement offers include opposing counsel contact information, case documents, or other information? Recent decisions provide guidance on these and other issues.

The expectation that settlement offers include enough information to allow an informed decision by putative class members favors making offers as early as practicable. This is demonstrated by two cases. In Reid, the court sustained a settlement offer made at the onset of litigation which consisted of only a release form and a description of the lawsuit and the consequences of settling. This is in sharp contrast to In re Southeastern Milk Antitrust Litigation, where the court rejected a pre-certification settlement offer made after substantial discovery had occurred. There, the court reasoned, a pre-certification offer was inappropriate because putative class members would be unable to make an informed decision to settle since they had no access to the voluminous, confidential information generated in discovery.

When considering whether to notify opposing counsel or the court of planned communications, it is safe to assume that opposing counsel will become aware of the communications – either directly from the recipients or when the communications eventually are disclosed in discovery, settlement, or pre-trial proceedings. Likewise, it is safe to assume that complaints will be lodged with the court as soon as the communications are disclosed. Given the predictability of opposing counsel, this consideration is best focused on the court’s anticipated reaction to the particular subject matter of the planned communications.

While courts do not require that pre-certification communications and settlement offers be in written form, courts appear more willing to sustain written, as opposed to unrecorded oral, communications. In fact, as reflected in Bobryk, Filby, and Reid, courts were comfortable relying primarily on the written substance of the settlement communications in holding that they were appropriate. In comparison, when the communications are not written, disputes about what was communicated inevitably arise and this can, as Zamboni demonstrates, influence a court to take some corrective action, despite the fact that plaintiffs bear the burden of proving the impropriety of defense communications.

Finally, deciding to embark on pre-certification communications or settlements raises the issue of what information should be included with the communications. The touchstone of

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21 964 F. Supp. 2d at 893.
22 2009 WL 3747130, at *3 (E.D. Tenn. Nov. 3, 2009) (“Absent review of these documents by the putative class members and/or their independent legal counsel, these putative class members simply have no way to meaningfully evaluate the strengths and weaknesses of the claims asserted by the named plaintiffs”). Notably, the court found the proposed settlement offer appropriate in all other respects.
23 2009 WL 3747130, at *3 (E.D. Tenn. Nov. 3, 2009) (“Absent review of these documents by the putative class members and/or their independent legal counsel, these putative class members simply have no way to meaningfully evaluate the strengths and weaknesses of the claims asserted by the named plaintiffs”). Notably, the court found the proposed settlement offer appropriate in all other respects.
24 2013 WL 5574505, at *1.
26 964 F. Supp. 2d at 893.
26 2013 WL 978935, at **3-4 (ordering corrective notice to cure allegedly inappropriate oral communications by defendant-employer even though there was conflicting evidence as to the subject communicated).
course, is that pre-certification communications should be accurate, impartial, not coercive, and reasonably comprehensive. But what specific information is needed to meet this goal? Recent decisions indicate that communications should, at a minimum, disclose the caption and number of the case for which the communication relates, \(^{27}\) and identify the parties that the communicator represents. \(^{28}\) In addition, the communication may need an impartial summary of the allegations and defenses in the case \(^{29}\) – including the actual complaint if the communication proposes a settlement. If the recipient is asked to provide information or otherwise take action, \(e.g.,\) sign a waiver, opt-out of class, deny damages, \(etc.,\) the communication should explain the consequences to the recipient of providing information or taking the requested action. \(^{30}\)

\(^{27}\) See Reid, 964 F. Supp. 2d at 893.

\(^{28}\) See Austen, 831 F. Supp. 2d at 559.

\(^{29}\) See Filby, 2014 WL 243961, at *1; see also Bobryk, 2013 WL 5574505, at *1.

\(^{30}\) See, \(e.g.,\) Filby, 2014 WL 243961, at *1.