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I. INTRODUCTION

In a traditional lawsuit, when an attorney files a complaint on a client's behalf, the existence of an attorney-client relationship is unquestioned. However, this clarity does not currently exist in federal class action litigation.[1] Instead, the majority view holds that an attorney-client relationship does not exist between class counsel and unnamed class members until a federal district court certifies

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[1] In this Article, I have restricted my analysis to the circumstances faced by class counsel for a plaintiff class. Although the Federal Rules of Civil Procedure expressly authorize both plaintiff and defendant classes, plaintiff classes are far more common. *See infra* note 26 (discussing defendant classes). The issues faced by class counsel for a defendant class are similar, but not identical, and are beyond the scope of this Article.

the action as a class action.[2] Accordingly, the existing law leaves the relationship between class counsel and prospective class members undefined at a particularly critical time in the litigation—after filing, but before class certification.

This uncertainty leaves class counsel, defense counsel, and the prospective class members in a very awkward situation. If unnamed class members are not full-fledged clients of the class attorneys, neither are they traditional third parties with whom lawyers for the parties are expected to deal at arm's length as nonadvocates. They are intimately involved in the action, with their interests squarely at stake. The unnamed class members are expected shortly to ripen into members of a fully represented class, belonging squarely on one side of the litigation.

The issue as to when class counsel "represents" unnamed class members has particular relevance with regard to attorney communications. If the unnamed class members are considered unrepresented, both class counsel and defense counsel must deal with them as third parties. However, the situation is dramatically different if the unnamed class members are considered represented by class counsel. In that situation, class counsel is under an ethical obligation to communicate with the class members, keeping them reasonably informed about the status of the litigation and responding promptly to their requests for information.[3] Correspondingly, defense counsel—free to communicate in an honest manner with

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[2] This problem arises only with respect to unnamed class members; the class representatives, as named plaintiffs, are held to have an attorney-client relationship with class counsel. *See infra* note 7 and accompanying text. State court class action decisions are similar with respect to this issue. *Compare* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 4.06[2], at 4-57 (2001) ("The members of the purported class on whose behalf a class action is instituted are deemed represented by counsel for the class representatives as of the time the complaint is filed with the court."), *with* Atari, Inc. v. Super. Ct., 212 Cal. Rptr. 773, 776 (Ct. App. 1985) ("We cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party . . . represented by counsel' even before the class is certified . . . ."). However, the scope of this Article is limited to federal class actions.

[3] MODEL RULES OF PROF'L CONDUCT R. 1.4 (1999); *see infra* note 157 and accompanying text (discussing ethical obligations to clients under Rule 1.4).

unrepresented parties[4]—may not communicate with class members represented by other counsel without the consent of that lawyer.[5]

In class actions, there is a split of authority as to the point at which unnamed class members become "represented" by counsel. The authorities generally agree that once the court certifies the case as a class action, a lawyer-client relationship exists between class counsel and all class members.[6] Pre-certification, however, the rules are less well-defined.

The majority view, embraced by most courts,[7] the Restatement,[8] and the leading class action treatise,[9] holds that before class certification, putative class members are not "represented" by class

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[4] MODEL RULES OF PROF'L CONDUCT R. 4.1, 4.3 (1999); *see infra* notes 160-61 and accompanying text (discussing ethical obligations to persons not represented by counsel).

[5] MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999); *see infra* note 164 and accompanying text (discussing proscriptions of Rule 4.2).

[6] *See, e.g.*, Palumbo v. Tele-Communications, Inc., 157 F.R.D. 129, 133 (D.D.C. 1994) (stating class certification confers status of litigant on absent class members and creates attorney-client relationship with class counsel); Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992) ("After the class has been certified, defendants' counsel must treat the unnamed class members as 'represented by' the class counsel for purposes of DR 7-104."); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) ("By communicating with the class members after this court had orally certified the class, [defendant] also violated DR 7-104(A)."); Bower v. Bunker Hill Co., 689 F. Supp. 1032, 1034 (E.D. Wash. 1985) (stating after class certification, "defense counsel may not communicate with any class member with respect to matters which are the subject of this litigation without prior consent of class counsel or this court"); Resnick v. Am. Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the class counsel."). *See generally* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.24, at 257 (1997) [hereinafter MANUAL FOR COMPLEX LITIGATION] ("Once a class is certified, the rules governing communications apply as though each class member is a client of class counsel."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. l (2000) [hereinafter RESTATEMENT] (noting "according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class").

[7] *See, e.g.*, Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.15 (2d Cir. 1978) (noting certification makes class attorney's client), *aff'd on other grounds*, 444 U.S. 472 (1980); Garrett v. Metro. Life Ins. Co., No. 95-CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. June 12, 1996) (noting "before class certification, the putative class members are not 'represented' by the class counsel for purposes of DR 7-104"); Babbitt v. Albertson's, Inc., No. G-92-1883, 1993 WL 128089, at *4 (N.D. Cal. Jan. 28, 1993) (stating "the putative class members in the instant case are not represented by class counsel for the purpose of application of the disciplinary rules"); *Resnick*, 95 F.R.D. at 376 n.6 ("Before certification DR 7-104 does not apply because the potential class members are not 'represented' by counsel.").

[8] RESTATEMENT, *supra* note 6, § 99 cmt. l (noting "prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients").

[9] MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.24, at 257.

counsel. The implications of this majority view upon class action communication and discovery are profound. Until the class is certified, opposing counsel may conduct ex parte interviews,[10] obtain statements regarding the matter in controversy,[11] and negotiate settlements[12]—all without the consent of, or even without notifying, class counsel.[13] Indeed, at least one court has held that opposing counsel need not even inform putative class members that a class action lawsuit is pending.[14] In addition, this view constrains class counsel's communications with putative class members due to the

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[10] *See, e.g., Fulco*, 789 F. Supp. at 47-48 (allowing defendant to conduct discovery of absent class members before class certification through ex parte interviews).

[11] *See, e.g.*, Weight Watchers, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972) (permitting defendant to communicate with putative class members concerning subject matter of action); *Babbitt*, 1993 WL 128089, at *7 (finding defense attorney's pre-certification communication with putative class members did not violate anti-contact rule); Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (permitting defense counsel to contact members of proposed class to obtain information prior to certification).

[12] *See, e.g.*, Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 213 (2d Cir. 1987) ("[D]efendants do not violate Rule 23(e) [of the Federal Rules of Civil Procedure] by negotiating settlements with potential members of a class."); *Weight Watchers, Inc.*, 455 F.2d at 773 (allowing defendant to negotiate settlements with potential class members); MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.24, at 257 ("Defendants ordinarily are not precluded from communications with putative class members, including discussions of settlement offers with individual class members before certification . . . .").

[13] *See, e.g., Christensen*, 815 F.2d at 213 (finding bad faith justifying attorneys' fees award where defendant tendered offer to putative class members); Shelton v. Pargo, Inc., 582 F.2d 1298, 1303-05 (4th Cir. 1978) (finding no notice requirement because Rule 23(e) applies only to certified class action); *Weight Watchers, Inc.*, 455 F.2d at 770 (holding plaintiff cannot prevent negotiation of settlements between defendant and other potential class members); *Winfield*, 20 Fair Empl. Prac. Cas. (BNA) at 1094 (allowing defendants to contact putative class members); Nesenoff v. Muten, 67 F.R.D. 500, 503 (E.D.N.Y. 1974) (allowing defendant to settle with potential class members prior to certification); Am. Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 575-76 (D. Md. 1974) (allowing communication between defendant and potential class members subject to court's guidelines).

[14] Jankousky v. Jewel Cos., Inc., 538 N.E.2d 689, 692 (Ill. App. Ct. 1989).

ethical proscriptions concerning solicitation,[15] and the limitations on communicating with unrepresented parties generally.[16]

This overly simplified approach leads to unsatisfactory results. Counsel on both sides may have reasons for wishing to communicate with unnamed class members before class certification. Class counsel may desire to notify putative class members of the existence of the class lawsuit, to respond to inquiries regarding the action, to ascertain the whereabouts of other class members, to obtain factual information relevant to class members' eligibility and potential damages, and to obtain financial contributions toward the litigation.[17]

Defense counsel, on the other hand, may desire to obtain factual information relevant to class members' eligibility and potential damages, to obtain information relevant to the merits or the defense of the action, to discuss potential settlement, or to obtain releases from liability. Moreover, in some instances, the defendant may have a pre-existing relationship with the putative class members requiring ongoing contact, such as when a class sues its employer.[18]

In addition, the case law reflects the potential for unscrupulous tactics by counsel on both sides—heavy-handed defense tactics aimed at "persuading" putative class members not to participate in the class lawsuit,[19] as well as self-interested class counsel improp-

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[15] *See, e.g.*, Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) (finding class counsel's pre-certification advertisements and mass mailings were "surely causing serious and irreparable harm" to defendant); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999) (characterizing website as posing danger of using widespread publication "disguised as class communications, to coerce defendants into settlement"); Guichard v. State Farm Fire & Cas. Co., No. 95-2963, 1995 WL 702510, at *2 (E.D. La. Nov. 28, 1995) (requiring future notices and advertisements to indicate that no class had been certified to avoid any misleading communication). *See also infra* notes 226-34 and accompanying text (discussing ethical constraints on contacting putative class members).

[16] *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (1999) (dealing with unrepresented persons); *see also infra* note 161 and accompanying text (discussing ethical obligations to persons not represented by counsel).

[17] *See generally* 3 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 15.12-15.13, at 15-37 to 15-41, § 15.20, at 15-59 to 15-60 (3d ed. 1992) (describing reasons for precertification communications by class counsel and class representatives).

[18] *See generally id.* §§ 15.11, at 15-37, 15.14, at 15-41 to 15-42 (discussing prelitigation communications by party opposing class as part of ordinary business to remedy grievances or obtain releases).

[19] *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1208 (11th Cir. 1985) (upholding sanction of defense counsel for secretly soliciting exclusion requests from putative class

erly soliciting potential class members to participate in the action and "encouraging" early settlements at the expense of absent class members.[20] In short, the majority view adopts an arbitrary "bright line" approach, creating an illusion of certainty in an ambiguous relationship and failing to balance the relevant considerations. Accordingly, an approach is needed that better serves both the absent class members and the realities of class action litigation.[21]

Part II of this Article provides a brief orientation to the class action device and class certification.[22] Part III analyzes the major authorities addressing pre-certification attorney communications with potential class members.[23] Although pre-certification attorney communications encompass at least three different considerations—the policies and provisions of the Federal Rules of Civil Procedure, the ethical rules, and the First Amendment—the available case law tends to focus on only one or two of these factors,

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members despite court order). *See generally* 3 NEWBERG & CONTE, *supra* note 17, § 15.02, at 15-5 to 15-6 (noting defendants "commit abuses by soliciting opt-outs of the class, by misrepresenting the status of the litigation in communications with class members, and by other activities designed to circumvent the proper operation of Rule 23 governing class suits."); *see also* Long v. Fid. Water Sys., Inc., No. C-97-20118, 2000 WL 989914, at *3 (N.D. Cal. May 26, 2000) (noting defendants contacted putative class member and provided no notice "that if he opted for the arbitration provision, he could not participate in the pending class action" and that defendants "failed to notify [the putative class member] of the pending class action").

[20] *See, e.g.*, *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-918 (1987) (discussing conflicting goals of efficiency and distributive fairness in entrepreneurial incentives for class action attorneys); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1048-51 (1995) (asserting collusion between class counsel and defendants to detriment of named class representatives). *See generally* 3 NEWBERG & CONTE, *supra* note 17, § 15.02, at 15-5 (noting abuses by class counsel including "improper use of the class action to increase litigation and settlement bargaining power for individual gain in disregard of or at the expense of claims of absent class members, and to compromise adequate representation of the class for individual purposes").

[21] *See generally* 3 NEWBERG & CONTE, *supra* note 17, § 15.01, at 15-3 (noting generally the "lack of clarity in the relationships between the absent class members and their representative and counsel" and also noting that "[e]thical dilemmas involving one or several of the parties or counsel to a class action are often treated inconsistently by the courts"); Theodore J. Schneyer, *Reflections on the Changing Concept of "Clienthood" in the Law of Lawyering*, 12 AM. B. FOUND. RESEARCHING LAW, Spring 2001 at 1 (noting "the fuzzy legal status of classes and class members vis-a-vis class counsel").

[22] *See infra* notes 25-63 and accompanying text.

[23] *See infra* notes 66-214 and accompanying text.

rather than analyzing the interplay among all three. Finally, Part IV proposes a comprehensive structure for dealing with pre-certification attorney communications.[24]

II. A BRIEF BACKGROUND REGARDING CLASS ACTIONS

The class action is a procedural device, developed in equity,[25] in which the named plaintiffs[26] act as representatives both for themselves and for a class of similarly-situated others in pursuing a remedy.[27] The historical purpose of a class action was to decide questions common to all the members of the class in one proceeding without the necessity of all members appearing in court.[28] The fundamental characteristic of a class suit is its representative nature.[29]

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[24] *See infra* notes 220-61 and accompanying text.

[25] *See* Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948) ("The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."). *See generally* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932) (discussing bill of peace in equity); Note, *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958) [hereinafter Note, *Multiparty Litigation*] (discussing devices enabling classes of individuals to sue or be sued).

[26] Defendant classes are also possible, but are far less common. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties . . . .") (emphasis added); 1 NEWBERG & CONTE, *supra* note 17, § 3.02, at 3-8 ("Another type of class is the defendant class. An individual or a class plaintiff may sue a named defendant as representative of a class of other defendants similarly situated."); *see also* Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1322-23 (2000) (noting defendant class actions are rare). Indeed, a plaintiff class may sue a defendant class. *See* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1770, at 402-05 (2d ed. 1986) (discussing problems that arise when defendant class is being sued by plaintiff class).

[27] *See In re* Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1127-28 n.33 (7th Cir. 1979) (describing class action device as primarily vindicating rights of individual class members and also as vehicle for furthering substantive policies behind legislation); Welmaker v. W.T. Grant Co., 365 F. Supp. 531, 553 (N.D. Ga. 1972) ("The traditional purpose of a class action is to generate incentive to litigate claims that would otherwise not be litigated because they are so small as to make it impractical to bring individual suits.").

[28] Note, *Multiparty Litigation*, *supra* note 25, at 934.

[29] *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties . . . ."); *see also* 1 NEWBERG & CONTE, *supra* note 17, § 1.02, at 1-5 ("The fundamental nature of a class suit is its representative status. . . ."); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 507 (5th ed. 1994) ("[A class action] provides a means by which,

Class actions begin in the same way as any other lawsuit, by the filing of a complaint. As with other lawsuits filed in federal court, the complaint informs the parties of the nature of the claims.[30] The pleading of a class action generally requires no greater particularity in stating a claim for relief than other suits unless the complaint asserts special matters governed by the heightened pleading requirements in the Private Securities Litigation Reform Act of 1995[31] or Rule 9 or 23.1 of the Federal Rules of Civil Procedure.[32] However, the complaint must plead the prerequisites necessary to satisfy Rule 23.[33]

Accordingly, the complaint must show that the Rule 23(a) prerequisites[34] of numerosity,[35] commonality,[36] typicality,[37] and

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where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.").

[30] 7B WRIGHT & MILLER, *supra* note 26, § 1798, at 418; *see also* FED. R. CIV. P. 8(a) (setting forth general rules of pleading for claims for relief); 2 NEWBERG & CONTE, *supra* note 17, § 6.13, at 6-58 ("[C]lass allegations should put the defendant on notice that relief is sought on behalf of a class and basically, what the nature of that class is.").

[31] Securities fraud class actions brought under the Securities Act of 1933 and the Securities Exchange Act of 1934 are subject to the litigation procedures in the Private Securities Litigation Reform Act of 1995 which, in § 21D, sets forth a heightened pleading requirement. *See* 15 U.S.C. §§ 77z-1, 78u-4 (Supp. V 1999) (setting forth requirements for private class actions in private securities litigation).

[32] Rule 23.1 governs derivative actions by shareholders. FED. R. CIV. P. 9, 23.1; 7B WRIGHT & MILLER, *supra* note 26, § 1798, at 418-20.

[33] 7B WRIGHT & MILLER, *supra* note 26, § 1798, at 420.

[34] FED. R. CIV. P. 23(a)(1)-(4); *see also* 7A WRIGHT & MILLER, *supra* note 26, § 1759, at 97 ("Two other requirements that are not mentioned in the rule, presumably because they are self-evident, but that have been invoked by the courts, are that a definable class must exist and the representatives must be members of the class.") (footnotes omitted).

[35] Numerosity requires that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Satisfaction of this requirement depends on the specific facts of each case; neither the rule nor the courts require a specific number of class members to sustain a class action. 7A WRIGHT & MILLER, *supra* note 26, § 1762, at 151-53. Numerosity focuses more on the determination of the practicability of bringing a class action, rather than the mere number of class members. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 41 (1940) (suggesting courts should look at circumstances of case to determine practicability, not just number of class members); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981)

> [T]he proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. Thus, a number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim.

adequacy of representation[38] are present for the class. In addition, the class must satisfy the requirements of one or more of the types of classes set out in Rule 23(b):[39] (1) that the class action would avoid inconsistent or varying adjudications with respect to either individual class members[40] or the practical disposition of the

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Id.

[36] Commonality requires the existence of "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). The rule does not require total commonality; the questions of law or fact do not require the class members to be identically situated. 7A WRIGHT & MILLER, *supra* note 26, § 1763, at 196-98. *See, e.g.*, Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998) ("A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).").

[37] Typicality focuses on the class representative(s), requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). The typicality requirement serves to bolster the requirement of adequate representation in Rule 23(a)(4) by assuring that the representative's claims "are similar enough to the claims of the class so that he will adequately represent them." 7A WRIGHT & MILLER, *supra* note 26, § 1764, at 232-33; *see, e.g.*, Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997) ("Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent."); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) ("The 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims.").

[38] Adequacy of representation requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Satisfaction of the adequate representation requirement is a question of fact, and depends on the circumstances of each case. 7A WRIGHT & MILLER, *supra* note 26, § 1765, at 271. This requirement has two components: "Does the representative have any kind of a material conflict of interest with the class with respect to the common questions involved, and will counsel for the class vigorously prosecute the action on behalf of the class?" 1 NEWBERG & CONTE, *supra* note 17, § 3.13, at 3-73. *See also* 7A WRIGHT & MILLER, *supra* note 26, § 1766, at 297-98 ("Quality of representation embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves."); *id.* § 1769.1, at 375 (noting court also "will consider the quality and experience of the attorneys for the class").

[39] Often an action will come within more than one of the Rule 23(b) categories. This is not problematic in determining the propriety of a class action. 7A WRIGHT & MILLER, *supra* note 26, § 1772, at 425. However, Rule 23(b)(3) class actions have a heightened notice requirement and offer the opportunity for class members to opt out of the lawsuit, neither of which is true of (b)(1) and (b)(2) actions. FED. R. CIV. P. 23(b)(1)-(3). 7A WRIGHT & MILLER, *supra* note 26, § 1772, at 425-26, *id.* § 1775 at 491-92; *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-77 (1974) (applying notice requirement). When a class action satisfies the requirements of either Rule 23(b)(1) or (b)(2), and also satisfies the requirements of Rule 23(b)(3), the action should not be treated as a (b)(3) action. 7B WRIGHT & MILLER, *supra* note 26, § 1793, at 295-97.

[40] FED. R. CIV. P. 23(b)(1)(A); *see* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike . . ., or where the party must treat all alike as a matter of practical necessity . . . ."); *see also* 7A WRIGHT & MILLER, *supra* note 26, § 1773, at 434 ("[Subsec-

interests of nonparties;[41] (2) that the action seeks injunctive or declaratory relief with respect to the class as a whole;[42] or (3) that questions of law or fact common to the class predominate over questions affecting only individual members, and that the class action is a superior method for obtaining a fair and efficient adjudication of such issues.[43]

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tion(b)(1)(A)] is applicable when practical necessity forces the opposing party to act in the same manner toward the individual class members and thereby makes inconsistent adjudications in separate actions unworkable or intolerable.").

[41] FED. R. CIV. P. 23(b)(1)(B); *see Amchem Prods.*, 521 U.S. at 614 ("Rule 23(b)(1)(B) includes, for example, 'limited fund' cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims."); *see also* 7A WRIGHT & MILLER, *supra* note 26, § 1774, at 437.

> Subdivision (b)(1)(B) allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members, rather than on the opposing party.... Since the purpose of this provision is to protect the interests of all class members against any determination that would have an adverse effect on them, if only one action (the one instituted by the representatives) could impair the rights of other members of the potential class, then an action under Rule 23(b)(1)(B) would be appropriate.

Id.

[42] FED. R. CIV. P. 23(b)(2); *see also* 1 NEWBERG & CONTE, *supra* note 17, § 4.11, at 4-38 to 4-39.

> There is considerable overlap between the requirements for class actions brought under subsection (b)(1) and those brought under (b)(2). From the conceptual standpoint, the requirements of Rule 23(b)(2) appear to be a special category of class actions that otherwise would likely qualify under Rule 23(b)(1)(A) or (B) or both sections. Subsection (b)(2) class actions, unlike those of other Rule 23(b) categories, are limited to those class actions seeking primarily injunctive or corresponding declaratory relief.... Rule 23(b)(2) class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons, though this type is not the exclusive type of suit that qualifies under this category.

Id.

[43] FED. R. CIV. P. 23(b)(3); Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966) ("The principal distinction between an action maintained as a class action under 23(b)(3) from those maintained under 23(b)(1) or 23(b)(2) is that in (b)(3) members of the class may request to be excluded .... No such option exists to members of a class ... under Rule 23(b)(1) or (2)."); *see also* 1 NEWBERG & CONTE, *supra* note 17, § 4.20, at 4-71 ("[S]ubdivision (b)(3) is general so that it comprehends all class actions ...."). Rule 23(b)(3) lists four nonexhaustive factors for the court to consider in determining whether class action treatment would be superior: (1) the interest of class members in individually controlling the litigation; (2) the extent and nature of any ongoing litigation; (3) the desirability of concentrating litigation in a particular forum; and (4) the difficulties in managing a class action. FED. R. CIV. P. 23(b)(3); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967)

Rule 23(c)(1) directs the district court to determine "[a]s soon as practicable after the commencement" of a class action "whether it is to be so maintained."[44] This determination is called "certifying" the class.[45] A prominent treatise has noted that "the appropriate timing will vary with the circumstances of the case," and that the district court's "principal concern should be to develop a record adequate to enable it to decide whether the prerequisites of Rule 23 have been met."[46] Due to this flexibility, the timing of class certification can vary widely.[47] The local rules of some district courts require the plaintiff to move for class certification within ninety days.[48] However, despite the language of these rules, the district court may nonetheless defer its ruling on the motion.[49] Indeed, there is

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("The object of [the functional tests of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.").

[44] FED. R. CIV. P. 23(c)(1). *See, e.g.*, Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570-71 (11th Cir. 1992) (citing Rule 23(c)(1)); Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 623 (7th Cir. 1986) (same); Wright v. Schock, 742 F.2d 541, 543 (9th Cir. 1984) (same); *see also* 7B WRIGHT & MILLER, *supra* note 26, § 1785, at 103-04 ("The judge in reviewing whether all the criteria of Rule 23 are satisfied can consider possible conflicting interests, and can redefine the class to accommodate those concerns or utilize notice to ensure that the class members have an opportunity to be heard.").

[45] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.11, at 232 (observing this determination is "commonly called 'certifying' the class, although Rule 23 does not use the term.").

[46] *Id.* § 30.11 at 232-33; *see, e.g.*, Gross v. Medaphis Corp., 977 F. Supp. 1463, 1475 (N.D. Ga. 1997) (denying motion for class certification as premature "[s]ince there has been no class discovery"); Alexander v. F.B.I., 971 F. Supp. 603, 611 (D.D.C. 1997) (deferring ruling on motion for class certification pending further discovery); *see also* 7B WRIGHT & MILLER, *supra* note 26, § 1785, at 96 ("The time at which the court finds it 'practicable' to make a class action determination may vary with the circumstances of the particular case."); *id.* at 107-08 (explaining class certification determination "usually should be predicated on more information than the complaint itself affords. Thus, some courts may allow discovery relating to the issue whether a class action is appropriate before deciding whether to allow it to proceed on a class basis.").

[47] *See* 2 NEWBERG & CONTE, *supra* note 17, § 7.14 at 7-47 (noting "each suit has its own case history and surrounding circumstances that affect the practicabilities of reaching an initial class determination. Accordingly, initial class rulings have been made as early as a few months following the filing of the complaint and as late as several years thereafter.").

[48] *See, e.g.*, E.D. PA. LOCAL R. CIV. P. 23.1(c) ("Within ninety (90) days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination . . . as to whether the case is to be maintained as a class action.").

[49] 7B WRIGHT & MILLER, *supra* note 26, § 1785, at 104 ("In some cases even if a motion for class certification is made at an early stage, the determination under subdivision (c)(1) may have to be delayed substantially because of an inability to determine whether class

authority for the proposition that the district court may delay class certification until after a decision on the merits.[50]

Thus, class certification will not occur contemporaneously with the filing of the complaint.[51] Rather, some delay is an inherent part of the process. The question is in the length of the delay, which may, depending on the case, be measured in months or years,[52] with a mean time period of twenty-five months in the federal court system.[53] Until the district court denies class certification, a lawsuit filed as a class action is treated as a class action.[54] In particular, this imposes fiduciary duties and obligations upon class counsel with respect to all potential class members, when counsel otherwise would have such responsibilities only with respect to the named plaintiffs.[55]

Once the court certifies the class, for purposes of subdivisions (b)(1) and (b)(2), the class members have been ascertained for purposes of litigation.[56] However, this is not the case for classes certified as (b)(3) actions, which require an additional step. When a court certifies a class action under Rule 23(b)(3), it must direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[57] The notice must advise the class members that they may request exclusion from the class,

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action treatment is appropriate or because of the pendency of other proceedings."); *see also id.* § 1788, at 224 ("The court may decide to postpone all notice giving until after discovery has taken place to be in a better position to determine the propriety of class action treatment and to define the class.").

[50] *Id.* § 1785, at 98-102; *see, e.g.*, Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000) (affirming summary judgment as to liability prior to certifying class); Goodman v. Lukens Steel Co., 777 F.2d 113, 121-25 (3d Cir. 1985) (noting class certification even after appeal may be appropriate); Cockrum v. Califano, 475 F. Supp. 1222, 1231-36 (D.D.C. 1979) (certifying after final judgment). *But see* 2 NEWBERG & CONTE, *supra* note 17, § 7.15, at 7-54 (noting "[w]hether summary dispositions on the merits, before a class ruling, [are] proper in a Rule 23(b)(3) class action is unsettled.").

[51] *See* 7B WRIGHT & MILLER, *supra* note 26, § 1785, at 107-08 (noting delay in class certification).

[52] *See supra* note 47 and accompanying text (discussing wide variation in timing of class certifications).

[53] *See* 2 NEWBERG & CONTE, *supra* note 17, § 7.14, at 7-47 to 7-48.

[54] MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.11, at 232.

[55] *See infra* note 205 (noting fiduciary duty of counsel to entire class).

[56] 7B WRIGHT & MILLER, *supra* note 26, § 1786 at 194-95.

[57] FED. R. CIV. P. 23(c)(2).

that the class action judgment will bind them if they do not request exclusion, and that they may enter an appearance through counsel.[58]

Providing an opportunity to "opt out" of the class action is mandatory when the court certifies the class under subdivision (b)(3);[59] class members in subdivision (b)(1) and (b)(2) actions usually are not provided the alternative of excluding themselves from the action.[60]

Rule 23 does not specify the timing for the notice required in subdivision (b)(3) class actions. Generally, however, notice is sent as soon as the court determines that a class action is proper under subdivision (c)(1).[61] Even after the court certifies the class, in some

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[58] *Id.*

[59] Some authorities do not recognize an attorney-client relationship between class counsel and the unnamed class members until the end of the exclusion period. *See, e.g.*, Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (allowing defendants to contact unnamed class members); *see also* 3 NEWBERG & CONTE, *supra* note 17, § 15.18, at 15-49 ("After a court has certified a case as a class action *and the time for exclusions has expired*, the attorney for the named plaintiff represents all class members who are otherwise unrepresented by counsel.") (emphasis added). The justification for using the end of the exclusion period goes to the notion of certainty. *See id.* § 15.16, at 15-44 to 15-45 ("In an action for damages under Rule 23(b)(3), the actual scope of the class cannot be determined until after the period for exclusion from the class has expired. At this time, the number and identity of class members who wish to opt out of the action will be known.").

[60] *See* 7B WRIGHT & MILLER, *supra* note 26, § 1786, at 195 (giving lack of special defenses to issues relating to individuals as reason to be less concerned about opportunity to be present); *see also id.* § 1793, at 295 ("[I]n these cases notice by the court theoretically is discretionary only"). The court may elect, in its discretion, to direct notice to subdivision (b)(1) or (b)(2) class members "for the protection of the members of the class or otherwise for the fair conduct of the action." FED. R. CIV. P. 23(d)(2). However, because subdivision (b)(1) and (b)(2) class members "do not have the alternative of bringing a separate suit, [such] notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights." 7B WRIGHT & MILLER, *supra* note 26, § 1786, at 195-96. Although not required, a district court may also, in its discretion under Rule 23(d)(5), afford members of classes certified under subdivision (b)(1) or (b)(2) with the opportunity to opt-out "when necessary to facilitate the fair and efficient conduct of the litigation." Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997); *see also In re* Paine Webber Ltd. P'ships Litig., 147 F.3d 132, 138 (2d Cir. 1998) (upholding district court's discretion when class member missed opt-out deadline); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990) ("The command of Rule 1 of the Federal Rules of Civil Procedure leads us to construe the text of Rule 23(d) liberally to accomplish this end.").

[61] 7B WRIGHT & MILLER, *supra* note 26, § 1786, at 197; *see also id.* § 1788, at 222-23.

> [T]he question of when the notice is given directly relates to the ability to assure that the absentees' rights are fully protected. Thus, notice must be sent long before the merits of the case are adjudicated and, indeed, probably should be sent as soon as possible after the action is commenced;

cases the court may postpone sending formal notice under Rule 23(c)(2) for good cause, if the delay will not prejudice the class members.[62]

The final subdivision of particular relevance to this Article is Rule 23(d), which authorizes district courts to issue a wide variety of orders to aid in the conduct and control of class actions. Among other things, subdivision (d) authorizes district courts to impose conditions on the representative parties and accords discretion in dealing with other procedural matters.[63]

Accordingly, Rule 23 sets forth the requirements and some of the procedures available in class action lawsuits.[64] However, Rule 23 does not supply the definitional details necessary to eliminate some of the ambiguities that arise in the rule's application, and was not drafted with an eye to the ethical issues faced by the lawyers involved. In particular, Rule 23 provides no guidance regarding pre-certification "representation" and attorney communications with unnamed class members.

> as a practical matter, this means as soon as the court determines that the class action is proper under subdivision (c)(1).

Id.

[62] *See, e.g.*, R & D Bus. Sys. v. Xerox Corp., 150 F.R.D. 87, 91 (E.D. Tex. 1993) (finding time needed to resolve decertification issues good cause for delay); *In re* Four Seasons Sec. Laws Litig., 58 F.R.D. 19, 31 (W.D. Okla. 1972) (finding time to negotiate settlement good cause for delay). In addition, Rule 23(f), permitting interlocutory appeals of class certification orders, may create some further delay. FED. RULE CIV. P. 23(f).

[63] Rule 23(d) of the Federal Rules of Civil Procedure provides:

> 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.

FED. R. CIV. P. 23(d).

[64] *Id.*

Historically, courts have often relied on their Rule 23(d) authority and treated pre-certification attorney communications with prospective class members as a matter within the complete regulation and discretion of the district court.[65] Even those courts that recognize the impact of other legal and ethical considerations still generally fail to balance and assess the interplay among all three considerations—the Federal Rules, the First Amendment, and the ethical rules.

III. THREE INTERTWINED CONSIDERATIONS: THE FEDERAL RULES, THE FIRST AMENDMENT, AND THE ETHICAL RULES

In examining pre-certification attorney communications with unnamed class members, the case law has failed to integrate three different considerations relevant to such communications: Rule 23 of the Federal Rules of Civil Procedure, the First Amendment, and the ethical rules. Instead, the courts have tended to approach communications issues in a disjointed manner, failing to note the interplay among these considerations or rejecting a consideration as inapplicable, and thereby addressing only one or two of these three factors. This Part distills the concepts relevant to each of these considerations.

A. THE FEDERAL RULES OF CIVIL PROCEDURE

The consideration most often addressed in the case law involves the scope of the Federal Rules of Civil Procedure. Due to the complexities inherent in class actions and their protracted nature, managing a class action "frequently require[s] the exercise of considerable judicial control and ingenuity."[66] Accordingly, Rule 23(d) accords the district courts broad discretion to issue orders facilitating the conduct of class actions.[67] Subsection (d)(3) ex-

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[65] *See infra* note 78 (noting recommendation to courts to prohibit communication with actual and potential class members unless court gives prior approval). *See also e.g.*, Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (noting court has both duty and "broad discretion" to "exercise control over class actions").

[66] 7B WRIGHT & MILLER, *supra* note 26, § 1791, at 286.

[67] FED. R. CIV. P. 23(d). *But see* 7B WRIGHT & MILLER, *supra* note 26, § 1794, at 315-17

pressly authorizes district courts to issue orders "imposing conditions on the representative parties or on intervenors,"[68] and subsection (d)(5) is a catchall category authorizing orders "dealing with similar procedural matters."[69] The broad wording of these provisions gives courts room to create restrictions upon pre-certification attorney communications.

In the major decision in this area, *Gulf Oil Co. v. Bernard*,[70] the United States Supreme Court reviewed the scope of a district court's authority under Rule 23(d) of the Federal Rules of Civil Procedure to limit communications from class counsel to prospective class members during the pendency of a class action lawsuit.[71]

The *Gulf Oil* class sought injunctive, declaratory, and monetary relief for discriminatory employment practices.[72] However, just one month before the filing of the class action, Gulf and the Equal Employment Opportunity Commission had signed a conciliation agreement, which included back pay based on a set formula.[73] Many of the putative class members overlapped with the employees who were to receive settlement offers under the conciliation agreement.[74] Accordingly, less than two weeks after the filing of the class action, Gulf moved for an order limiting communications from class counsel to putative class members.[75] Gulf's motion asserted 452 of the 643 employees eligible for backpay under the conciliation agreement had signed releases, and asserted class counsel had recommended, at a

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(discussing limitations on courts' discretion).

[68] FED. R. CIV. P. 23(d)(3); *see also* 7B WRIGHT & MILLER, *supra* note 26, § 1794, at 313 (noting this provision "simply codifies the long-recognized inherent power of the court to enter orders providing for the fair and efficient administration of the controversy before it").

[69] FED. R. CIV. P. 23(d)(5); *see also* 7B WRIGHT & MILLER, *supra* note 26, § 1796, at 332-33 (noting although courts cannot use this subsection to "issue orders, in the guise of managing the action, that actually substantially alter a party's ability to present the merits of his claim or defense," that provision's language should not be construed "in a way that unduly restricts the power of the district court to deal effectively and flexibly with the problems that arise during a class action").

[70] 452 U.S. 89 (1981).

[71] *Id.* at 99-102.

[72] *Id.* at 92.

[73] *Id.* at 91-92.

[74] *Id.* at 92.

[75] *Id.*

meeting of seventy-five class members, that the class members not sign Gulf's releases.[76]

The district court granted Gulf's motion, issuing a temporary order prohibiting all communications to class members concerning the case,[77] but subsequently permitted Gulf to continue to solicit releases under the conciliation agreement.[78] Further, the district court denied class counsel's request to send a leaflet to potential class members urging them to consult an attorney before signing the releases.[79] The district court thereby prevented class counsel from communicating with potential class members until after the release deadline under the conciliation agreement expired.[80]

On appeal to the United States Court of Appeals for the Fifth Circuit, a divided panel initially affirmed, concluding the order was within the extensive powers granted in Rule 23.[81] However, the Fifth Circuit subsequently reheard the case en banc and reversed, finding the order constituted an impermissible prior restraint in violation of the First Amendment.[82]

The United States Supreme Court affirmed the en banc decision, finding the district court had abused its discretion.[83] However, the Supreme Court's decision did not reach the First Amendment

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[76] *Id.* at 92-93.

[77] *Id.* at 93-95.

[78] At the time of the *Gulf Oil* decision, the *Manual for Complex Litigation* recommended that district courts prohibit communications between formal parties and their lawyers with all actual and potential class members unless preapproved by the court. Jeffrey R. Snyder, Comment, *Judicial Screening of Class Action Communications*, 55 N.Y.U. L. REV. 671, 671 (1980). The district court's order expressly relied upon this provision. *Gulf Oil*, 452 U.S. at 96.

[79] *Gulf Oil*, 452 U.S. at 96-97.

[80] *Id.*

[81] Bernard v. Gulf Oil Co., 596 F.2d 1249, 1260-63 (5th Cir. 1979).

[82] Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980). The courts traditionally have defined a "prior restraint" as a "predetermined judicial prohibition restraining specified expression." *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975); *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (finding prior restraint where Nebraska state trial judge placed "freeze" on communication of news on specific aspects of murder trial); Near v. Minnesota, 283 U.S. 697, 711 (1931) (prohibiting Minnesota statute limiting specific types of language in newspaper publications). *See also infra* notes 134-39 and accompanying text (evaluating prior restraint conclusion in *Gulf Oil*).

[83] *Gulf Oil*, 452 U.S. at 103.

issue.[84] Instead, the Court's analysis addressed only the reach of Rule 23(d).[85]

The Supreme Court noted that district courts have "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[86] However, the Court cautioned that district court discretion "is not unlimited."[87] Rather, this discretion "is bounded by the relevant provisions of the Federal Rules," and is "subject to appellate review."[88]

The Court observed that the district court's order had interfered with class counsel's ability to inform class members about the lawsuit and to obtain information about the merits of the case from class members.[89] Due to these potential problems, the Court stated that courts should weigh both the need for a limitation and the potential interference limitation's with the rights of the parties.[90] Any limitation "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[91]

Thus, despite the breadth of the language of Rule 23(d) and its underlying policies, the Supreme Court's *Gulf Oil* decision properly acknowledged that Rule 23(d) does not exist in a vacuum. District courts do not have unfettered discretion in fashioning Rule 23(d) orders.[92] In particular, in issuing pre-certification orders, the district court must consider the implications of the First Amend-

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[84] *Id.* at 101-02 n.15 ("We do not reach the question of what requirements the First Amendment may impose in this context. Full consideration of the constitutional issue should await a case with a fully developed record concerning possible abuses of the class-action device.").

[85] *Id.* at 102.

[86] *Id.* at 100.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 101.

[90] *Id.* In evaluating the necessity for a court order, *Gulf Oil* instructs the district court to make "specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.*

[91] *Id.* at 102. The Court recognized the possibility of potential abuses, but found no justification for a communications ban, noting "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 the Rules." *Id.* at 104.

[92] *Id.* at 100.

ment upon the terms and conditions of its proposed order.[93] Under *Gulf Oil*, the district court must allow communications between class counsel and prospective class members unless there is a clear showing of abuse and the court makes specific findings of need, giving explicit consideration to the narrowest possible relief.[94]

Gulf Oil contains two particularly noteworthy points. First, *Gulf Oil* involved a broad restraint on communications by class counsel—rather than defense counsel—with potential class members.[95] Although some courts subsequently have attempted to characterize *Gulf Oil* as applicable both to class counsel and defense counsel communications,[96] the language of *Gulf Oil* focused on the particular dangers of interfering with class counsel's communications.[97] *Gulf Oil* expressly observed the necessity of ensuring that the court is "furthering, rather than hindering," the policies embodied in Rule 23:

> In the present case, we are faced with the unquestionable assertion by [class counsel] that the order created at least potential difficulties for them as they sought to vindicate the legal rights of a class of employees. 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 [class counsel] 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 . . . to obtain

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[93] *Id.* at 102 ("In addition such a weighing . . . should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.").

[94] *Id.* at 101-02.

[95] *Id.* at 89.

[96] *See infra* note 173 and accompanying text (citing and explaining erroneous understandings by multiple courts in applying *Gulf Oil* decision as general limitation on defense counsel's pre-certification communication activities with potential class members).

[97] *Gulf Oil*, 452 U.S. at 89.

> information about the merits of the case from the persons they sought to represent.[98]

In addition to the Supreme Court's focus on the detriments peculiar to restraints upon communications between class counsel and prospective class members, the Court also explicitly referred to the ethical rules. The Court noted that "the rules of ethics properly impose restraints on some forms of expression," citing the prohibitions against attorney communications with represented persons.[99]

Accordingly, *Gulf Oil* mentions all three elements critical to the analysis of pre-certification lawyer communications in class actions: Rule 23(d), the First Amendment, and the ethical rules. Moreover, *Gulf Oil* correctly recognized the peculiar harm resulting from communication restrictions between class counsel and prospective class members, while simultaneously recognizing the propriety of restrictions upon communications with represented persons. Unfortunately, subsequent lower court decisions, more often than not, have forgotten or neglected the full *Gulf Oil* analysis.[100]

B. THE FIRST AMENDMENT

Although clearly influenced by First Amendment concerns, the Supreme Court's *Gulf Oil* decision declined to decide the case on that basis or to squarely consider the First Amendment issue.[101] Nonetheless, the First Amendment has important implications for pre-certification attorney communications with unnamed class members. In undertaking a First Amendment analysis, a court first must ascertain the type of speech at issue. Pre-certification attorney contact with putative class members tends to fall into five

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[98] *Id.* at 101 (citation omitted).

[99] *Id.* at 104 n.21. The opinion cites DR 7-104 of the *ABA Model Code of Professional Responsibility*, which was the precursor to the current Rule 4.2 of the *ABA Model Rules of Professional Conduct*. *See infra* note 164 and accompanying text (citing Model Rules' limitations on lawyer conduct with represented persons, when consent is required, and other times when communication is not limited).

[100] *But see infra* note 108 (discussing *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985), as example of court addressing considerations of attorney communication with unnamed class members).

[101] *Gulf Oil*, 452 U.S. at 101 n.15.

broad categories: imparting information (both factual and legal), obtaining information, advertising, solicitation, and communications unrelated to the class lawsuit. The published decisions involving restrictions on attorney communications under a Rule 23(d) order typically have been aimed at improper solicitation efforts by defense counsel or class counsel.[102] In such cases, courts must undertake a commercial speech analysis of First Amendment considerations.[103] However, courts must exercise care in ascertaining precisely what type of speech is impacted by a Rule 23(d) order, because the proper First Amendment inquiry will not always be one of commercial speech. For example, some restrictions on communication may constitute a prior restraint on traditionally protected speech;[104] other communications may involve the dissemination of information discovered before trial.[105]

The most common scenario involves motions for Rule 23(d) orders due to improper solicitation.[106] The United States Court of Appeals for the Eleventh Circuit, in *Kleiner v. First National Bank*,[107] examined potential First Amendment concerns arising in this context, appropriately using a commercial speech analysis.[108] In

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[102] *See, e.g., Kleiner*, 751 F.2d at 1203-07 (agreeing that district court possessed authority to ban defendant from soliciting exclusion requests).

[103] Commercial speech involves expression that is related largely or solely to the economic interests of the speaker and the audience, and is protected by the First Amendment. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). *See generally* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (discussing types of commercial speech that enjoy First Amendment protection). Commercial speech encompasses not only direct invitations to trade, but also communications designed to advance business interests, exclusive of beliefs and ideas. *In re* Primus, 436 U.S. 412, 438 n.32 (1978); *see also* Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 66 (1983) (noting manufacturer's informational pamphlet discussing advisability of prophylactics constituted commercial speech); Friedman v. Rogers, 440 U.S. 1, 8 (1979) (noting trade name constitutes commercial speech). *See infra* notes 107-29 and accompanying text (referring to cases in which First Amendment concerns were addressed).

[104] *See infra* notes 134-39 and accompanying text (discussing prior restraint of constitutionally protected speech).

[105] *See infra* notes 142-48 and accompanying text (discussing First Amendment issues in pretrial discovery).

[106] *See supra* note 15 and accompanying text (discussing communications used as improper solicitations).

[107] 751 F.2d 1193 (11th Cir. 1985).

[108] *Kleiner* is one of the few cases to address all three considerations pertinent to attorney communications with unnamed class members. Although *Kleiner* focused on First Amendment concerns, it also mentioned Rule 23(d) orders and the ethical rules, albeit in

Kleiner, the district court restricted the defendant's contacts with class members regarding the litigation to taking depositions of five class members.[109] Disregarding these orders, the defendant conducted a telephone solicitation canvass, contacting approximately 3,000 potential class members to persuade them to opt out of the class.[110] Nearly 2,800 of the class members contacted by the defendant did, indeed, opt out.[111] The district court sanctioned defense counsel for violating the court's Rule 23(d) orders.[112]

On appeal to the Eleventh Circuit, defense counsel challenged the district court's imposition of sanctions, arguing the protective orders constituted an impermissible prior restraint on free speech rights.[113] However, the appellate court upheld the orders as withstanding First Amendment scrutiny, finding defense counsel's speech was "expression of a commercial variety."[114]

> "[T]he purpose of the defendant's contacts with class members] was to further what the [defendant] perceived as its own financial interests. The interests of its customers had nothing to do with it." . . . Taken together, the defense of the [defendant's] business conduct, the underlying profit motive, and the invitation to opt out branded the telephone canvass as speech of a commercial nature.[115]

Generally, the regulation of commercial speech must satisfy a four-part analysis:[116] (1) the commercial speech must not be misleading and must concern lawful activity;[117] (2) the state's

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passing. 751 F.2d at 1206-07.

[109] *Id.* at 1196-97, 1206; *see also* E.E.O.C. v. Mitsubishi Motor Mfg., 73 Fair Empl. Prac. Cas. (BNA) 762, 765 (C.D. Ill. 1997) (holding employer limited to discussing case with employees by means of noticed depositions).

[110] *Kleiner*, 751 F.2d at 1198.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 1203.

[114] *Id.*

[115] *Id.* at 1203 n.22 (citations omitted).

[116] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[117] Untruthful or misleading commercial speech does not enjoy constitutional safeguards. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) ("The States and

interest must be substantial; (3) the regulation must directly advance the state's interest; and (4) the regulation must not be more extensive than necessary.[118]

As applied to attorney communications in the pre-certification context, the Eleventh Circuit stated that a district court order limiting such communications will satisfy the First Amendment, "if it is grounded in good cause and issued with a 'heightened sensitivity' " for First Amendment concerns.[119] Four criteria determine the existence of the requisite "good cause": (1) the severity and likelihood of the perceived harm; (2) the precision with which the order is drawn; (3) the availability of a less onerous alternative; and (4) the duration of the order.[120]

Applying these four factors, the Eleventh Circuit, with respect to the perceived harm, noted the defendant's "telephone solicitation canvass is a classic example of a major potential abuse which necessitates restraint,"[121] and "the solicitation of exclusions constitutes a 'per se' abuse."[122]

The court next observed that the district court's order was narrowly drawn:

> [T]he order was restricted to communications regarding the litigation. The order thus did not impinge on the Bank's ability to speak with customers about routine business matters unrelated to the lawsuit.

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the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . .").

[118] "[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in [*Central Hudson*]." Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995).

[119] *Kleiner*, 751 F.2d at 1205.

[120] *Id.* at 1206; *see also* United States Postal Serv. v. Athena Prods., Ltd., 654 F.2d 362, 367-68 (5th Cir. 1981) (considering duration of, precision of, and harm caused by injunction detaining defendant's mail); Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630, 633 (N.D. Tex. 1994) (applying criteria from *Central Hudson*).

[121] *Kleiner*, 751 F.2d at 1206. The Eleventh Circuit noted: "In the realm of litigation, a fair and just result often presupposes restraints on the speech of the parties." *Id.* (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)).

[122] *Id.* at 1207 n.28. The Eleventh Circuit reached its conclusion of "per se" abuse by relying on Model Rule 4.2, which prohibited attorneys from communicating about the subject of the representation with a person the lawyer knows is represented by another lawyer in the matter. *See infra* note 164 and accompanying text (discussing proscriptions of Rule 4.2).

> Since defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner, the order in no way tread on legitimate communications by counsel.[123]

The Eleventh Circuit also concluded there was no less restrictive alternative.[124] The district court's order sought "to filter news of the opportunity for exclusion through the impartial and open medium of court-supervised notice," by employing preview screening.[125] The Eleventh Circuit observed that such screening is a "constitutional substitute" for a complete ban on communications.[126]

Finally, the Eleventh Circuit noted the order limited defense contacts only up through the time of trial.[127] Moreover, the ban on soliciting exclusions extended only through the end of the exclusion period, and thereby was of even briefer duration.[128] Accordingly, the court concluded the order's limited duration satisfied the First Amendment.[129]

The nature of the attorney communications in *Kleiner*, in secretly soliciting exclusion requests from potential class members, clearly concerned commercial speech. However, other pre-certification attorney communications with unnamed class members will not always fall within the commercial speech realm. For example, *Kleiner* described the *Gulf Oil* decision, which involved a blanket order barring class counsel from any contact with the plaintiff class without advance court approval, as "a classic case of noncommercial speech which directly implicated the doctrine of prior restraint."[130]

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[123] *Kleiner*, 751 F.2d at 1206-07; *see also Seattle Times*, 467 U.S. at 37 (holding "where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery . . ., it does not offend the First Amendment.").

[124] *Kleiner*, 751 F.2d at 1207.

[125] *Id.* (citing Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980)).

[126] *Id.*

[127] *Id.* at 1206-07.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1205; *see also supra* notes 70-99 and accompanying text (discussing *Gulf Oil* and decision restraints on communication).

Accordingly, communications such as those in *Gulf Oil* are protected by traditional prior restraint safeguards that do not necessarily extend to questions of commercial speech.[131]

In its en banc consideration of *Gulf Oil*,[132] the Fifth Circuit addressed these First Amendment concerns, treating the district court's order prohibiting attorney communication as a prior restraint upon traditionally protected speech.[133] The Fifth Circuit's decision that the order impacted on traditional, rather than commercial, speech stemmed from two observations. First, the court noted that the "restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients."[134] Second, the Fifth Circuit emphasized that class counsel "neither received nor expect to receive from class members any compensation for their services."[135] Accordingly, the court concluded that the communications affected by the order were "protected expressions which call into play the full panoply of First Amendment safeguards against prior restraint."[136]

The Fifth Circuit characterized the district court's order as "the essence of prior restraint [because] it places specific communications under the personal censorship of a judge."[137] Further, the Fifth Circuit found, "[t]he validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contexts."[138] As the court noted, "The order before us suppresses essentially everything, and one seeking to exercise his right to speech or association must petition the court. No showing has been made, or even offered, that reasonable alternatives with lesser impact are unavailable."[139] Accordingly, when attorney communica-

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[131] *Id.* at 1204.

[132] Bernard v. Gulf Oil, 619 F.2d 459 (5th Cir. 1980).

[133] *Id.* at 471.

[134] *Id.*

[135] *Id.* at 472-73. Class counsel in *Gulf Oil* were Legal Defense Fund lawyers. *Id.* at 472. Accordingly, class counsel's communications qualified as protected political expression under *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963).

[136] *Gulf Oil*, 619 F.2d at 473.

[137] *Id.*

[138] *Id.* at 475. The en banc court also rejected potential abuses in class actions as justifying an exception to the constitutional limits upon prior restraints. *Id.* at 476.

[139] *Id.* at 476-77. In general, a prior restraint may be justified only if the expression

tions constitute protected political expression, the communications do not come within a commercial speech framework, and receive a much closer and heightened level of scrutiny.[140] Thus, a court must exercise care to ensure that any restrictions upon this type of communication satisfy strict First Amendment scrutiny as well as the commercial speech considerations that are more commonly involved.

In still another example, the restriction sought upon attorney communication might involve a protective order to prevent public dissemination of information acquired after filing of the complaint but before trial.[141] In such a situation, the court should conduct a *Gulf Oil* analysis, and then should analyze First Amendment concerns using the *Seattle Times* test.[142]

Unlike *Gulf Oil* and *Kleiner*, *Seattle Times* did not involve a class action. In *Seattle Times*, a religious group called the Aquarian Foundation sought damages from several newspapers and others for defamation and invasion of privacy in publishing stories about the Foundation.[143] During the course of discovery, the Foundation

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sought to be restrained "surely [will] result in direct, immediate, and irreparable damage." N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971). In addition, the restriction must be the least restrictive means of preventing the damage, and must comport with required procedural safeguards. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976) (noting for prior restraint to be lawful, it "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech"); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (holding barriers to prior restraint are high and presumption against its use was not overcome when trial record failed to show measures short of prior restraint would not have protected rights of criminal defendant).

[140] *In re* Primus, 436 U.S. 412, 431-33 (1978), NAACP v. Button, 371 U.S. 415, 430-33 (1963).

[141] In class actions, courts may issue protective orders under either Rule 23(d) or Rule 26(c), or with reference to both provisions. 7B WRIGHT & MILLER, *supra* note 26, § 1792, at 289. In either case, the analysis should remain the same. *Id.* *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 529 F. Supp. 866, 892 (E D. Pa. 1981) (discussing protective orders under Rule 26 and citing *Gulf Oil*).

[142] Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). The *Kleiner* court cited *Seattle Times*, noting "[i]n the realm of litigation, a fair and just result often presupposes restraints on the speech of the parties." Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1206 (11th Cir. 1985). *But see* Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., 138 F.R.D. 33, 36-37 (S.D.N.Y. 1991) (stating court must consider "whether there is a public interest in the particular discovery materials at issue, and whether countervailing privacy interests warrant nondisclosure"). *Seattle Times* applies when disclosure of information would invade protected privacy interests. 467 U.S. at 35-36.

[143] *Seattle Times*, 467 U.S. at 22-23.

refused to divulge and the newspapers moved to compel the production of information concerning the identity of Foundation donors and members.[144] In granting the motion to compel, the trial court also issued a protective order prohibiting the newspapers from publishing or otherwise disseminating the information.[145] The newspapers challenged the protective order as offending the First Amendment, but the Supreme Court rejected this challenge.[146]

According to the Court in *Seattle Times*, a protective order entered on a showing of good cause does not offend the First Amendment if it is limited to the context of pretrial discovery.[147] In evaluating such protective orders, the court must consider whether the " 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.' "[148]

For practical purposes, when a district court issues an order pursuant to Rule 23(d) to limit attorney communications, the subject communications ordinarily will constitute commercial speech.[149] Concerns generating a judicial response most often have involved potential overreaching by counsel involving lawyer persuasion or pressure in a solicitation context.[150] Such concerns provide a logical

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[144] *Id.* at 24-25.
[145] *Id.* at 25-27.
[146] *Id.* at 28-29.
[147] *Id.* at 37.
[148] *Id.* at 32 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).
[149] *See supra* notes 114-29 (describing when attorney contact with class members is considered commercial speech).
[150] Under the decisions of the United States Supreme Court, both lawyer advertising and solicitation constitute commercial speech. *See* Rex R. Perschbacher & Debra Bassett Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255, 256 (1987) ("Analytically, all advertising involves some degree of solicitation—an explicit or implicit invitation to deal. Moreover, at some point the difference between advertising and solicitation becomes conceptually unclear. However, advertising usually involves communications directed indiscriminately to the general public, while solicitation includes person-to-person efforts to obtain legal business."). In the seminal decision of *Bates v. State Bar of Arizona*, the Supreme Court extended First Amendment protections for commercial speech to lawyer advertising. 433 U.S. 350, 383-84 (1977). Any state restrictions upon lawyer advertising may regulate it only to the extent necessary to further the state's substantial interest. *See In re* R.M.J., 455 U.S. 191, 203 (1982) (noting state's interest must be substantive and regulation proportional to serving interest); Ohralik

intersection, and considerable overlap, with the third consideration in pre-certification communications—the ethical rules.

C. THE ETHICAL RULES

Attorneys have ethical obligations concerning communications with respect to those they represent,[151] those represented by other counsel,[152] and unrepresented third parties.[153] The legal profession has several sources of ethical rules. The American Bar Association's Model Rules of Professional Conduct set forth ethical rules and guidelines, which, together with the former Model Code of Professional Responsibility, form the basis for most states' ethical rules.[154] The recently adopted Restatement (Third) of the Law Governing Lawyers summarizes the existing rules and case law, and also departs from existing authority when the drafters believed better solutions were available.[155] In addition, the American Bar Association, and state, county, and local bar associations, publish formal and informal opinions concerning ethical issues.[156]

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v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (noting great interest of state to regulate lawyers). *See also infra* notes 226-34 and accompanying text (discussing use of proscription against solicitation to challenge pre-certification communications).

[151] *See infra* note 157 and accompanying text (discussing duties owed to clients).

[152] *See infra* note 164 and accompanying text (discussing duties owed to persons represented by counsel).

[153] *See infra* note 160-61 and accompanying text (discussing duties owed to persons not represented by counsel).

[154] *See* MODEL RULES OF PROF'L CONDUCT (1999); MODEL CODE OF PROF'L RESPONSIBILITY (1983) (providing rules of professional conduct). Thirty-nine states, plus the District of Columbia and the Virgin Islands, have adopted the Model Rules; with the exception of California, the remaining states base their standards on the Model Code. *See* COMPENDIUM OF PROF'L RESPONSIBILITY RULES AND STANDARDS 517, at 7-8 and inside back cover (1997). California has adopted neither the Model Rules nor the Model Code. *See* CAL. RULES OF PROF'L CONDUCT (1992).

[155] RESTATEMENT, *supra* note 6; *see also* GEOFFREY C. HAZARD, JR., *Foreword* to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at XXII (2000).

> In many instances, . . . the Restatement significantly departs from the code formulations. These departures are carefully considered and were extensively debated. As those of us involved in the drafting of the codes will testify, many of these departures simply clarify the intendment of the code provisions and others seek to supersede drafting mistakes. Other departures reflect recognition that experience with the codes revealed that better resolutions were to be had on a variety of issues.

Id.

[156] *See, e.g.*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1997) [hereinafter

With respect to attorney communications, the ethical rules create a dichotomy hinging on "represented" status. With respect to those whom they represent, an attorney's ethical obligations include a duty to keep a client reasonably informed about a matter's status, a duty to comply promptly with a client's reasonable requests for information, a duty to convey settlement offers to a client, and a duty to explain matters sufficiently so as to permit a client to make informed decisions.[157]

With respect to attorney communications to non-clients, if a person is represented by counsel, communications regarding the subject of the representation must be channeled through that person's counsel.[158] It is ethically improper to engage in ex parte contact with a represented person absent her counsel's consent.[159] However, when an individual is not represented by counsel, an attorney may freely contact that unrepresented person, restrained only from making a false statement of material law or fact[160] or from implying that the attorney is disinterested.[161]

ABA/BNA LAWYERS' MANUAL].

[157] MODEL RULES OF PROF'L CONDUCT R. 1.4 & cmt. 1 (1999).

[158] *See infra* note 164 and accompanying text (discussing Model Rule 4.2 and duties owed to persons represented by counsel).

[159] MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999).

[160] *Id.* R. 4.1.

[161] When a person is not represented by counsel, Model Rule 4.3 governs an attorney's communications with that unrepresented person. Model Rule 4.3 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.

MODEL RULES OF PROF'L CONDUCT R. 4.3 (1999). *See also* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 39.4, at 39-4 to 39-5 (3d ed. 2001) (discussing shortcomings of Rule 4.3). Similarly, the ABA Model Code, DR 7-104(A)(2) addressed attorney communications with unrepresented persons:

> (A) During the course of his representation of a client a lawyer shall not: . . . (2) 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.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104 (1983).

Unfortunately, these ethical rules assume the lawyer has already ascertained the identity of the client.[162] Model Rule 4.2 governs an attorney's communications with a represented person:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person[[163]] 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 by law to do so.[164]

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[162] *See generally* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 43-57 (1978) [hereinafter HAZARD, PRACTICE OF LAW] (discussing difficulties in identifying client); *see* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9, 4.2 (1999) (assuming lawyer knows identity of clients or potential clients).

[163] The text of Model Rule 4.2 originally prohibited attorney communications with a represented "party." The drafters substituted the word "person" for "party" in 1995. *See* 2 HAZARD & HODES, *supra* note 161, § 38.2, at 38-3.

[164] MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999). Rule 4.2 proscribes only communications "about the subject of the representation." Therefore, a defendant having an ongoing relationship with putative class members may continue to communicate with them about matters unrelated to the lawsuit. *See id.* R. 4.2 cmt. 1 ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").

Similarly, in the ABA Model Code, DR 7-104(A)(1) addressed attorney communications with represented persons in virtually identical language:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate 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.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1983). *See* 2 HAZARD & HODES, *supra* note 161, § 38.2, at 38-3 (noting Model Rule 4.2 "is taken virtually verbatim from DR 7-104(A)(1) of the Code of Professional Responsibility."). The Restatement contains a similar provision:

> (1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.
> (2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

RESTATEMENT, *supra* note 6, § 99, at 70. Comment l to this section deals expressly with

This absolute prohibition[165] upon a lawyer's communication with a represented person is a well-established rule.[166] The purposes behind the proscription against ex parte contact with represented individuals include protecting the represented person against overreaching by opposing counsel, safeguarding the attorney-client relationship from interference by opposing counsel, and reducing the likelihood that clients will disclose information that might harm their interests.[167] The primary purpose of the rule is to protect the layperson.[168]

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communications with class members, stating:

> A lawyer who represents a client opposing a class in a class action is subject to the anti-contact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. . . .

Id. cmt. l, at 77; *see also id.* at 87 (summarizing cases).

[165] *See* Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 502 (1998) ("[Model Rule 4.2] states an absolute prohibition, rather than a restriction on time, place, or manner.").

[166] *See* HENRY S. DRINKER, LEGAL ETHICS 201 (1953) (noting Canon 9 of Canons of Professional Ethics provided "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel," and also noting this prohibition was set forth in David Hoffman's 1836 treatise). *See also id.* at 349 (quoting Hoffman's Resolution XLIII: "I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of, his counsel"). *See generally* ABA/BNA LAWYERS' MANUAL, *supra* note 156, at 1001:292 (discussing background and purposes of anti-contact rule).

[167] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995), *reprinted in* ABA/BNA LAWYERS' MANUAL, *supra* note 156, at 1001:290, 1001:293; *see also* ABA CENTER FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF'L CONDUCT 392 (3d ed. 1996) (noting "[t]he purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounselled laypersons") (citations omitted); 2 HAZARD & HODES, *supra* note 161, § 38.2, at 38-4 (noting "[t]he purpose of the rule is . . . to prevent clients from being overreached by opposing lawyers.") (emphasis omitted).

[168] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995), *reprinted in* ABA/BNA LAWYER'S MANUAL, *supra* note 156, at 1001:293 (explaining Model Rule 4.2 is intended to "provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"); *see also supra* notes 164-67 and accompanying text (discussing communication by lawyers with parties represented by counsel); 2 HAZARD & HODES, *supra* note 161, § 38.2, at 38-3 ("In tandem with Rule 4.3, Rule 4.2 prevents a lawyer from taking advantage of a lay person to secure admissions against interest or to achieve an unconscionable settlement of a dispute."); *id.* § 38.4, at 38-7 (stating "the purpose of Rule 4.2 . . . is primarily to protect opposing clients"); Note, *Developments in the Law—Class*

Interestingly, however, the case law with respect to pre-certification attorney communications with unnamed class members has paid little attention to the ethical rules.[169] This disregard results from an initial, unexamined decision to classify unnamed class members as unrepresented, thereby limiting courts' attention to the third-party rules and never bringing Model Rule 4.2 into play.

1. The Case Law and the Ethical Rules. For the most part, the cases approaching this issue from the perspective of the majority view simply tend to proclaim that putative class members are not "represented" by class counsel, offering little, if any, analysis for this conclusion.[170] This pattern also exists with respect to the analysis provided by the leading class action treatises regarding this issue.[171] Some courts apparently believe, erroneously, that the Supreme Court's *Gulf Oil* decision[172] prohibits a general limitation against

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Actions, 89 HARV. L. REV. 1318, 1599-1600 (1976) [hereinafter Note, *Class Actions*] (noting rule lawyer may communicate with represented person only through counsel "reflects a concern that an unsophisticated litigant will be unduly influenced by representations of opposing counsel").

[169] *See, e.g., In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) (noting "a district court's discretion to issue [Rule 23(d)] orders must be exercised within the bounds of the first amendment and the Federal Rules," without mention of ethical rules).

[170] For example, *Resnick v. American Dental Ass'n* is often cited for the proposition that class counsel does not "represent" unnamed class members before class certification. 95 F.R.D. 372, 376-77 (N.D. Ill. 1982). However, with respect to pre-certification representation status, the court offers only a footnote, which states, "*Before* certification DR 7-104 does not apply because the potential class members are not yet 'represented by' counsel." *Id.* at 376 n.6. The authority cited for this proposition is *Cada v. Costa Line, Inc.*, 93 F.R.D. 95, 98 (N.D. Ill. 1981), which again, provides no analysis. Similarly, *Garrett v. Metropolitan Life Insurance Co.* offers no analysis, but simply states that putative class members are not represented by class counsel. No. 95-CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. June 12, 1996) ("But before class certification, the putative class members are not 'represented' by the class counsel for purposes of DR-7-104.") (citations omitted).

[171] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.24, at 257 (stating "[d]efendants ordinarily are not precluded from communications with putative class members," without explanation). *Newberg on Class Actions* provides a more ambiguous passage without explanation or analysis. *See* 3 NEWBERG & CONTE, *supra* note 17, § 15.14, at 15-41 ("In the absence of a local court rule or a pretrial order prohibiting or restricting communications . . . with absent class members, the defendants may continue to communicate . . . with members of the class, as long as they do not infringe on . . . the constructive attorney-client relationship . . . ."); *see also* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 30.45, at 626 (5th ed. 2000) ("Once the class is certified, class counsel is the sole legal representative. This means that defense counsel may not contact any of the class members directly or indirectly.").

[172] Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); *see supra* notes 70-99 and accompanying text (discussing *Gulf Oil* decision).

defense counsel's pre-certification communications with putative class members.[173]

By finding putative class members unrepresented, the courts can deem Model Rule 4.2 inapplicable and thereby disregard its potential ramifications. In those cases offering some analysis or rationale for reaching this conclusion, the justifications typically include the failure of unnamed putative class members formally to retain counsel to represent them,[174] and the nature of putative class members as "relatively passive beneficiaries" of the named plaintiffs' efforts.[175]

In contrast to the majority view, an important minority view holds that class counsel represents putative class members from the time of the filing of the complaint.[176] The cases representing the

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[173] *See, e.g.*, Fraley v. Williams Ford Tractor & Equip. Co., 5 S.W.3d 423, 434 (Ark. 1999) ("We decline to impose the proposed bright-line role in all class actions, because we cannot say with certainty that such a role would withstand constitutional scrutiny."). However, the fallacy of this reasoning was explained in another decision:

> [In *Gulf Oil*, the Supreme Court] held a blanket order against communications between class members and *class* counsel interfered with the latter's ability to represent the class and was therefore inimical to the purposes of Rule 23. Those same principles obviously do not apply to protect communications to class members by opposing counsel.

Resnick, 95 F.R.D. at 376 (footnotes omitted).

[174] *See, e.g., Resnick*, 95 F.R.D. at 376-77 (holding communications between plaintiff class members and defense counsel barred under Code of Professional Responsibility); Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (granting protective order allowing defendant to contact class members). *See also* Johnson, *supra* note 165, at 507 ("The unnamed putative class member has not sought legal services, nor has a court ordered that they should be rendered to that person.").

[175] *Winfield*, 20 Fair Empl. Prac. Cas. (BNA) at 1094.

[176] *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1206-07 (11th Cir. 1985) (stating "defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, *if not sooner*") (emphasis added) (footnote omitted); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (affording protections of Rule 4.2 to potential class members from filing of complaint); Haffer v. Temple Univ., 115 F.R.D. 506, 512 (E.D. Pa. 1987) (holding pre-certification communications by defense counsel urging potential class members not to meet with class counsel violated Model Code DR 7-104). Still other cases have precluded defense counsel from communicating with putative class members, but have done so through the use of a court order and therefore have conducted their analysis under Rule 23 and *Gulf Oil*, rather than using the ethical rules. *See, e.g.*, Rankin v. Bd. of Educ., 174 F.R.D. 695, 697-98 (D. Kan. 1997) (barring defendants and their counsel from communicating with plaintiffs or prospective class members); Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630, 632-34 (N.D. Tex. 1994) (determining letters sent by defendant to putative class members constitutes abuse of class action process); Pollar v. Judson Steel Corp., 33 Fair Empl. Prac. Cas. (BNA) 1870, 1871 (N.D. Cal. 1984) (granting temporary restraining order preventing defendant from communicating with

minority view often similarly suffer from a lack of explanation and analysis. However, the justifications offered by the better-reasoned decisions pay attention to, and include an analysis of, the purposes underlying the ethical rule[177] and the rights and benefits afforded to unnamed class members by the filing of the action.[178]

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putative class members).

Perhaps the decision cited most often for the proposition that class counsel represents putative class members from the outset of the litigation is *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981). Although *Impervious Paint* is the decision most often cited, its language leaves some ambiguity as to whether the behavior of defense counsel, which was the subject of the court's rebuke, occurred before or after class certification. *Compare* RESTATEMENT, *supra* note 6, § 99 cmt. l, at 87 (describing *Impervious Paint* as "pre-certification contact—during opt-out period—violates anti-contact rule"), *with* 3 NEWBERG & CONTE, *supra* note 17, § 15.15, at 15-44 n.115 (describing *Impervious Paint* as a post-certification decision). Despite this conflict, "it is reasonable to interpret the case as stating, at least in dicta, that putative class members are represented even before certification for purposes of the anti-contact rule." Johnson, *supra* note 165, at 509 n.37.

[177] *See Dondore*, 152 F. Supp. 2d at 665-66 (noting purpose of Model Rule 4.2 is to prevent lawyers from taking advantage of laypersons, and observing extending reach of rule to unnamed class members furthered purpose).

> As a practical matter, a court cannot decide the issue of class certification immediately upon the filing of the complaint. Discovery is often required and the preparation and study of briefs is necessary. Thus, certain benefits must be afforded the putative class members in the interim. As the tolling of the statute of limitations is needed to further the salutary purposes of class actions, restraints are likewise needed against communications with putative class members until the issue of class certification can be determined. If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.

Id. at 666. *See generally* 2 HAZARD & HODES, *supra* note 161, § 38.4, at 38-7.

> Where there is already an ongoing relationship between the class members and the party opposing the class, such as between a group of employees and their employer, direct independent communication between the parties is inevitable, and additional communications through counsel ought not to be prohibited so long as courtesy copies of communications are provided to counsel. On the other hand, the lawyer for the opponent of the class should not be allowed to take statements concerning the matter in controversy from individual class members through ex parte interviews, for that could impose the very disadvantages that the rule is designed to prevent.

Id.

[178] *See Dondore*, 152 F. Supp. 2d at 665-66 (noting class action is truly representative suit, in which putative class members have "at least" fiduciary relationship with class counsel, and observing "truly representative" nature of class action provides putative class members with certain rights and protections); *see also id.* at 665 (noting mere filing of class action lawsuit extends protections to potential class members by, for example, tolling statute of limitations

2. Ambiguity in Status. The reason for the disagreement in the case law stems from the "indeterminate" status[179] of putative class members. The Restatement, while providing a general section regarding the formation of a client-lawyer relationship,[180] expressly notes, in an accompanying comment, the difficulty of client identification in class actions.[181] Similarly, the ethical rules are singularly unhelpful in this regard; they define neither the term "client" nor "represented."[182] Instead, the Model Rules dodge the issue by providing that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."[183]

However, despite the lack of definitions, in the Model Rules' discussion of a lawyer's responsibilities, the lawyer is described as

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"even for those who were unaware of the action and did not rely on it in refraining from filing their own motions for individual intervention or joinder," by permitting unnamed class members to challenge adequacy of representation by plaintiff, and, in some circumstances, giving unnamed class members rights with respect to class settlement).

[179] *See* 2 HAZARD & HODES, *supra* note 161, § 38.4, at 38-6 ("Members of a class other than the designated class representatives have an indeterminate status as participants in the litigation, at least until they affirmatively 'opt out' of the class, where that option is available under governing rules of civil procedure."); *see also* RESTATEMENT, *supra* note 6, § 14 cmt. f, at 131-32 ("Class actions may pose difficult questions of client identification.").

[180] *See* RESTATEMENT, *supra* note 6, § 14, at 125.

> A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.

Id.

[181] *See* RESTATEMENT, *supra* note 6, § 14 cmt. f, at 131.

> [C]lass members who are not named representatives . . . have some characteristics of clients. For example, their confidential communications directly to the class lawyer may be privileged . . ., and opposing counsel may not be free to communicate with them directly . . . . Members of the class often lack the incentive or knowledge to monitor the performance of the class representatives. Although members may sometimes opt out of the class, they may have no practical alternative other than remaining in the class if they wish to enforce their rights. Lawyers in class actions thus have duties to the class as well as to the class representatives.

Id.

[182] *See* MODEL RULES OF PROF'L CONDUCT, Terminology (1999) (providing no definition for "client," "represented," or "lawyer-client relationship").

[183] *Id.* Scope para. 3.

a client's "representative," and as one who "performs various functions" in that capacity:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.[184]

Class counsel serves in each of these capacities on behalf of putative class members, thus suggesting the propriety of finding an attorney-client relationship between class counsel and potential class members.[185]

Unnamed class members are not easily categorized. On the one hand, unnamed class members resemble plaintiffs in any other action. They are participants—albeit somewhat distant ones—in a lawsuit. The filing of the complaint initiates the lawsuit, and

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[184] *Id.* Preamble para. 1-2.

[185] Similarly, one description of "client" is "the person or entity on whose behalf a lawyer acts." MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); *In re* Wilde Horse Enters., 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991). Class counsel unquestionably act on behalf of the entire class, including unnamed class members. *See In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); *In re* "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18 (2d Cir. 1986) ("[C]lass attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class."); *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J. concurring) ("The obligation of counsel representing a class runs to the class as a whole . . ."); *see also infra* notes 205-06 and accompanying text (discussing additional attorney obligation).

includes them among the class of others similarly situated to the named plaintiffs.[186] The action asserts and preserves their rights and interests in the subject matter of the litigation. Specifically, their interests are implicated in that the filing of the action tolls the statute of limitations,[187] class counsel's actions in pursuing the litigation directly benefit or harm the class members, and class settlement generally benefits the class members.[188]

On the other hand, unnamed class members often are distinctively different from plaintiffs in other lawsuits. Unnamed class members may have never met class counsel; they may have no idea that a lawsuit has been filed or that such a lawsuit was even contemplated; they may have no idea they are potential members of a class; they may have suffered an injury so minimal that an individual plaintiff would not seek recovery; and they may have no interest in pursuing any remedy.[189] In some ways, unnamed class members resemble true non-clients. For example, if a tenant sues the landlord of her apartment complex for inadequate security measures, other tenants in that complex, although having no role in the lawsuit, may nevertheless benefit (or suffer) from the litigation's outcome. Such a non-client may be just as "interested," or even more interested, in the lawsuit's outcome than a class member with a small stake barely aware, or even unaware, of litigation involving

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[186] *See supra* notes 27-29 and accompanying text (discussing representation of similarly situated persons by named representatives).

[187] *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (explaining rule that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."); *see also* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983) (expanding upon *American Pipe* rule to note "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied").

[188] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.43, at 267 (noting "[c]ounsel representing a class are responsible for communicating an offer to the class representatives and ultimately to the members of the class"); *id.* § 30.45, at 270 (noting practice of settlement classes, in which settlement is reached before class is certified).

[189] This is, of course, inherent in the concept of the class action device. For example, Rule 23 requires notice to potential class members, and the Advisory Committee notes observe that "the amounts at stake for individuals may be so small that separate suits would be impracticable." FED. R. CIV. P. 23(c)(2), advisory committee notes.

her interest. Moreover, such non-clients may be practically bound by the litigation, even if it lacks true preclusive effect.[190]

The imprecise nature of determining the identity of the client and ascertaining the beginning of the attorney-client relationship is not unique to class actions.[191] Questions regarding client identity and the existence of an attorney-client relationship[192] arise in many contexts, including initial consultations,[193] estate administration,[194] bankruptcy,[195] and organizational clients,[196] to name a few.[197] In

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[190] The Federal Rules of Civil Procedure take this fact into account and thus protect the interests of non-parties by providing rules for the joinder of necessary persons to the litigation and for intervention in the litigation by third parties. FED. R. CIV. P. 19, 24.

[191] HAZARD, PRACTICE OF LAW, *supra* note 162, at 43-57:

> In the traditional lore of the legal profession, identifying the client is not a problem. The client is the troubled fellow who walks into the office, papers in hand, wanting someone to help him in a legal matter. If all real world lawyer-client relationships began this way and involved nothing else, the question of client identity would always be answered before the relationship begins.

Id. at 43. *See also id.* at 45 ("[I]n the real world, . . . the identity of the client may not be established until after some critical decisions have to be made, and may never be unambiguously established at all."). As one court has stated, "What constitutes an attorney-client relationship is a rather elusive concept." Folly Farms I, Inc. v. Trs. of the Client's Sec. Trust Fund, 387 A.2d 248, 254 (Md. 1978).

[192] Formalities are unnecessary to establish an attorney-client relationship. *See* 1 MALLEN & SMITH, *supra* note 171, § 8.3, at 783 ("No particular contract or formality is necessary to create the [attorney-client] relationship. The relationship of attorney and client can be express or implied . . . ."); *see also* Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209, 218 (1986) (noting attorney-client relationship "may be created informally by the implication of the actions of the attorney and the purported client").

[193] *See generally* Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation & Conflicts of Interest*, 3 GEO. J. LEGAL ETHICS 689, 701-05 (1990) (describing situations where initial consultation forms attorney-client relationship).

[194] *See* Joel C. Dobris, *Ethical Problems for Lawyers Upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1, 27 (1983) (noting different views of who client is when administering estates); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319, 1321-25 (1994) (describing confusion among authority in determining identity of client in fiduciary relationships); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 891 (noting confusion and lack of guidance in determining client in estate administration); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 13 (1999) ("In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries.").

[195] *See* Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 98-99 (1998) [hereinafter Rapoport, *Uniform Code*] (describing "client identity," issued in bankruptcy cases).

[196] *See generally* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege*

particular, the bankruptcy setting and the initial consultation present two situations ethically analogous to unnamed class members.

3. Some Analogous Considerations. Two analogous scenarios provide relevant considerations in determining what approach to take in determining the status of the relationship between unnamed class members and class counsel: the attorney for the debtor-in-possession in bankruptcy cases and the initial attorney-client consultation.

a. The Bankruptcy Attorney. Chapter 11 bankruptcy proceedings present one potential area of analogy.[198] In this context, a recurring question is whether the attorney's client is the debtor-in-possession or the estate.[199] Part of the difficulty in the Chapter 11 context results from the nature of the debtor-in-possession role: the debtor, which has filed for relief under Chapter 11, remains in possession while also possessing the powers of a trustee.[200] From the outset, this dual role places the debtor in a position where its own interests are potentially adverse to the interests that it must

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and the No-Contact Rule, 10 GEO. J. LEGAL ETHICS 739, 739-40 (1997) (noting complexity of identifying clients in organizational representations).

[197] *See* HAZARD, PRACTICE OF LAW, *supra* note 162, at 44-45 (listing examples raising ambiguous client scenarios and noting lawyer's "initial problem in all these situations is to determine who the client is"); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 26-28, 39-42 (1987) (noting traditional lawyer-client and lawyer-third party analysis breaks down when applied to triangular lawyer relationships such as lawyer-government-government employee relationship and lawyer-corporation-officer relationship); Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 695-703 (1994) (noting recurring situations "fraught with potential ambiguity regarding the identity of the client" include representation of entities, family members, buyers and sellers, borrowers and lenders, and fiduciaries, including trustees and guardians).

[198] *See* John D. Ayer, *Down Bankruptcy Lane*, 90 MICH. L. REV. 1584, 1597 (1992) (noting bankruptcy is, in effect, "a national limited resource class action"); Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 965-66 (1994) (noting "[i]n many ways, the dynamics of litigation in a class action case mirror the dynamics of litigation in a bankruptcy case . . . . In the abstract, a bankruptcy case is nothing but a specialized class action case . . . .").

[199] *See infra* notes 202-03 and accompanying text (describing conflicting views of client identity in bankruptcy).

[200] Unless, of course, the court decides to appoint a trustee. 11 U.S.C. §§ 1104, 1107(a) (1994).

serve in its role as debtor-in-possession, in which it serves as a fiduciary for its creditors.[201]

When the attorney for the debtor-in-possession enters into the mix, this adds another layer. As Professor Rapoport has observed:

> When it comes to the DIP [debtor-in-possession] as the client, bankruptcy folks aren't all on the same page. Is the client the *DIP* or the *estate*? Some folks think that, unless the DIP behaves as though its interests are identical to those of the unsecured creditors, the DIP has violated its fiduciary duties to the estate. Others recognize the DIP's instinct for self-preservation. Treating the DIP as the manager of the estate, with the estate as the "real" client, has very different ramifications from treating the DIP as the real client. The first approach requires us to take interests other than the DIP's own into account. The second approach places much greater reliance on other entities involved in the case—for example, the creditors' committee—to act to protect their respective constituent interests.[202]

In examining the responsibilities of the attorney for the debtor-in-possession, however, the key concept is that of a fiduciary.[203]

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[201] John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 387-89 (1986); Stephen McJohn, *Person or Property? On the Legal Nature of the Bankruptcy Estate*, 10 BANKR. DEV. J. 465, 507-08 (1994).

[202] Rapoport, *Uniform Code*, *supra* note 195, at 98-99 (footnotes omitted, emphasis in original); *see also* C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 86 (1997) ("What complicates matters in bankruptcy cases is that counsel for the DIP is said to represent the 'Estate,' and there's no consensus on exactly what representing the Estate means. The Estate wants to reorganize, but for whose benefit? . . . Depending on which case or article you read, you get different answers.").

[203] *Compare In re* Whitney Place Partners, 147 B.R. 619, 620 (Bankr. N.D. Ga. 1992) ("The unique circumstances which surround insolvency and the filing of a Chapter 11 case place the attorney for the debtor in possession in the unusual position of sometimes owing a higher duty to the estate and the bankruptcy court than to his client."), *and In re* Wilde Horse Enters., Inc., 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991) (stating "[a]n attorney's 'client' is the person or entity on whose behalf the lawyer acts . . . . Because the attorney for debtor in possession is a fiduciary of the estate and an officer of the Court, the duty to advise the client

Although a fiduciary relationship does not, in and of itself, create an attorney-client relationship, it is one factor to consider in determining whether an attorney-client relationship exists.[204] If, for example, class counsel owed no fiduciary duty to potential class members, this absence would suggest a corresponding absence of an attorney-client relationship. However, class counsel clearly bears a fiduciary obligation toward unnamed class members.[205]

Class counsel cannot disregard the interests of unnamed class members in the pre-certification course of litigation. Class counsel's fiduciary responsibilities do not flow solely to the named representatives pre-certification, and then suddenly expand when the district court certifies the class. In all pre-certification actions, class counsel must act with an eye toward unnamed class members.

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goes beyond responding to the client's request for advice."), *with In re* Sidco, Inc., 173 B.R. 194, 196-97 (Bankr. E.D. Cal. 1994) (pointing out "basic tenet that attorneys for debtors-in-possession have a fiduciary duty to their client, the debtor-in-possession, not to the creditors and shareholders whose interests may be adverse to the debtor . . . . The debtor-in-possession, not the attorney, acts as the trustee to the estate"), *and In re* Brennan, 187 B.R. 135, 150 (Bankr. D.N.J. 1995) (noting "the fiduciary duty of the debtor's professionals is derivative of the debtor's fiduciary duty. Since . . . a debtor in possession has no duty to investigate his own financial affairs, it follows that his professionals have no such duty either").

[204] *See* 2 MALLEN & SMITH, *supra* note 171, § 14.3, at 547 ("For example, the holding of money in a trust or escrow capacity can create a fiduciary relationship but not an attorney-client relationship.").

[205] *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (noting "putative class members stand at least in a fiduciary relationship with class counsel"); *In re* Avon Sec. Litig., No. CIV.A. 91-2287-LMM, 1998 WL 834366, at *10, n.5 (S.D.N.Y. Nov. 30, 1998) ("Even before a class has been certified, counsel for the putative class owes a fiduciary duty to the class."); Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("The role of class counsel is akin to that of a fiduciary for the class members."); Wagner v. Lehman Bros. Kuhn Loeb, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (stating class counsel "stands in a fiduciary relationship with the absent class"); *see also* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) (noting "class action counsel possess, in a very real sense, fiduciary obligations to those not before the court"); MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 30.24, at 256 (noting "prior to class certification, there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent"); 3 NEWBERG & CONTE, *supra* note 17, § 15.14, at 15-41 (noting "constructive attorney-client relationship" between class counsel and unnamed class members before class certification); Stephen B. Murray & Linda S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel for the Class, or a Selection of Counsel with Class?*, 74 TUL. L. REV. 2089, 2097 (2000) ("Attorneys filing a suit seeking class action management have a fiduciary obligation that extends to all persons or entities who can fairly be included within the class definition as stated in the first pleading filed in which a class action is requested.").

Indeed, class counsel's failure to act as a fiduciary on behalf of unnamed class members is a basis for finding counsel has not satisfied the "adequacy of representation" prerequisite for class certification.[206] Accordingly, drawing upon the lessons of bankruptcy practice, class counsel's pre-certification fiduciary obligations to unnamed class members suggest the existence of an attorney-client relationship from the outset of the action.

b. The Initial Consultation. Another analogous situation bearing on this area is the initial attorney-client consultation. On the surface, the initial consultation may appear dissimilar to the class action context due to the differences in client contact. In an initial consultation, the lawyer and potential client typically have had some form of contact, whether in-person or through some medium, such as telephone, letter, facsimile, or email. In a class action, the lawyer and the unnamed class members often have had no contact whatsoever. However, this contrast becomes less dissonant when viewed through the prism of relevant context.

In a traditional (as opposed to class action) lawsuit, the lawyer must have some contact with a client to acquire the information necessary to file the action. However, in a class action, the lawyer need not have contacted each class member before filing a lawsuit due to the existence and nature of class representatives. Indeed, the dollar amounts at stake in some class actions are too small to serve as a financial incentive for the layperson to locate a lawyer, or for the lawyer to accept the case, unless a class action is possible.[207]

Client contact aside, the initial consultation poses similar questions as to client status—the timing of the beginning of the

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[206] *See, e.g., Wagner*, 646 F. Supp. at 661 (stating class counsel "stands in fiduciary relationship with the absent class").

[207] *See* Note, *Class Actions*, *supra* note 168, at 1578:

> The holder of a nonrecoverable claim will not have a financial incentive to underwrite the costs of litigation, and may have no incentive even to spend the time necessary to select a lawyer. If he should find an attorney interested in his problem, that attorney will nonetheless be unwilling to go to court unless a class can be formed—an adequate fee may come only from the fund that litigation might create. . . . Nor can the named plaintiff demand that single-minded allegiance of his attorney envisioned by the traditional model. The attorney is the representative for the class and it is improper for him to ignore the interests of absentees.

Id.

attorney-client relationship and whether the representation will proceed. In making these determinations in the context of an initial consultation, the crucial underlying consideration goes to the notion of whom the ethical rules were designed to protect. In deciding whether and when an attorney-client relationship is established during an initial consultation, the courts have focused on the protection of the putative client. Indeed, the putative client's expectation as to the existence of an attorney-client relationship often is determinative.[208]

In stark contrast to the focus on the putative client in the initial consultation context, the current majority view with respect to representation of unnamed class members instead has focused solely on the interests of counsel. When the focus shifts to protecting the layperson, and the expectations of putative class members, the requisite course of action is indisputable.

Upon learning of a class action lawsuit, an unnamed class member would naturally conclude that class counsel was her lawyer, would naturally assume that she could contact class counsel in confidence regarding any questions or concerns about the lawsuit, and would naturally assume, without anything more, that class counsel was protecting her interests. Delaying putative class

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[208] *See, e.g.*, United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985) (requiring potential client's subjective belief be reasonable); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) (identifying professional relationship as formed when client believes she is consulting attorney with intention of seeking legal advice); Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 342 (D. Mass. 1982) (finding attorney-client relationship because prospective class members "reasonably regarded" counsel "as their lawyer"); *see also* William H. Raley Co. v. Super. Ct., 197 Cal. Rptr. 232, 236 (Ct. App. 1983) (stating conflict of interest may arise from attorney's relationship with non-client when "an attorney's relationship with a person or entity creates an expectation that the attorney owes a duty of fidelity"); Friedman, *supra* note 192, at 231 (noting one important fact in determining existence of attorney-client relationship "is the expectation of the client based on how the situation appears to a reasonable person in the client's position"). In addition to having a reasonable expectation, a number of courts have also required that the putative client shared confidential information with the attorney. *See, e.g.*, Diversified Group, Inc. v. Daugerdas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001) (reasoning that to establish implied attorney-client relationship, putative client must have submitted confidential information to attorney with reasonable belief that lawyer was acting as her attorney); Pain Prevention Lab, Inc. v. Elec. Waveform Labs, Inc., 657 F. Supp. 1486, 1495 (N.D. Ill. 1987) (stating that in order to establish implied attorney-client relationship party must submit confidential information under reasonable belief lawyer was acting as attorney). This factor will not, however, be present in analyzing putative class members.

members' status as "represented" by class counsel secures no benefit whatsoever to the class members.[209] Instead, delaying "represented" status tilts the situation generally toward the defense by subjecting putative class members to interviews by defense counsel, to settlement discussions without full knowledge of their rights, and to potential overreaching.[210]

Protecting the client (or putative client) should be a consideration in determining "represented" status generally, and is the primary purpose underlying Model Rule 4.2.[211] The protections accorded by pre-certification restrictions on communication are particularly important. It is in the earlier stages of litigation that putative class members are most likely to be uninformed and, therefore, that improper communications will likely cause the most damage.[212] Courts should resolve the ambiguity caused by the indeterminate status of potential class members by considering class counsel as representing such class members from the outset of the litigation.[213] Thus, class counsel's fiduciary role with respect to unnamed class members, and the expectations of potential class members, support the minority view's approach.[214]

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[209] *Cf.* Bower v. Bunker Hill Co., 689 F. Supp. 1032, 1034 (E.D. Wash. 1985). Although the court was addressing post-certification communication, the rationale is the same: "[C]lass members gain no benefit from such contact. Quite the contrary, the imbalance in knowledge and skill which exists between class members and defense counsel presents an extreme potential for prejudice to class members' rights." *Id.*

[210] *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1203 (11th Cir. 1985) ("Unsupervised, unilateral communications [by the defense] with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable."); Georgine v. Amchem Prods., Inc., 160 F.R.D. 478, 490 (E.D. Pa. 1995) ("Various communications disseminated to class members by attorneys opposed to this settlement were, on their face, clearly materially false and misleading in several respects."); *see also infra* notes 235-39 and accompanying text (discussing communication abusers in class actions).

[211] 2 HAZARD & HODES, *supra* note 161, § 38.4, at 38-6 to 38-7.

[212] *See* Domingo v. New England Fish Co., 727 F.2d 1429, 1441 (9th Cir. 1984) ("If anything, the policies weighing in favor of communications restrictions after the class has been certified are much less compelling than before certification.").

[213] *See* 2 HAZARD & HODES, *supra* note 161, § 38.4, at 38-6 to 38-7 (noting, in context of contacting unnamed class members, that "[i]ntermediate situations should be resolved by reasoning from the purpose of Rule 4.2, which is primarily to protect opposing clients and only incidentally to protect opposing lawyers").

[214] Class counsel's obligations to absent class members are also noted in two recent Supreme Court decisions: *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Products v. Windsor*, 521 U.S. 591 (1997). These cases discussed the hazards for absent class

IV. TOWARD A REASONED ANALYSIS OF PRE-CERTIFICATION ETHICS

The Federal Rules of Civil Procedure, the First Amendment, and the ethical rules all have implications for pre-certification attorney communications with unnamed class members. However, the courts often have not considered the implications of all three factors. In particular, the courts have tended to disregard the implications of the ethical rules in this area.[215] This Part provides a proposed solution to this problem.

Courts need to approach pre-certification attorney communications with prospective class members by balancing the three considerations addressed in Part III—Rule 23, the First Amendment, and the ethical rules. As discussed in Part III, courts initially erred by considering only the reach of Rule 23(d) in fashioning court orders, failing to factor the ethical rules into their analysis and overlooking the need to consider the First Amendment's free speech protections.[216] Today, the majority of courts addressing the issue consider the reach of Rule 23(d) and the First Amendment's free speech protections but fail to consider the ethical rules.[217] By peremptorily concluding that absent class members are not "represented" by class counsel, the majority view dodges the ethical proscriptions. In Part IV, a critical examination of the remaining two justifications for the majority view is followed by a balancing test, which is posited as a better alternative to the existing approach.[218]

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members in global settlements involving settlement class actions, particularly with respect to conflicts of interest. *See Ortiz*, 527 U.S. at 852 (noting class counsel had "great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class"); *Amchem*, 521 U.S. at 626-27 (noting conflict resulting from divergent interests of presently injured and future claimants).

[215] *See supra* notes 154-214 and accompanying text (discussing implications of ethical rules).

[216] *See supra* notes 66-214 and accompanying text (discussing Rule 23, ethical rules, and First Amendment).

[217] *See, e.g., In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) (deciding Rule 23(d) issue without mention or discussion of ethical rules).

[218] *See infra* notes 220-61 and accompanying text (proposing different alternative to majority view).

A. THE PROFFERED JUSTIFICATIONS

Historically, the remaining two justifications for retaining the majority view—that unnamed class members are not represented by class counsel until class certification—include defense counsel's need for information from class members, and the dangers of solicitation by class counsel.

1. Discovery and Absent Class Members. The primary beneficiary of the delay in according "represented" status to unnamed class members is defense counsel, whose ability to obtain information from potential class members regarding the action's merits and defenses is thereby enhanced.[219] This justification, although frequently offered, is unpersuasive. The need for information exists in every case, and should not preempt ethical considerations.[220]

By characterizing unnamed class members as unrepresented, defense counsel may approach such class members directly, without permission and without supervision. Such contacts permit the efficient acquisition of information useful to the defense in formulating both litigation strategy and potential settlement offers. In some instances, defense counsel may actually have better access to unnamed class members than does class counsel, either due to solicitation restrictions upon class counsel or as a result of pre-existing relationships that may provide greater access to information concerning the identities of unnamed class members. For example, if the class consists of the defendant's former or current employees or customers, defense counsel may have ready access to the names, addresses, and telephone numbers of potential class members from the defendant's business records.

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[219] *See supra* notes 10-14 and accompanying text (discussing effect of pre-certification contact by defense counsel in class actions).

[220] *See* Resnick v. Am. Dental Ass'n, 95 F.R.D. 372, 377 (N.D. Ill. 1982):

> [T]he rationalization based on ADA's counsel's need to prepare for trial is wholly without merit. It proves too much. Every case should be prepared in part by the lawyer's communicating with the opposing party. That is after all what much of the mechanism of discovery is designed for. But it is of course unethical for those communications to take place directly without the involvement of the opposing party's lawyer. . . . It is hardly necessary to spell out the reasons for the prohibition of a lawyer's direct dealing with an adverse party represented by counsel.

Id.

Although the ability to obtain information directly from potential class members benefits defense counsel in preparing its case, such direct access to plaintiffs is not available to defendants in other lawsuits. Instead, in other types of lawsuits, including mass joinder, defense counsel must treat plaintiffs as represented parties and must obtain information through traditional discovery devices.[221] Thus, by according "represented" status to unnamed class members at the outset of a class action lawsuit, defense counsel is put in the same position as when defending any other action.[222] Only the current unfair advantage of access to information held by potential plaintiffs, unavailable in any other lawsuit, is removed.

Indeed, this unfairness is particularly acute because it permits defense counsel to gain a second advantage which is generally unavailable. Once a class is certified, the vast majority of courts do not generally permit discovery with respect to absent class members.[223] The courts have reasoned that taking discovery from absent class members violates the representative nature of the class action concept.[224] Thus, the courts will permit such discovery only when the information is not available from the class representatives, the

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[221] As one court noted in rejecting a defendant's argument for post-certification contact with class members: "[T]he defendants' [sic] articulated reason for contacting class members here is to obtain information to aid in the preparation of its own case. . . . [S]uch a need is present in every case and can be readily filled by the use of the discovery process." Bower v. Bunker Hill Co., 689 F. Supp. 1032, 1034 (E.D. Wash. 1985).

[222] *See* Note, *Class Actions*, *supra* note 168, at 1599 (noting "the traditional rule that counsel may communicate with the opposing litigant only through the litigant's attorney").

[223] *See* 3 NEWBERG & CONTE, *supra* note 17, § 16.03 (noting courts generally will deny discovery of absent class members absent strong showing of necessity). *See, e.g.*, Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1556-57 (11th Cir. 1986) (declining to approve use of dismissal against absent class members who failed to respond to discovery); Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 485, 488 (S.D.N.Y. 1973) (holding absent class members are not parties subject to either discovery or counterclaims); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (allowing discovery only against named parties); Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (refusing to allow discovery on unnamed plaintiffs). *But see* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004-06 (7th Cir. 1971) (dismissing claims of absent class members who failed to answer interrogatories propounded by defendants).

[224] *Resnick*, 95 F.R.D. at 379 ("[T]he limitations on discovery responsibilities imposed on unnamed class members derive not from the absence of an attorney-client relationship but rather from the status of those unnamed persons as 'absent' parties.").

discovery requests are not unduly burdensome, and the information sought is relevant to the decision of common questions.[225]

Accordingly, the majority view affords defense counsel two advantages to which it would otherwise not be entitled: (1) the ability to contact unnamed class members directly, rather than through opposing counsel during the discovery process, and (2) the ability to acquire information unavailable after class certification due to the protections accorded unnamed class members in a representative action.

2. Balancing Communication Dangers. The remaining justification for the majority view concerns improper advertising and solicitation by class counsel. Class counsel's pre-certification communications with unnamed class members have most commonly been challenged under now-outdated notions of improper advertising or solicitation.[226] Solicitation and advertising formerly posed a

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[225] *See* Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621-22 (S.D. Tex. 1991) (allowing discovery on absent class members when interrogatories are "clear, concise, and limited primarily to the defendants' defenses and the plaintiffs' claims"); Gardner v. Awards Mktg. Corp., 55 F.R.D. 460, 463 (D. Utah 1972) (refusing to allow submission of interrogatories to over 600 firms and individuals because unnecessary and would result in delay of trial of common issues); *see also supra* note 223 and accompanying text (discussing courts' refusal to allow discovery from absent class members).

[226] *See, e.g.*, Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 789 (E.D. La. 1977).

> Considering first the possible solicitation of representation and/or funds, we regard regulation aimed at preventing such an abuse as promotive of both the public's and the legal profession's interests. Not only does curbing solicitation by less than scrupulous attorneys serve those laymen liable to be unfairly badgered and/or persuaded by the activity, but it also protects the reputation and professional image of the bar itself.

Id.; *see also id.* at 790 ([The rule prohibiting communication with nonparties] "is one we find all the more compelling in the class action framework, given the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding."). However, a more recent case observed:

> There is some clamor about counsel generating this suit rather than the clients, and that this is unacceptable. In truth, class actions are inevitably the child of the lawyer rather than the client when the client's recovery is going to be small in relation to the costs of prosecuting the case .... I suppose lawyers going out to find clients is not the bad thing it was once thought to be.

Williams v. Balcor Pension Inv., 150 F.R.D. 109, 118 (N.D. Ill. 1993). *See also* Note, *Recent Cases*, 88 HARV. L. REV. 1903, 1918-19 (1975) [hereinafter Note, *Recent Cases*] ("[T]here is little reason to believe that the dangers of solicitation are sufficiently greater in class actions than in individual suits to justify burdens in addition to those of the generally applicable *Code of Professional Responsibility*.").

greater basis for concern than they do today. Until the Supreme Court's 1997 decision in *Bates v. State of Arizona*,[227] the states widely prohibited attorney advertising as unethical and unseemly.[228] The Supreme Court's post-*Gulf Oil* decisions have expanded *Bates* to permit advertising regarding specific legal problems[229] as well as targeted, direct-mail solicitation.[230] However, the prevailing ethical

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[227] 433 U.S. 350 (1977).

[228] *See* Perschbacher & Hamilton, *supra* note 150, at 258.

[229] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985) (refusing to reprimand attorney who advertised willingness to represent women injured through use of Dalkon Shield contraceptives); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.2 (1999)

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Id. R. 7.1

Model Rule 7.2 provides:

> (a) Subject to the requirements of Rule 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication. (b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used. (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and (3) pay for a law practice in accordance with Rule 1.17. (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Id. R. 7.2.

[230] *See, e.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988) (concluding Kentucky could not consistent with First Amendment prohibit attorney from sending truthful letters to people known to be facing certain legal problems). *See generally* Vance G. Camisa, *The Constitutional Right to Solicit Potential Class Members in a Class Action*, 25 GONZ. L. REV. 95 (1989) (discussing constitutional right of plaintiffs attorneys to solicit class members). Correspondingly, the current Model Rule regarding solicitation prohibits an attorney from contacting prospective clients in-person or by telephone contact. MODEL RULES OF PROF'L CONDUCT R. 7.3 (1999). In the class action context, this rule effectively confines class counsel to communicating with putative class members through advertisements or mass mailings. *See Shapero*, 486 U.S. at 472 (finding unconstitutional Kentucky's blanket ban on all targeted, direct-mail solicitation); *Zauderer*, 471 U.S. at 627 (finding unconstitutional Ohio's rule prohibiting solicitation through advertisements regarding specific legal problem where

rules and the Court's decisions still ban most in-person and telephone solicitation, except where a pre-existing relationship is present.[231]

Thus, if class counsel is considered as representing unnamed class members at the outset of the litigation, class counsel may contact potential class members directly, either in person or by telephone, without engaging in improper solicitation. However, if unnamed class members are unrepresented, class counsel may not

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attorney advertised in several newspapers offering to represent women injured by Dalkon Shield); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (1999) (providing any written communication from lawyer "soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words 'Advertising Material' on the outside envelope").

[231] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (1999), which provides:

> (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if: (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment. (c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication. (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Id.

In *Ohralik v. Ohio State Bar Ass'n*, the Supreme Court directly confronted in-person solicitation by attorneys and concluded the potential dangers justified banning such communications. 436 U.S. 447 (1978). The Court observed that when an attorney solicits in person, the attorney is able to exert pressure for an immediate response "without providing an opportunity for comparison or reflection." *Id.* at 457. The Supreme Court subsequently explained that "*Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances . . . . [T]he constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation." Edenfield v. Fane, 507 U.S. 761, 774 (1993) (finding unconstitutional Florida's ban on in-person solicitation by certified public accountants).

ethically initiate in-person or telephone contact.[232] Although the Supreme Court has clarified other means could be used to inform potential class members of the existence of the class action lawsuit, such as through newspaper advertisements and mass mailings,[233] some courts have placed restrictions upon these methods as well, citing solicitation concerns.[234]

In contrast to the rebukes to class counsel for "drumming up business," the case law is replete with horror stories of ex parte communication abuses by defense counsel in the class action context. These abusive communications include misrepresentations concerning the class action's purpose, status, or effects,[235] as well as

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[232] MODEL RULES OF PROF'L CONDUCT R. 7.3 (1999). One district court noted this tension in a published decision:

> During the time between the institution of a class action and the close of the opt-out period, the status of plaintiffs' counsel in relation to the class members cannot be stated with precision. While class counsel clearly have the duty to represent the interests of the absent class members, it would also appear that contact initiated by class counsel prior to the close of the opt-out period would be unethical as direct solicitation of clients, if the purpose or predictable effect of the contact is to discourage a decision to opt out of the class. Thus, the peculiar status of the class member during this period of time may place additional burdens on class counsel: For purposes of the obligation to avoid compromising the rights of the class members, class counsel must treat them as clients; for purposes of the obligation to avoid unethical solicitation, class counsel must treat the class members as non-clients.

Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981). *See also* Note, *Recent Cases*, *supra* note 226, at 1919 ("Such dissemination of legal advice hardly seems unethical. Requesting potential class members to remain in the class is solicitation of legal business only in an attenuated sense: since the suit has already been filed such communication does not stir up litigation.").

[233] *See Shapero*, 486 U.S. at 466 (holding Kentucky could not discipline attorney for mailing truthful solicitation letters to individuals attorney knew were facing foreclosure on their homes for failure to pay debts); *Zauderer*, 471 U.S. at 627 (1985) (holding Ohio could not discipline attorney for merely placing newspaper advertisement aimed at Dalkon Shield users); *In re* Primus, 436 U.S. 412, 434 (1978) (permitting attorney to send letter to woman known to have been threatened with sterilization as condition of receiving Medicaid benefits, informing her of free legal help by recognized civil rights group).

[234] *See, e.g.*, A.J. v. Kierst, 56 F.3d 849, 858 n.10 (8th Cir. 1995) (finding unwarranted district court's expressed concern, in imposing limitations on class counsel's communications with unnamed class members, "that plaintiffs' motive for communicating with the [unnamed class members] was 'to generate litigation' and to launch a fishing expedition 'to go after money damages' ").

[235] *See, e.g.*, Long v. Fid. Water Sys., Inc., No. C-97-20118 RMW, 2000 WL 989914, at *3 (N.D. Cal. May 26, 2000) (noting defendants contacted putative class member and provided no notice "that if he opted for the arbitration provision, he could not participate in the

threats or other forms of coercion.[236] Such communications have potentially wide-ranging ramifications, as they may undermine putative class members' ability to make informed decisions regarding their participation in class actions,[237] may result in putative class members' forfeiture of their rights when coercion exists, may undercut the effectiveness of class notice,[238] may affect class counsel's ability to provide adequate representation, and may even prevent class actions from proceeding.[239]

Thus, the potential exists for either class counsel or defense counsel to engage in improper communication. Risks remain despite Supreme Court decisions that have afforded class counsel greater latitude with respect to advertising and solicitation. For example, class counsel may engage in improper behavior by pressuring potential class members to participate in the lawsuit, or may improperly advocate an early settlement at the expense of absent class members.[240] However, the bulk of the case law, which illustrates a wide variety of improper defense tactics, demonstrates that the majority view does not serve the ultimate responsibility of protecting unnamed class members. Simply put, there is no

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pending class action" and that defendants "failed to notify [the putative class member] of the pending class action"); Haffer v. Temple Univ., 115 F.R.D. 506, 510-11 (E.D. Pa. 1987) (noting defendant's representatives made false and misleading statements to class members, inaccurately describing class, falsely indicating only one lawyer was representing class, and engaging in written and oral communications intended to discourage class members from meeting with class counsel); Tedesco v. Mishkin, 629 F. Supp. 1474, 1478-79 (S.D.N.Y. 1986) (involving defendant who sent false, misleading, inherently coercive letter to class plaintiffs, attacking class counsel and discouraging participation in class action).

[236] *See, e.g.*, Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1202 (11th Cir. 1985) (noting "the inherent coercion of the Bank's machinations" because class consisted of Bank borrowers); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 726 (3d Cir. 1962) (involving coercion created by cancellation of wholesaler accounts); *In re* Int'l House of Pancakes Franchise Litig., 1972 Trade Cas. (CCH) ¶ 73,797 (W.D. Mo. 1972) (involving coercion created by threats to terminate franchise agreements).

[237] *See, e.g.*, Am. Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974) (recognizing danger of convincing class members that claim is unlikely to succeed).

[238] *See, e.g.*, Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (noting defense communication with class members included legal advice that district court specifically omitted from class notice).

[239] *See, e.g.*, Greisler v. Hardee's Food Sys., Inc., 1973 Trade Cas. (CCH) ¶ 74,455 (E.D. Pa. 1973) (considering affidavits of non-interest from potential class members in determining numerosity at class certification hearing).

[240] *See supra* note 20 and accompanying text (describing potential for improperly soliciting class members and encouraging early settlements).

compelling basis for the current predisposition in favor of defense counsel. Instead, courts need to adopt a balancing approach to this issue.

B. THE BETTER APPROACH

Surely a potential class member who learns of a lawsuit filed on her behalf should rightfully expect that the suit is intended to protect her legal rights and that class counsel undertook to safeguard those rights from the outset. Protecting those rights is better achieved by according unnamed class members "represented" status from the outset of the litigation. This approach better reflects class counsel's obligations owed to absent class members, the purposes of Model Rule 4.2, and the expectations of absent class members.[241]

Accordingly, in recognition of class counsel's existing fiduciary duties to class members, the purpose of Model Rule 4.2, the unwarranted benefits to defense counsel, and the documented greater dangers of unregulated defense contacts with class members, courts should substitute the current presumption of non-representation with a presumption of representation. This change in presumption would render the ethical rules the starting point in analyzing pre-certification attorney communications with putative class members. However, the mere substitution of one bright-line rule for another will not always satisfactorily resolve all of the issues that sometimes arise in this context.

Thus, this beginning determination, while more consistent with litigation realities, should not end the inquiry. Instead, treating putative class members as "represented" by class counsel from the outset should constitute a beginning assumption—but an assumption whose ramifications are subject to modification by a Rule 23(d) court order consistent with First Amendment concerns. For example, if defense counsel wished to contact potential class members regarding settlement possibilities, this might constitute a

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[241] *See supra* notes 167-68, 177-78, 184-85, 205-06, 209 and accompanying text (discussing purpose of Model Rule 4.2, class counsels' obligations to absent class members, and expectations of absent class members).

situation meriting a Rule 23(d) court order permitting such communications under circumstances regulated by the court.

This change in presumption would have avoided the larger problems in *Gulf Oil Company v. Bernard.*[242] In *Gulf Oil*, the problem identified by the Supreme Court was that the district court's order interfered with class counsel's ability to obtain information from, and to provide information about the lawsuit to, the potential class members.[243] By according potential class members represented status from the outset of the litigation, class counsel would have been entitled to impart and obtain information. When Gulf then moved for a court order seeking to limit communications from class counsel to putative class members, the district court, by focusing first on the ethical rules, would have seen the enormity of the impact of Gulf's proposal.

In *Gulf Oil*, Gulf wanted to solicit releases under the conciliation agreement.[244] Under the ethical rules, if class counsel represents the potential class members, then defense counsel must channel communications to class members through class counsel.[245] Accordingly, one possible solution was for defense counsel to work through class counsel in distributing information to potential class members. If class counsel refused, this would still have left defense counsel with the option of moving for a Rule 23(d) order to permit the solicitation of releases. In reviewing such a motion, the district court would have to evaluate the ethical rules, the *Gulf Oil* factors, and any First Amendment considerations. In doing so, the district court would have to make specific findings justifying the issuance of a Rule 23(d) order,[246] and if the order involved some limitation on class counsel's communications with class members, such as requiring class counsel to discuss the releases only in the presence of defense counsel, the court would have to evaluate the limitation under the appropriate First Amendment analysis.[247]

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[242] 452 U.S. 89 (1981).

[243] *Id.* at 101. *See also supra* notes 86-91 and accompanying text (discussing *Gulf Oil* decision).

[244] *Gulf Oil*, 452 U.S. at 92-93.

[245] *See supra* notes 164-68 and accompanying text (discussing ethical rules and their requirements).

[246] *See supra* notes 90-91 and accompanying text (reviewing court's reasoning).

[247] *See supra* notes 102-48 and accompanying text (discussing First Amendment cases and

Two additional examples help to illustrate the benefits of implementing this proposal. First, the proposed approach helps provide a more appropriate focus in evaluating motions by defense counsel to restrict class counsel's pre-certification advertisements, mass mailings, or websites. By first considering such motions using Model Rules 7.1, 7.2, and 7.3 regarding advertising and solicitation,[248] as well as Model Rule 4.2 regarding represented parties,[249] district courts will be less likely to make mistakes in their rulings. At present, some courts are too hasty to interject their own subjective assessment as to the propriety of a written advertisement or solicitation, and thus too hasty to restrict such communication, instead of using guidance from the ethical rules, which would instruct intercession only when the communication was false or deceptive.[250] Thus, the proposal protects potential class members while lessening the likelihood of improper restrictions on communication. However, if the court was convinced that the communication was false or deceptive, the court could fashion an appropriate and lawful remedy by following *Gulf Oil*'s instructions regarding Rule 23(d) orders and using the proper First Amendment analysis.[251]

This proposal also provides greater guidance in evaluating motions by class counsel to restrict communications from defendants to putative class members, for example, in a situation where the defendant employs the potential class members. If class counsel moved to restrict the defendant's communications to putative class members, the district court would turn first to the ethical rules. Model Rule 4.2 expressly exempts communications that do not involve the subject matter of the representation.[252] Thus, the ethical

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analysis of type of speech for First Amendment purposes).

[248] *See supra* notes 229-32 and accompanying text (surveying Model Rules and associated cases ameliorating restrictions on attorney advertising).

[249] *See supra* note 164 and accompanying text (setting forth Model Rule 4.2 and noting its limited application to ongoing attorney-client relationships).

[250] *See, e.g.*, Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) (finding class counsel's pre-certification advertisements and mass mailings were "surely causing serious and irreparable harm" to defendant); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999) (characterizing website as posing danger of using widespread publication "disguised as class communications, to coerce defendants into settlement").

[251] *See supra* notes 90-91, 102-48 and accompanying text (reviewing court's *Gulf Oil* reasoning and discussing analysis of speech in First Amendment cases).

[252] *See supra* note 164 and accompanying text (setting Model Rule 4.2 and noting its

rules dictate to the district court that a blanket restriction upon defendant's communications, including communications unrelated to the litigation, likely would be improper.

However, Model Rule 4.2 also prohibits an attorney from communicating about the subject of a matter in which the recipient of the communication is known to be represented by other counsel.[253] Accordingly, if defense counsel takes advantage of the defendant's access to putative class members to facilitate communications about the litigation, such as by using defendant's email system to send messages about the litigation or holding a meeting on defendant's premises, such activity would run afoul of the ethical proscription and would be improper absent the consent of class counsel.

If the defendant, rather than defense counsel, engaged in the challenged activity, the district court would need to examine the situation closely. In particular, the court would need to determine whether the defendant essentially acted as a proxy for defense counsel, which is prohibited under Model Rule 8.4 and thus would implicate the proscriptions of that ethical rule.[254] Even if the defendant acted independently, without the knowledge of defense counsel, this would not necessarily render the communication proper. Although the ethical rules permit clients to communicate directly with each other,[255] the potential for coercion inherent in communications by an employer to an employee would warrant the district court's careful examination with regard to the propriety of issuing a Rule 23(d) order if necessary, taking into consideration First Amendment concerns, to protect putative class members from defendant's efforts at persuasion or pressure.

Thus, if application of the ethical rules did not resolve the matter to the court's satisfaction, the district court could consider issuing a Rule 23(d) order. In doing so, the court should carefully follow *Gulf Oil*'s caution, requiring a weighing of the need for any limita-

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limited application to ongoing attorney-client relationships).

[253] *See supra* note 164 and accompanying text.

[254] MODEL RULES OF PROF'L CONDUCT R. 8.4 (1999) (stating it is "professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

[255] *Id.* 4.2 cmt. 1 (1999) (stating "parties to a matter may communicate directly with each other").

tion and the potential interference of such a limitation with the rights of the parties,[256] and the court should make specific findings reflecting these considerations. If the court decides that a Rule 23(d) order is appropriate, these considerations "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[257]

In drafting such a "carefully drawn order," the district court must also consider relevant First Amendment concerns. The court must first determine the type of speech impacted by its order. In most instances, the targeted communications will constitute commercial speech, which is subjected to a commercial speech analysis. However, not all communications will fall into a commercial speech category, and the court must examine the order closely to ascertain whether the speech affected might constitute political expression subject to a traditional protected speech analysis,[258] or the public dissemination of information acquired before trial subject to the *Seattle Times* test.[259]

Accordingly, the ethical rules, Rule 23(d), and the First Amendment all play a role in this area. Situations potentially warranting judicial intervention might include defense counsel discussions of potential settlement with unnamed class members, defense counsel abuse of its ability to communicate with class members regarding matters unrelated to the litigation,[260] or the use of heavy-handed persuasion techniques by either side.[261]

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[256] *See* Gulf Oil v. Bernard, 452 U.S. 89, 101 (1981).

[257] *Id.*

[258] *See supra* notes 134-39 and accompanying text (explaining Fifth Circuit's prior restraint analysis in *Gulf Oil*).

[259] *See supra* notes 142-48 and accompanying text (explaining *Seattle Times* test as it supplements *Gulf Oil* analysis).

[260] *See, e.g.*, Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 679 (N.D. Ga. 1999) (declining to limit parties' communication with media but requiring defendants' emails to class members to include warning employer cannot retaliate against employees who choose to participate in litigation); Shores v. Publix Super Mkts., Inc., 1996 WL 859985, at *3 (M.D. Fla. Nov. 25, 1996) (requiring corporate employer to include same warning regarding retaliation).

[261] *Cf.* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 791 (E.D. La. 1977) (noting court must determine whether local rule of court needlessly restrained First Amendment rights).

V. CONCLUSION

The majority of courts have uncritically treated class counsel as not representing unnamed class members until the district court certifies the lawsuit as a class action. This prevailing majority view ignores the purposes underlying Model Rule 4.2, fails to consider class counsel's fiduciary role with respect to unnamed class members, and provides an unjustified advantage to defense counsel. A better approach is to consider class counsel as "representing" all class members, whether named or unnamed, as of the time of the filing of the complaint. However, the application of the ethical rules does not end the inquiry. The district court may modify the ramifications of the ethical rules, when warranted by the specific circumstances posed in a particular case, by issuing a Rule 23(d) order. In issuing a Rule 23(d) order, the court must balance the purposes and policies of the ethical rules, Rule 23, and the First Amendment. This approach more fully acknowledges the necessity of protecting potential class members and the implications of the ethical rules, while providing a remedy for improper communications by either defense counsel or class counsel.