KNOWLEDGE IS POWER: A PRACTICAL PROPOSAL TO PROTECT PUTATIVE CLASS MEMBERS FROM IMPROPER PRE-CERTIFICATION COMMUNICATION

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Abstract

[a.1] Putative class members occupy a unique role in class action litigation before a class action is certified. The putative class members are not parties to the litigation and are not required to do anything while litigation affecting their rights proceeds without them. The United States Supreme Court and other courts have stated that courts overseeing class actions have a duty to protect the interests of absent class members.

[a.2] Defendants often desire to communicate with putative class members and settle their claims before a case is certified. Because of the unequal positions of the parties, such communication can hinder the proper administration of justice. Under existing law, courts have no way to be made aware of any communication until after the problematic communication has occurred. Courts, therefore, cannot protect absent class members from objectionable communication but must react after-the-fact if such communications are ultimately detected.

[a.3] The Supreme Court in *Gulf Oil* held that courts cannot issue orders regarding pre-certification communication without evidentiary findings of actual or threatened abuse. This puts courts in the awkward position of having the duty to "protect" absent class members from harmful communication of which the courts are unaware.

[a.4] The *Gulf Oil* Court unduly limited trial courts in their duty to protect putative class members. A solution to the problem of improper communication can be had by applying established First Amendment jurisprudence regarding lawyer's speech and lawyer advertising. The attached essay outlines the problem, explains the solution and highlights the cases evidencing the need for the proposed solution.

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I. INTRODUCTION

> Misleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally.[1]

[I.1] The window between the filing and the certification of a class action presents a unique opportunity for an unscrupulous defendant to subvert the proper administration of justice. Before the action is filed, the parties may communicate with potential class members, identifying common issues and preparing for the battle ahead. After the class is certified, the Federal Rules of Civil Procedure and Rules of Professional Conduct apply as though each class member is a client of class counsel and defense counsel may only communicate to those class members through class counsel.[2] The law is unclear, however, on a court's right to control a defendant's ex parte communication with putative class members after the class action is filed but before it is certified.[3] A number of scholars have opined that ethics should guide attorneys during this period of uncertainty,[4] but ethical solutions lack adequate penalties for abuse. Should improper communication occur, following the Supreme Court's statements in *Gulf Oil Co. v. Bernard*, a court can only take corrective action after a full evidentiary showing of the abuses by which the moving party is threatened.[5] This is an inadequate solution to a serious problem. A framework must be articulated that allows courts to actively protect the interests of putative class members and take action to prevent harm from improper communication, not merely react to reports of problems after-the-fact. This article proposes such a framework.

[I.2] Part of the problem is the "special, nontraditional status in litigation"[6] occupied by putative, or absent, class members prior to certification. Class actions are representative suits filed by

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[1] *In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988). As the publishers of an electronic law journal, we are committed to linking the authorities cited in our articles to electronic sources when available. Due to technical problems beyond our control, we are not able to provide hyperlinks to certain authorities even though they are in the Westlaw or Lexis systems. Please note that authorities appearing in these footnotes that are underlined are hyperlinked; all others are not.

[2] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.33 (2005).

[3] *See generally* Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?,* 68 MO. L. REV. 813 (2003).

[4] *Id.* at 816; Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002); Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927 (2004).

[5] 452 U.S. 89, 102 (1981).

[6] 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 1:3 (4th ed. 2005).

self-appointed class representatives on behalf of others similarly situated. Absent class members are not named parties and did not initiate the litigation. Instead, assuming the court ultimately finds that the class representatives fulfill the requirements for class certification, the absent class members generally do not have to do anything to avail themselves of the benefits of the litigation. Even though their presence is crucial to the maintenance of a class, absent class members have no real duties to the parties or the court. Until certification, absent class members are "not required to do anything. [They] may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for [their] protection."[7]

[I.3] Class action defendants are often not content to allow absent class members to "sit back" prior to certification. Instead, class action defendants often want to deal decisively with the claims of the putative class members by communicating with those putative class members for reasons associated with litigation strategy or to explore settling their claims before certification. The court in *Kleiner v. First National Bank of Atlanta*[8] discussed the advantage to defendants of doing so. "When confronted with claims pressed by a plaintiff class, it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests."[9] By settling claims with individual, putative class members, defendants can eradicate one of the four pillars of a class action, namely numerosity. Without a class that is sufficiently large, defendants may terminate class actions before they actually begin.

[I.4] Further, class members may not have sufficient information to make informed decisions. The *Kleiner* court recognized this problem, noting that a defendant's ex parte communication with putative class members "is rife with potential for coercion."[10] The *Kleiner* court added that "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable."[11]

[I.5] The potential damage resulting from such one-sided communication is particularly clear when one considers the disparity in information possessed by the parties. The putative class members most likely have limited information about the allegations made in the class action, little or no information regarding recovery options should the class action be successful and, quite possibly, may not even know that they are a potential member of a pending class action.

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[7] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

[8] 751 F.2d 1193 (11th Cir. 1985).

[9] *Id.* at 1202.

[10] *Id.*

[11] *Id.* at 1203.

The defendant, on the other hand, has superior knowledge of the claims made, potential liability, and possible recovery ranges.

[I.6] The Supreme Court addressed the issue of a party's ex parte communication with absent class members in *Gulf Oil Co. v. Bernard*. There, the Court stated that "[b]ecause of the potential for abuse [of the class action process], a district court has both the *duty* and the *broad authority* to exercise control over a class action and to enter appropriate orders governing the conduct of counsel . . . ."[12] While Federal Rule of Civil Procedure 23(d)(2) provides district courts with broad powers to restrict pre-certification communication, the *Gulf Oil* court ruled that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."[13]

[I.7] This language has been repeatedly cited by courts considering the issue of pre-certification communication with putative class members. Concerned with running afoul of *Gulf Oil*, courts have been reluctant to issue orders regarding pre-certification communication without specific evidentiary findings of actual or threatened abuse. This reticence encourages clandestine, abusive pre-certification communication and handcuffs courts willing to shoulder their burden to ensure the proper administration of justice. Instead of preemptively issuing carefully drafted orders to reduce the threat of improper communications, courts after *Gulf Oil* have only considered those isolated situations where class counsel actually learned about and could prove the defendants engaged in some sort of improper communication. Such a random approach is inconsistent with a court's "duty" to protect putative class members. The district court in *Kronenberg v. Hotel Governor Clinton, Inc.*,[14] explained that a court's "primar[y] concern" should not be "the interests of the named plaintiffs and their attorneys but the interests of the members of the class." Further, courts overseeing class actions have a duty to "'protect both the absent class and the integrity of the judicial process by monitoring the actions before it.'"[15] The current haphazard, after-the-fact approach employed by courts following *Gulf Oil* falls short of this important judicial obligation.

[I.8] To solve this problem, courts should consider not only the dictates of *Gulf Oil* and its

[12] Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (emphasis added).

[13] *Id.* at 101.

[14] 281 F. Supp. 622, 625-26 (S.D.N.Y. 1968). In that securities fraud action, the court denied the defendants' motion to dismiss despite the fact that the plaintiffs' attorney had sent an improper letter to the class. The court said that it was concerned primarily with the interests of the class, and because the statute of limitations against the plaintiffs in the case was about to run, the present suit was the only protection available to the members of the class.

[15] *Kleiner*, 751 F.2d at 1203 (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 331 (1980)).

progeny, but also those cases examining commercial speech and lawyer advertising. While the First Amendment may limit prior restraints on speech, there are alternative measures available to courts trying to stem the flow of improper communication to putative class members. By considering all of these issues instead of unnecessarily focusing narrowly on *Gulf Oil*, a court can fashion appropriate orders that do not abridge parties' free speech rights while fulfilling the court's obligation to protect putative class members from misinformation and unfair settlements.

[I.9] This article considers the applicable jurisprudence and proposes a requirement that defendants who engage in pre-certification communication or settlement dialogue with putative class members be required to do two things. First, before engaging in any communication with putative class members, the defendant must determine that the putative class member is not represented by counsel and that the putative class member is aware of the existence of the class action. Second, the defendant must inform the court and opposing counsel of the communication and its general substance. If a settlement offer is extended that would, if accepted, extinguish any of the putative class member's rights being litigated in the pending class action, a period of time must elapse between the offer and acceptance.

[I.10] The proposal is proper, supported by applicable jurisprudence, and necessary for the proper functioning of class action litigation. Importantly, the proposal allows a court to actually monitor actions before it and be aware of problematic communications, instead of randomly reacting to reports of problems.

II. CLASS ACTION PROCEDURE AND THE COURT'S RULE 23 AUTHORITY

[II.1] A quick examination of the class action procedure is important before analyzing the problem of pre-certification communication with putative class members.

[II.2] Class actions are defined as "a legal action undertaken by one or more plaintiffs on behalf of themselves and all other persons having an identical interest in the alleged wrong."[16] Once an individual or group files a class action in federal court, the court determines whether the individuals or group may proceed in a representative capacity on behalf of others similarly situated.

[II.3] Under Federal Rule of Civil Procedure 23, a class may be certified if the class is so large that joinder of all members is impracticable (numerosity), questions of law or fact are common to the class (commonality), the named parties' claims or defenses are typical of the class (typicality), and the representatives will fairly and adequately protect the interests of the class (adequacy). If those factors are met, the class representatives must then prove that class treatment is appropriate under one of three alternative categories. While there are several

[16] WEBSTER'S NEW COLLEGIATE DICTIONARY (1981).

subcategories of class actions under Rule 23,[17] the majority of actions are prosecuted under section (b)(3) of the Rule. "Framed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'"[18] "To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'"[19]

[II.4] A practical advantage of class actions is that it allows many individuals, whose claims may be paltry, to pool their resources against a common adversary.

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[20]

III. *GULF OIL*

[III.1] Any discussion of pre-certification communication with absent class members must start with *Gulf Oil Co. v. Bernard*.[21] In that case, the district court forbade all communications concerning the class action between the parties or their counsel and any actual or potential class member who was not a formal party, without the court's prior approval. The district court specifically rejected the plaintiffs' proposed notice urging class members to talk to a lawyer before accepting the defendant's settlement offer and signing an accompanying release.

[17] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997) (stating "[r]ule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing 'incompatible standards of conduct for the party opposing the class,'or would 'as a practical matter be dispositive of the interests' of nonparty class members 'or substantially impair or impede their ability to protect their interests.' Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners).' 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. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'") (citations omitted).

[18] *Amchem*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697).

[19] *Id.*

[20] *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[21] 452 U.S 89 (1981).

[III.2] The United States Supreme Court ruled that the district court's order was improper. The Court ruled that the order interfered with the right to notify potential class members about the action and with the class representatives' ability to develop the case before certification. The Court upheld the right jointly enjoyed by plaintiffs and their attorneys to full communication concerning the pending litigation.

[III.3] The Court noted that any restrictive order should be drawn so as to limit speech as little as possible and should clearly identify the abuses being addressed.[22] Furthermore, to the extent that a district court is empowered to restrict certain communications in order to prevent frustration of the policies embodied in the class action rules, the Supreme Court stated that a district court "may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened."[23]

[III.4] In regard to a court's power to restrict communication, the Supreme Court stated that under Federal Rule of Civil Procedure 23, "a district court has 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."[24] The Court recognized the competing concerns raised by a district court's duty to protect the class action process from abuse and the danger that communication orders will abridge the constitutional rights of the parties.[25]

[III.5] Orders regulating communication between litigants pose a threat to freedom of speech guaranteed by the First Amendment. Accordingly, a district court's discretion to issue such orders must be exercised within the bounds of the First Amendment and the federal rules.[26] The Court ruled that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties."[27] The Court believed that orders so drawn would further, rather than hinder, the policies embodied in the Federal Rules.[28] The balancing between protecting the interests of class members and fostering the resolution of

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

[23] *Id.* at 102 (quoting Coles v. Marsh, 560 F.2d. 186, 189 (3d Cir. 1977)).

[24] *Id.* at 100 (emphasis added).

[25] *Id.* at 101.

[26] *Id.*

[27] Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981).

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

the claim under the class action proceedings with a party's First Amendment rights "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[29]

[III.6] Following *Gulf Oil*, courts have routinely used Rule 23 to oversee and manage litigants' communications with absent class members. *Gulf Oil* "involved contact by plaintiff's counsel, but lower courts have applied [*Gulf Oil*] to contact by defendants and their counsel as well."[30] "Restrictions on the communication of settlement offers [by defendants] are subject to the same proof requirements."[31] "Two kinds of proof are required. First, the movant must show that a particular form of communication has occurred or has threatened to occur. Second, the movant must show that the particular form of communication at issue is abusive and that it threatens the proper functioning of the litigation."[32]

[III.7] Where a defendant has improperly communicated with members of a proposed class in an effort to disparage the class litigation or to subvert the relationship between class counsel and the class, courts have held that an order restraining further communication is appropriate.[33] In compliance with *Gulf Oil*, courts have required the party seeking the restraint to present an evidentiary showing of actual or threatened abuse by the party sought to be restrained.[34]

[III.8] Other practices "that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in the class counsel."[35] Some of those cases will be examined in a following section.

[III.9] The fact that a court has not yet determined whether a case will proceed as a class action

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[29] *Id.* at 102.

[30] Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc., 214 F.R.D. 696, 697 (S.D. Ala. 2003).

[31] *Id.* at 698 (citing Bublitz v. E.I. duPont de Nemours & Co., 196 F.R.D. 545, 548 (S.D. Iowa. 2000)).

[32] *Id.* at 697-98.

[33] *Id.* at 698*; see, e.g.*, Haffer v. Temple Univ., 115 F.R.D. 506, 513 (E.D. Pa. 1987); Tedesco v. Mishkin, 629 F. Supp. 1474, 1484 (S.D.N.Y. 1986); Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981), *appeal dismissed*, 659 F.2d 1081 (6th Cir. 1981)).

[34] *Cox Nuclear Med.*, 214 F.R.D. at 697.

[35] *Id.* at 698 (footnotes omitted).

does not impair its authority to control communications to absent class members.[36] "It would be a strange rule, indeed, where a court would be powerless to deal with what it considered abuses because the litigation had not reached a certain stage."[37] Further, "[t]o adopt such a rule would be little more than inviting counsel to engage in a race to complete questionable practices before the court acquires power to prevent such abuses."[38]

[III.10] Following *Gulf Oil*, the general rule is that defendants and their counsel may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). There are problems, however, with that accepted standard.

IV. THE PROBLEM WITH *GULF OIL*

[IV.1] The first requirement of the *Gulf Oil* analysis—that an evidentiary showing be made that a particular communication has occurred or has threatened to occur—is the source of the problem. If courts have the authority to ensure that pre-certification communication is proper, that power is worthless if the court is unaware of *any* communication in the first place. It seems illogical to say that a court has the power to confront and solve the problem of improper communication but must wait until randomly becoming aware of a violation to do anything.

[IV. 2] A blind adherence to *Gulf Oil*, which ignores other applicable jurisprudence, forces courts to react to complaints of improper communication, instead of taking a proactive position at the beginning of the litigation, to protect putative class members from objectionable communication. The "abuse" requirement articulated by the *Gulf Oil* court encourages clandestine communications and works against a court's duty to protect putative class members. Under *Gulf Oil*, courts can only react to abusive practices, not prevent them. A court's actions following the discovery of abuse may be too little too late.

[IV.3] The *Gulf Oil* court reached the right result but for the wrong reasons. While lawyers' speech is protected under the Constitution, there was no need for the Court to require a history or threat of abuse before allowing some meager protections. In *Kleiner v. First National Bank of Atlanta*, the United States Court of Appeals for the Eleventh Circuit accurately summarized the problem with *Gulf Oil*:

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[36] Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 53 F.R.D. 647 (E.D.N.Y. 1971).

[37] *Id.* at 651.

[38] *Id.*

> [I]t is unnecessary for a trial court to issue particularized findings of abusive conduct when a given form of speech is inherently conducive to overreaching and duress. The Supreme Court has acknowledged that unsupervised oral solicitations, by their very nature, are wont to produce distorted statements on the one hand and the coercion of susceptible individuals on the other.[39]

[IV.4] *Gulf Oil* and its progeny do not provide specific guidance on how a court can protect putative class members from misinformation or from an unfair settlement until after the objectionable communication is detected and brought to the court's attention. It is apparent from a review of the applicable cases following *Gulf Oil* that courts are often unaware of the initial improper contact by the defendant and simply react, after-the-fact, to complaints of improper communication. Such random enforcement does not serve the putative class members' interests. Instead of such reactive measures, courts overseeing class actions should take a decisive position, at the beginning of the class action, to protect putative class members from objectionable conduct in the first place. Courts should look past *Gulf Oil* and its progeny to fashion sensible solutions to prevent the problems associated with improper communications.

[IV.5] Furthermore, a strict adherence to *Gulf Oil* does not comport with established law about a defendant's right to engage in formal discovery of absent class members pre-certification. Courts and scholars agree that pre-certification discovery of absent members is extraordinary and requires a demonstration of need.[40] If the information sought would amount to only minor additions or repetitive testimony, the requesting party will likely fail to demonstrate the need for such discovery.[41]

[IV.6] Further, the requesting party must establish a *particularized* need. Generalized pleas for absent class member discovery to determine whether numerosity, commonality or typicality exist will not demonstrate a particularized need since those questions arise in every class action. If defendants were permitted pre-certification class-wide discovery based on this argument, absent class member discovery would become routine and the efficiencies of class actions would be undermined.

[IV.7] Parties seeking depositions of absent class members bear an even heavier burden than defendants seeking interrogatories or requests for production of documents from absent class members. In *Clark v. Universal Builders, Inc.*,[42] the United States Court of Appeals for the

[39] Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d. 1193, 1206 (11th Cir. 1985) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978)).

[40] *Id.*; MANUAL FOR COMPLEX LITIGATION, *supra* note 2, at § 21.141; CONTE & NEWBERG, *supra* note 6, at § 1:3.

[41] *See, e.g.,* Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598, 601 (N.D. Cal. 1993).

[42] 501 F.2d 324 (7th Cir. 1974).

Seventh Circuit stated that the party seeking the post-certification depositions of absent class members "has the burden of showing necessity and absence of any motive to take undue advantage of the class members," and that "the burden confronting the party seeking deposition testimony should be more severe than that imposed on the party requesting permission to use interrogatories."[43] Courts have applied this same standard to pre-certification requests for depositions of putative class members.[44]

[IV.8] A defendant who must meet these heavy burdens to engage in formal discovery should not be able to skirt those requirements and gather substantially the same information by engaging in clandestine, ex parte communications with absent class members, unbeknownst to the court or class counsel. Notwithstanding *Gulf Oil*, and to comport with established law on formal absent class member discovery pre-certification, courts can control the speech of counsel in the highly problematic period prior to certification by applying the established law regarding commercial speech and lawyer advertising.

V. APPLICABLE FIRST AMENDMENT JURISPRUDENCE

[V.1] Applying First Amendment jurisprudence to the issue of pre-certification communication with absent class members allows courts to fulfill their obligations to putative class members and still respect parties' rights to engage in free speech. The *Gulf Oil* court went too far by requiring parties to present an evidentiary showing of "actual" or "threatened" harm before imposing restrictions on pre-certification communication with absent class members. Instead, the Court should have tempered its ruling by considering jurisprudence surrounding commercial speech, in general, and the law surrounding lawyer advertising and lawyer solicitation, in particular.

[V.2] Historically, commercial speech (including lawyer's speech) did not receive protection under the Constitution. The Court noted in *Chaplinsky v. New Hampshire* that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[45] These "certain well defined" classes of speech, such as obscenity and false statements, have been labeled "low-value." The traditional view of the Court considered commercial communication to fall into the category of "low-value" speech.[46]

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[43] *Id.* at 341 (emphasis added).

[44] *Baldwin & Flynn*, 149 F.R.D. at 600.

[45] 315 U.S. 568, 571-72 (1942).

[46] R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992) (Stevens, J. concurring) (citing *Chaplinsky*, 315 U.S. at 572).

[V.3] The Court reversed course in 1976. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[47] the Supreme Court found that commercial speech (later defined to include lawyers' speech) is entitled to protection under the Constitution because of a consumer's right to receive information. As Justice Blackmun explained, "[e]ven an individual advertisement, though entirely 'commercial,' may be of general public interest."[48] The Court held that the government could regulate the time, place and manner of a commercial message but could not restrict its content unless the content was found to be misleading or coercive. While the *Virginia Pharmacy* court addressed commercial speech, it specifically reserved the question with respect to legal services.[49]

[V.4] Two years later, the Court ruled that the government may regulate commercial speech that is *potentially* misleading.[50] In the absence of false or misleading content, however, any attempt to regulate commercial speech beyond its time, place and manner of dissemination would receive the highest level of Constitutional scrutiny.[51] The regulation of commercial speech differs radically from noncommercial speech, which may only be regulated in narrow circumstances, with a specific showing that the speech is actually harmful.[52]

[V.5] The *Gulf Oil* court was right to note that a defendant's false statements to putative class members are actionable. As stated by the Court in *Gertz v. Robert Welch, Inc.*,[53] "there is no constitutional value in false statements of fact."[54] Citing *New York Times Co. v. Sullivan*,[55] the *Gertz* court noted that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[56]

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47 425 U.S. 748 (1976).

48 *Id.* at 764.

49 *Id.* at 773 n.25.

50 *See* Friedman v. Rogers, 440 U.S. 1, 13 (1979).

51 Robert T. Cahill, Jr., City of Cincinnati v. Discovery Network, Inc.: *Towards Heightened Scrutiny For Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225, 229-30 (1994) (footnotes omitted).

52 Brandenburg v. Ohio, 395 U.S. 444 (1969).

53 418 U.S. 323 (1974).

54 *Id.* at 340.

55 376 U.S. 254 (1964).

56 *Gertz*, 418 U.S. at 340 (citing *New York Times Co.*, 376 U.S. at 270).

[V.6] But the right to regulate potentially false or misleading speech does not allow a state to paternalistically protect citizens from commercial speech. In *Bolger v. Youngs Drug Products Corp.*,[57] the Court reviewed the constitutionality of a California statute that prohibited direct mail advertisements for contraceptives. The *Bolger* court reasoned that "[r]ecipients of objectionable mailings . . . may 'effectively avoid future bombardment of their sensibilities simply by averting their eyes.'"[58] Since the parties have the power to ignore the mailings, the Court reasoned that the state had no power to regulate the speech.

[V.7] When the speech involved direct solicitation of legal services, however, the Supreme Court was more willing to allow some form of prophylactic protection against in-person solicitation. In *Ohralik v. Ohio State Bar Ass'n*,[59] the Court specifically held that "the State . . . constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[60] A number of factors influenced the Court's decision, including the immediacy of the communication and the imminence of harm presented by in-person solicitations.[61] The example provided by the *Ohralik* court can, likewise, apply to the problem of a defendant's pre-certification communication with putative class members:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.[62]

[V.8] The *Ohralik* court, unlike the *Gulf Oil* court, expressly rejected the premise that "nothing

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[57] 463 U.S. 60 (1983).

[58] *Id.* at 72 (quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 542 (1980)) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

[59] 436 U.S. 447 (1978).

[60] *Id.* at 449.

[61] *Id.* at 457 n.13 (comparing Cohen v. California, 403 U.S. 15 (1971) with Chaplinsky v. New Hampshire 315 U.S. 568 (1942) and citing Brandenburg v. Ohio, 395 U.S. 444 (1969) and Schenck v. United States, 249 U.S. 47 (1919)).

[62] *Ohralik*, 436 U.S. at 457 (footnote omitted).

less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain."[63]

[V.9] In *Florida Bar v. Went For It, Inc.*,[64] the Court extended the amount of protection the state could exert over the speech of lawyers. The Court held that a rule prohibiting "lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster" was constitutional. [65] Citing both *Bolger* and *Ohralik*, the Court noted that the direct solicitation targeted by the Florida Bar Association differed from the commercial solicitations in *Bolger*.[66] The Court found that "the harm targeted by the [Florida] Bar cannot be eliminated by a brief journey to the trash can."[67]

[V.10] In *Central Hudson Gas & Elec. Corp. v. Public Service Commission*,[68] the Court outlined a four-part standard for assessing the validity of a regulation on speech. The Court in *In re R.M.J.* [69] adopted the analysis to assess the constitutionality of regulation of lawyer speech. The *Central Hudson* court laid out the requirements as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[70]

[V.11] Under this law, a court may place some limitations on attorneys' speech with absent class members as long as the requirements of *Central Hudson* are met. As will be discussed in the

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[63] *Id.* at 464.

[64] 515 U.S. 618 (1995).

[65] *Id.*

[66] *Id.* at 623, 630.

[67] *Id.* at 631.

[68] 447 U.S. 557 (1980).

[69] 455 U.S. 191 (1982).

[70] *Central Hudson*, 447 U.S. at 566.

following sections, the proposal advanced in this essay satisfies those Constitutional requirements.

VI. PROPOSAL FOR PRE-CERTIFICATION COMMUNICATION

[VI. 1] The law is clear: courts have the power under both *Gulf Oil* and the applicable First Amendment jurisprudence to limit communications between litigants and potential class members prior to class certification.[71] With that power in mind, the solution to the problem of improper communication is straightforward.

[VI.2] Before engaging in any communication with a putative class member, the defendant, after informing the putative class member of his identity and the party he represents, must ask a number of simple questions to ensure that the class member is apprized of her rights that are asserted in the class action and that the class member is not represented by counsel. If the defendant offers to settle the putative class member's claim, there must be a reasonable "cooling off" period to allow the putative class member sufficient time to ponder the offer. The defendant must inform the court and opposing counsel of his communication with the absent class member, as well as its general substance. Such notice allows class counsel to petition the court for a corrective notice if she feels the communication is incorrect or incomplete, or discuss the matter directly with the putative class member. The court, likewise, under its broad powers under Rule 23, can determine on its own if the communication is accurate. If it is not, it can order a corrective notice that disseminates accurate information.

[VI.3] This proposal is not without precedent. A state district court in *West v. G & H Seed Co.*,[72] balanced a defendant's First Amendment right to engage in communications with putative class members and the putative class members' right to be informed of the pending action. The court required that the defendant submit written questions to the putative class members that were designed to ensure that the putative class members were apprized of certain rights.[73] Further, the court required the defendant to provide class counsel the names of those represented clients inadvertently contacted.

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[71] Gulf Oil Co v. Bernard, 452 U.S. 89, 100 (1981); Keystone Tobacco Co. v. United States Tobacco Co., 238 F. Supp. 2d 151, 154 (D.D.C. 2002).

[72] No. 99-C-4984-A (27th Jud. Dist. Ct., St. Landry Parish, La., Dec. 6, 2000).

[73] Those questions included: Are you represented by an attorney in the subject class action? Are you aware that there is a class action and that you have the right to be involved in that class action lawsuit? Do you intend to be or want to be involved in the class action? Do you wish to speak to an attorney about this matter before you speak to me? Do you wish to answer questions about this matter? If the putative class member answered "No" to question 1, "Yes" to question 2, "No" to question 3, "No" to question 4, and "Yes" to question 5, the defendant could proceed with his communications. *Id.*

[VI.4] Likewise, in *Bublitz v. E.I. duPont de Nemours & Co.*,[74] the federal district court affirmed the right of the defendant to settle claims with putative class members pre-certification. The court, however, implemented reasonable restrictions on that right to protect absent class members.

[VI.5] The court forbade any oral solicitations and required that the defendant's offers be made in writing and filed with the court and copied to plaintiff's counsel within 24 hours from the time that the settlement offers were made.[75] The defendant also was required to provide the court and plaintiff a list of the names of the putative class members with whom it communicated.[76] Finally, the defendant was required to give the putative class members ten days in which to respond to the settlement offer.[77] This ten day window allowed time for the plaintiff's counsel to answer any questions the putative class members may have about the rights they may be giving up by settling.[78] The decision was silent as to the right of plaintiff's counsel to take affirmative steps to contact those putative class members.

[VI.6] The proposal allows a court to ensure that improper communication does not occur and to protect the interests of putative class members. Further, the defendant is not prejudiced by this proposal. The defendant is still entitled to engage in pre-certification communication and settlement dialogue with putative class members. There is no prior restraint of his right to free speech. Further, no affirmative burden is placed on the defendant. Instead, the defendant only triggers the obligation when it decides to engage in pre-certification communication or settlement dialogue with putative class members.

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[74] 196 F.R.D. 545 (S.D. Iowa 2000).

[75] *Id.* at 550.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 549.

VII. THE PROPOSAL IS CONSTITUTIONAL

[VII.1] The proposal comports with constitutional law for commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[79] Analyzing speech under *Central Hudson's* framework first requires a determination that the speech at issue is lawful and not misleading. Under both *Gertz v. Robert Welch, Inc.* [80] and *Gulf Oil*, courts have the express power to limit false or misleading speech in pre-certification communication with absent class members.

[VII.2] Speech that is neither false nor misleading may be regulated if the government shows a substantial interest that is materially advanced by the restriction and is no greater than necessary to achieve the court's substantial interest. Courts have recognized that the protection of consumers is a substantial government interest.[81] Protection against misinformation spread by lawyers is "especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"[82] Further, the Supreme Court has stated that a court overseeing a class action has a "duty" to absent class members so there can be little argument that a "substantial interest" is present.

[VII.3] Also, the Supreme Court has consistently held that the combination of maintaining high standards in the legal profession and protecting the public may allow narrow restrictions on speech.[83] "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."[84] The government has a substantial interest in avoiding any practice that may subvert the administration of justice. In the context of pre-certification communications, courts should be especially wary of settlements by defendants with unsophisticated and unknowledgeable putative class members in which the class member forfeits substantial rights asserted in a class action. Protecting unknowledgeable parties from unfair settlements is just the kind of substantial interest that satisfies the second prong of *Central Hudson*.

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[79] 447 U.S. 557 (1980).

[80] 418 U.S. 323 (1974).

[81] *See, e.g.,* Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995); Edenfield v. Fane, 507 U.S. 761, 769 (1993).

[82] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).

[83] *Id.* at 464; *In re* Primus, 436 U.S. 412, 438 (1978).

[84] Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977).

[VII.4] The third prong of *Central Hudson*, a finding that the proposal directly advances the government's interest, "'is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[85] The problems routinely raised in pre-certification class communication include those considered by the *Ohralik* court and discussed earlier. The proposed restrictions will alleviate the complained-of harms.

[VII.5] Finally, the provision is no more extensive than necessary to achieve the government's interest. To survive this prong, the regulations cannot "completely suppress information when narrower restrictions on expression would serve its interest as well."[86] The rules must "demonstrate narrow tailoring of the challenged regulation to the asserted interest–'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'"[87] Here, there is no prohibition on speech. Instead, the speaker must simply give notice of that communication to the court and opposing counsel.

[VII.6] The proposal also complies with other pronouncements of the United States Supreme Court about lawyer communications. In *Shapero v. Kentucky Bar Ass'n*,[88] the Court addressed the constitutionality of blanket provisions restricting attorney advertising. There, the Court held that former ABA model rule 7.3 was inconsistent with the First Amendment.[89] The fact that

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[85] *Florida Bar*, 515 U.S. at 626 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995)) (quoting Edenfield, 507 U.S. at 770-71).

[86] *Central Hudson*, 447 U.S. at 565.

[87] Greater New Orleans Broad. Ass'n v. U.S., 527 U.S. 173, 188 (1999) (quoting Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

[88] 486 U.S. 466 (1988).

[89] Former ABA Model Rule of Professional Conduct 7.3 (1984) stated:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Shapero, 486 U.S. at 470-71.

"targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech."[90]

[VII.7] The *Shapero* court noted that the Kentucky Bar Association had a "less restrictive and more precise means" of overseeing the potentially deceptive speech.[91] The Court suggested a requirement similar to the proposal at hand: "require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses."[92] The advantage of protecting putative class members from unfair settlements and misinformation far outweighs the burdens on the defendants in keeping records of communications and reporting those communications. Further, without such a rule, courts can only react when, and more importantly if, such miscommunication is ultimately detected. Such a reactive and random approach, based on the possible discovery of improper communications, does not serve the putative class members or fulfill a court's obligations to those putative class members.

[VII.8] From a policy perspective, applying the law regarding lawyer advertising and solicitation to a defendant's communications with absent class members is reasonable. It is appropriate for courts, fulfilling their "duty" to protect absent class members and exercising their "broad authority" under the class action rules, to limit the time, place, and manner of communication by a defendant with putative class members. All of the concerns outlined by the *Ohralik* court—the inherent pressures, demand of an immediate response, lack of an opportunity for comparison or reflection, possibility of one-sided presentations, the chance of speedy and uninformed decision making, and lack of an opportunity for counter education—are present when defendants contact putative class members pre-certification. Such dangers "cannot be eliminated by a brief journey to the trash can."[93]

[VII.9] Further, extending the same protection to absent class members as that which is extended to the general public is reasonable and logical. A lawyer who advertises for cases has interests aligned with the plaintiff. Normally in such a case, a lawyer's monetary recovery is dependent upon his client's monetary recovery. Their interests are aligned.

[VII.10] A class action defendant, however, has interests adverse to the putative class member. It seems reasonable that the putative class member be granted the same protections from an adverse party that a member of the general public is granted from a party who shares his

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[90] *Shapero*, 486 U.S. at 476 (citing *In re* R.M.J., 455 U.S. 191, 203 (1982)).

[91] *Id.*

[92] *Id.* (citation omitted).

[93] Florida Bar v. Went For It, Inc., 515 U.S. 618, 631 (1995).

interests.

[VII.11] By considering First Amendment jurisprudence focusing on lawyer communication in other contexts, courts can fashion a reasonable remedy to protect absent class members from unfair settlements and misinformation and still not run afoul of the Constitution.

[VII.12] Some may question the distinction between plaintiff's counsel and defendant's counsel contact with putative class members and whether applying this proposal only to defendants is proper. But class counsel's relationship with, and duty to, the putative class members is markedly different than any relationship that a defendant may have with the putative class members. Those differences justify applying the proposal only to defense counsel.

[VII.13] First, there is a fiduciary relationship, even pre-certification, between class counsel and the putative class. Also, class counsel is subject to various ethical constraints in regard to his communication with, and treatment of, putative class members. Further, class counsel has a duty to speak to putative class members to fulfill his obligations to the class as a whole. Finally, class counsel's communication with putative class members is essential for discovery purposes. Those differences make the proposal, which affects only a defendant's pre-certification contact with putative class members, fair, necessary and proper.

[VII.14] The *Manual for Complex Litigation (Third)* states that "there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent."[94] Although that language is absent in the most recent version of the Manual, that "incipient fiduciary relationship" is nevertheless present between the putative class and the counsel that seeks to represent it. As stated by the authors of a law review article on the subject of the obligations of class counsel, "[a]ttorneys 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."[95] "This fiduciary relationship, although it embraces class members that the lawyer has not met and may never meet, begins with the filing of the suit and does not end until all matters pertaining to all members of the entire class have been resolved."[96] These substantial ethical duties and responsibilities are imposed pre-certification on plaintiff's counsel, not defense counsel.

[VII.15] Further, plaintiff's counsel has the right, as well as the obligation, to communicate with putative class members prior to certification for a variety of legitimate reasons. As stated by

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[94] MANUAL FOR COMPLEX LITIGATION (THIRD) §30.24 (1995).

[95] 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).

[96] *Id.* at 2096.

Newberg on Class Actions, class counsel may feel the need to convey basic information to class members "such as the pendency of the suit, the nature of the claim, and the identity and qualifications of class counsel."[97] "These communications serve general due process concerns by keeping unnamed class members as actively informed as possible of the adjudication of their claims."[98] In fact, "[b]oth the named plaintiffs and unnamed potential class members benefit from pre-certification communications."[99] "[N]amed plaintiffs, who fail to communicate with putative class members to determine their interest in the litigation, have been criticized for failing to supply information bearing on the class certification determination."[100]

[VII.16] From a practical standpoint "[c]ommunicating with class members and obtaining information from them enable the named plaintiffs to better prove their allegations that a class action should be maintained."[101] Importantly, "allowing the named plaintiffs to contact putative class members may result in a more streamlined litigation process and more focused discovery."[102]

[VII.17] Furthermore, plaintiff's counsel may wish to communicate with putative class members to ascertain whether there are sufficient numbers of claimants to satisfy the numerosity requirement and that communication might provide an evidentiary basis for numerosity. Likewise, communication allows for potential proof of commonality and typicality.

[VII.18] In summary, plaintiff's counsel's pre-certification communication with potential class members serves to educate the putative class as to the pending class action, inform the putative class of the nature of the claims asserted, tell them of the potential for class-wide relief and the opportunity to join a class action, and most importantly, to assist the plaintiff in establishing the elements necessary to prove the prerequisites for class certification. In addition to these practical considerations, class counsel has a special relationship with and duties to the putative class members which justifies a distinction between his communication with them and a defendant's communication.

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[97] 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 13:47 (4th ed. 2005).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

VIII. CASES FOLLOWING *GULF OIL* SHOW A NEED FOR THE PROPOSAL

[VIII.1] A review of cases following *Gulf Oil* illustrates the need for notice to the court when a defendant engages in pre-certification communication with absent class members. As will be seen from this review, courts adhering to *Gulf Oil* can only react to reports of improper communications, not prevent them.

[VIII.2] One of the most egregious examples of a defendant's communication with class members for illicit purposes is *Kleiner v. First National Bank of Atlanta*.[103] In that case, the defendant bank conducted an aggressive telephone campaign with the explicit purpose of soliciting opt-outs to reduce its potential liability and to counter the adverse publicity of the lawsuit.[104] The bank assembled a force of 175 loan officers to contact the bank's customers. The bank's marketing director exhorted the loan officers to "do the best selling job they had ever done."[105] The objective of the campaign "was to persuade the borrowers to 'withdraw from the class.'"[106] The loan officers were instructed "to call the most receptive customers first and to avoid phoning antagonistic borrowers altogether."[107] They were given "score sheets lined with columns for tallying opt-out commitments and the dollar amounts for the corresponding loans."[108] Customers were marked as "Friend" or "Foe."[109] The bank eventually succeeded in reaching over 3,000 customers, nearly 2,800 of whom decided to exclude themselves from the class. Those customers represented "$694,997,218.00 in past or present loans."[110]

[VIII.3] The district court concluded that the bank's campaign violated its protective and class notice orders and sanctioned the bank's attorneys for their participation in the campaign. While the matter was on appeal, the case settled and, under the terms of the court-approved agreement, all qualifying class members who first requested exclusion were entitled to void those requests and participate in the distribution of the settlement on equal footing with the remaining class members. Further, the stipulation in the settlement awarding attorney's fees encompassed the

[103] 751 F.2d 1193 (11th Cir. 1985).

[104] *Id.* at 1197.

[105] *Id.* at 1198.

[106] *Id.* at 1198.

[107] *Id.* at 1197-98.

[108] *Id.*

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

[110] *Id.*

district court's award of fees and costs regarding the class notice and the disciplinary proceeding against the defense lawyers. The district court's injunction against communication with members of the plaintiff class was also moot upon settlement. The issue on appeal was a $50,000.00 fine and disqualification of defense counsel and their firm. The appeals court stated that actions such as those of the bank obstruct the court's duty to "'protect both the absent class and the integrity of the judicial process by monitoring the actions before it.'"[111] The court affirmed the sanction.

[VIII.4] In *In re School Asbestos Litigation*,[112] the Third Circuit Court of Appeals found that the district court was within its authority under Rule 23(d) to require a party to indicate its involvement in the litigation when it communicated directly with class members concerning the subject of the lawsuit. The *In re School Asbestos Litigation* court examined other examples of conduct "that sought either to affect the class members' decisions to participate in the litigation or to undermine class plaintiffs' cooperation with or confidence in class counsel."[113] It cited cases where (1) "the defendant sent letters commenting on the litigation to class members, warning them of the costs of suit and urging them not to participate;"[114] (2) "representatives of defendant university made false and misleading statements to members of plaintiff class, inaccurately describing it and indicating that only one attorney was representing it, and engaged in written and oral communications intended to discourage [the class members] from meeting with class counsel;[115] (3) "defendant sent unauthorized, false, misleading, and inherently coercive letter, written by the defendant but signed by class members sympathetic to defendant, to class plaintiffs, attacking class counsel and discouraging participation in the class action;"[116] and where (4) "defendant communicated with class members advising that evidentiary proof of claim would be required for recovery and that class members might be subjected to discovery and other legal procedures, which communications appeared to have resulted in a large number of opt-outs among contacted class members,"[117] and ruled that it was within its authority to order the defendants to reveal their involvement in the communication.

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[111] *Id.* at 1203 (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 331 (1980)).

[112] 842 F.2d 671 (3d Cir. 1987).

[113] *Id.* at 682.

[114] *Id.* at 682 n.23 (citing Erhardt v. Prudential Group, Inc., 629 F.2d 843 (2d Cir. 1980)).

[115] *Id.* (citing Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987)).

[116] *Id.* (citing Tedesco v. Mishkin, 629 F. Supp. 1474 (S.D. N.Y. 1986)).

[117] *Id.* (citing Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981), *appeal dismissed*, 659 F.2d 1081 (6th Cir. 1981)).

[VIII.5] In *Hampton Hardware, Inc. v. Cotter & Co.*,[118] a member of a cooperative association of hardware stores brought a class action against the association. In response, the association sent letters to the individual members urging them not to join the lawsuit. The first letter stated that joining the lawsuit would be at an "enormous potential cost to your Company" and that "[a]ll of this will cost you precious dollars and us time from our mission."[119] The second letter stated that "[b]y not participating in this suit, you will help save your Company expense in dollars and time."[120] The third letter stated in part that "[b]y asking you to join the class, [plaintiff] is asking you to sue yourself."[121]

[VIII.6] The *Hampton* court ruled that the letters were improper because they were an attempt to "reduce the class members['] participation in the lawsuit based on threats to their pocketbooks."[122] The court noted that the ongoing commercial relationship between the defendant and putative class members made the communications inherently coercive.[123]

[VIII.7] *Dondore v. NGK Metals Corp.*,[124] was decided under Pennsylvania Rule of Professional Conduct 4.2. That Rule states that in representing a client, a lawyer shall not communicate about the subject of the representation with the party 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. The court ruled that "under Pennsylvania law, putative class members are 'properly characterized as parties to the action'" and that "during the interim between the filing of the action and the certification of the class, 'unnamed class members do have certain interests in the lawsuit.'"[125] "The 'truly representative' nature of a class action suit affords its putative class members certain rights and protections, including . . . the protections contained in Rule 4.2 of the Rules of Professional Conduct."[126] The court continued that "[i]f defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from

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118 156 F.R.D. 630 (N.D. Tex. 1994).

119 *Id.* at 631.

120 *Id.* at 632.

121 *Id.*

122 *Id.* at 633.

123 *Id.*

124 152 F. Supp. 2d 662 (E.D. Pa. 2001).

125 *Id.* at 666 (quoting Bell v. Beneficial Consumer Disc. Co., 348 A.2d 734, 736 (Pa. 1975) and Miller v. Fed. Kemper Ins., Co., 508 A.2d 1222, 1228 (Pa. Super. Ct. 1986)).

126 *Dondore*, 152 F. Supp. 2d at 666.

often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined."[127]

[VIII.8] In *Abdallah v. The Coca-Cola Co.*,[128] the district court ruled that Local Rule 23.1 (c), which prohibited all communication between parties and putative class members without prior approval from the court, was invalid under *Gulf Oil*. Despite invalidating that local rule, the court still ruled that the defendant could not have ex parte unilateral contact with the potential class members.

[VIII.9] The case was a racial discrimination case brought by employees of The Coca-Cola Company. Even though the employer had not given the court any reason to suspect that it would attempt to mislead its employees and coerce them into non-participation, the court ruled that "simple reality suggests that the danger of coercion is real and justifies the imposition of limitation on [the defendant's] communications with potential class members."[129] The defendant was allowed to continue to share its views about the lawsuit with its employees but was required to include language in any communications detailing the unlawfulness for it to retaliate against its employees who chose to participate in the case. The defendant was also prohibited from discussing the lawsuit directly with its employees, except to the extent that it needed to speak with managerial employees to investigate any acts, omissions, or statements that those employees committed that could expose the defendant to liability.

[VIII.10] *Belt v. EmCare Inc.*[130] was a collective action brought against an employer on behalf of nurse practitioners and physicians' assistants under the Fair Labor Standards Act. The court explained that a collective action under the FLSA is similar to a class action under Federal Rule of Civil Procedure 23 in which the plaintiff seeks to represent a class of absent plaintiffs. "[U]nlike a class action, [however,] absent class members will not participate in the recovery (or be bound by the judgment) unless they specifically opt into the class upon receiving notice of the pending action."[131]

[VIII.11] The plaintiff complained about the defendant-employer engaging in unauthorized ex parte communication with absent class members. The plaintiff complained that the defendant's letter to the absent class members contained misleading and coercive information in an attempt

[127] *Id.*

[128] 186 F.R.D. 672 (N.D. Ga. 1999).

[129] *Id.* at 678.

[130] 299 F. Supp. 2d 664 (E.D. Tex. 2003).

[131] *Id.* at 665 (citing Cash v. Conn Appliances, Inc., F. Supp. 2d 884, 897 n.32 (E.D. Tex. 1997)).

to undermine the purposes of the action by discouraging absent members from joining. Relying on *Gulf Oil* and its progeny, the court ruled that it had the power to enjoin future non-approved communication with absent class members by any defendant.[132] Citing *Kleiner* and *Hampton Hardware*, the court noted that "[a]s commercial speech, ex parte communications tending to discourage absent class members from joining the suit may be limited by orders grounded in good cause issued and with a heightened sensitivity for First Amendment [c]oncerns."[133]

[VIII.12] The offensive letter in *Belt v. EmCare Inc.* was sent by the defendant/employer to all employees and misrepresented many of the issues. The court found that the letter was drafted to discourage absent class members from joining the suit.

> [T]he letter suggested that the . . . action was an attack on the potential plaintiffs' status as professionals . . . [and] misrepresented the amount of damages available to the absent class members . . . . The letter incorrectly represented that [the named] [p]laintiff sought only the overtime due for a forty-hour workweek as reduced by attorney's fees.[134]

The defendant, "without any legitimate basis, equated [the] [collective] action with a medical malpractice suit despite the fact that it [was] a claim for unpaid wages."[135] In addition, "[t]he letter suggested that [the] suit could endanger the potential class members' job stability when . . . it [stated] that 'it is unclear how the Court's rulings may impact clinical operations on a going forward basis.'"[136]

[VIII.13] The court found that the letter was drafted by the defendant/employer to discourage participation in the suit. The court found that the statements in the defendant's letter had "heightened potential for coercion because where the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive."[137] The court found that the defendant "exploited this relationship by preying upon fears and concerns held in the medical community and by suggesting that this action could affect the potential class members' employment" and was "an

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[132] *Id.* at 667.

[133] *Id.* at 668 (citing Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1203 (11th Cir. 1985); Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630, 633 (N.D. Tex. 1994)).

[134] *Id.* at 666-67 (footnote omitted).

[135] *Id.* at 667.

[136] *Belt*, 299 F. Supp. 2d at 667.

[137] *Id.* at 668 (citing *Kleiner*, 751 F.2d at 1202; *Hampton Hardware*, 156 F.R.D. at 633).

attempt to frighten potential class members from joining this action."[138] The court finally found that the defendant's letter "was intended to undermine the purposes of the collective action by encouraging absent class members not to join."[139] The court found that the defendant could "have no purpose but to discourage absent class members from joining the suit when it misrepresented damages available and preyed upon the absent class members' fears and concerns."[140]

[VIII.14] Defense counsel's role in drafting the letter convinced the court that the misrepresentations were not accidental. The fact that the letter was sent with no notice to the plaintiff or the court and on the day before EmCare was to provide the plaintiff with the potential class members' mailing address for a court-approved notice persuaded the court that the defendant intended to subvert the court's carefully crafted notice and its role in administrating the collective action.[141] Based on all of this, the court found that the letter was the type of communication that the court had the authority and duty to restrict. The court also stated that the conduct was more egregious than it would be in a typical class action since "potential class members must opt into the collective action rather than opt out as in a class action."[142]

[VIII.15] The court enjoined all defendants from making any ex parte communications with the class members regarding the action until the end of trial. The *Belt* court looked to four criteria to determine whether a order restricting further speech was warranted: the severity and likelihood of perceived harm, the precision with which the order is drawn, the availability of a less restrictive alternative, and the duration of the order.[143] The court also imposed sanctions on the defendant and its counsel. The court ordered the defendant to issue a corrective notice and to bear the costs and attorney's fees plaintiffs incurred in bringing the Motion for the Protective Order. The court also allowed "all potential class members to whom [defendant] directed its improper communications [to] have an additional 30 days to opt into the putative class."[144] Finally, the court reserved the possibility that it would allow putative class members to opt into the class post-verdict.

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[138] *Id.*

[139] *Id.* at 669.

[140] *Id.*

[141] *Id.*

[142] *Belt*, 299 F. Supp. 2d at 669.

[143] *Id.*

[144] *Id.* at 670.

[VIII.16] In light of the abusive communications between defendants and putative class members, some courts have disallowed or limited pre-certification settlements with putative class members. In *Jenifer v. Delaware Solid Waste Authority*,[145] the district court required that the settling defendant notify the putative class members of the existence of the class action and the possibility that by agreeing to the settlement, the putative class members would waive their right to participate in the class action.

[VIII.17] The district court concluded that "[t]he effect of a defendant attempting to influence potential plaintiffs not to join a potential class action is just as damaging to the purposes of Rule 23 as a defendant that influences members of an already certified class to opt out. In both scenarios, improper communication could diminish the size of the class or potential class, and thus, reduce the potential liability."[146]

[VIII.18] In *Ralph Oldsmobile, Inc. v. General Motors Corp.*,[147] the plaintiff filed a class action against GM on behalf of all franchised GM dealers in New York. The plaintiff complained of GM's settlement of the dealers' claims pre-certification. Plaintiff asserted that GM's settlement release was abusive and that GM's communication with the dealers was coercive and did not provide adequate information about the rights waived by the releases. Plaintiff argued that it was improper for GM to offer the releases without referring to the pending class action and without informing the dealers of the fact that signing the release may waive or limit the rights asserted in the class action. Plaintiff requested that the court stop GM from obtaining additional releases and for the court to treat all obtained releases as null and void. GM responded that it was entitled to settle with individual putative class members prior to class certification, that there was no coercion, and that there was no evidence that any of the putative class member dealers waived their rights unknowingly or involuntarily. The court found that the record of GM's communication with the dealers regarding the releases supported findings of "potential abuse."[148] The record specifically supported findings of potential coercion and potentially unknowing waivers of the rights asserted in the class action.[149]

[VIII.19] As to the coercion issue, the court cited *Kleiner v. First National Bank of Atlanta*,[150]

[145] No. Civ.A.98-270MMS., Civ.A.98-565MMS, 1999 WL 117762 (D. Del. Feb. 25, 1999).

[146] *Id.* at *2 (citation omitted).

[147] No. 99 Civ. 4567(AGS), 2001 WL 1035132 (S.D.N.Y. Sept. 7, 2001).

[148] *Id.* at *3.

[149] *Id.*

[150] Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985).

stating that a "unilateral communications scheme . . . is rife with potential for coercion. [I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive."[151] The court also cited *Hampton Hardware, Inc. v. Cotter & Co., Inc.*,[152] and *Jenifer v. Delaware Solid Waste Authority*.[153] Although the court found "potential coercion," not evidence of actual coercion, the court relied on *Kleiner* and *Hampton Hardware* for the proposition that the potential class members depend on the defendant for information, supplies, and credit. "[The dealer's] continued success and, indeed, existence may depend upon GM's good will. The record, therefore, presents the clear potential for abuse."[154] The court also found that the putative class members "may sign the release without knowing what they [were] releasing. Such an unknowing release would be abusive and warrant relief."[155]

[VIII.20] The court, balancing GM's First Amendment rights and the court's duty under the applicable *Gulf Oil* analysis, required that appropriate notice be sent, at GM's expense, to potential members of the putative class. The notice was to inform the dealers that they may be in the class if the class is certified, provide them information on the status of the action, indicate how a dealer may obtain more information about the case or contact plaintiff's counsel, and clearly state that signing the release may prevent a dealer from recovering damages in the class action.[156] The court refused, however, to forbid General Motors from entering into future settlement agreements. The court found that it was not warranted by the potential abuses and that the notice was sufficient to cure any potential unknowing waivers. The court stated that "[t]here is no way to completely eliminate the potential for coercion in the relationship between GM and its dealers."[157] The court continued that "[c]ourts cannot simply interpose themselves in the business relationship between a franchisor and its franchisees each time a franchisee files a putative class action against the franchisor."[158]

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[151] Ralph Oldsmobile v. General Motors, No. 99 Civ. 4567 (AGS), 2001 WL 1035132, at *3 (S.D.N.Y. Sept. 7, 2001) (alteration in original) (internal quotations omitted).

[152] 156 F.R.D. 630 (N.D. Tex. 1994).

[153] No. Civ.A.98-270 MMS, Civ.A.98-565, 1999 WL 117762 (D. Del. Feb. 25, 1999).

[154] *Ralph Oldsmobile*, 2001 WL 1035132, at *4.

[155] *Id.*

[156] *See id.* at *6.

[157] *Id.*

[158] *Id.*

[VIII.21] The court further declined to void the releases that had already been executed. Pretermitting the issue of whether it actually had authority to do so, the court found that no dealer that had signed the release had asked the court to void its release. Nor was there anything in the record indicating that dealers who signed the releases did or did not know about the pending class action. Finally, even if a dealer knew nothing about the class action when it signed the release, the dealer might still wish to ratify the release even after learning of the class action. The court found "[t]he appropriate solution was to include in the notice to potential class members a statement . . . that the court will consider an application to void a release made by any dealer who signed [the] release prior to receiving the notice."[159]

IX. CONCLUSION

[IX.1] The cited cases after *Gulf Oil* illustrate the need for a court to take a proactive approach to prevent improper pre-certification communication with putative class members. When a defendant clandestinely convinces more than ninety percent of potential class members to opt out of a certified class, justice is not served.[160] When a defendant surreptitiously sends letters to class members urging them to save their company money by not participating in a lawsuit, justice is not served.[161] When a defendant underhandedly engages in false and misleading communication with class members, justice is not served.[162] *Gulf Oil's* requirement that an evidentiary showing be made before courts can take any action to protect putative class members from harmful communication encourages—instead of prevents—such abuses.

[IX.2] "The admonition that 'the fitting remedy for evil counsels is good ones' is of little or no value when the circumstances provide no opportunity for any remedy at all."[163] Courts must consider, and take steps to prevent, the potential harm occasioned by "evil counsel" who disseminate improper information to putative class members pre-certification. The current state of the law provides no avenue for courts to monitor and detect problematic communications. Instead, courts can only react only if such communication is ultimately detected.

[IX.3] While the problem of pre-certification communication could easily be solved by silencing all pre-certification communication, that solution would violate *Gulf Oil*, the First Amendment,

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[159] *Id.* at *8.

[160] *See id.*

[161] *See* Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994).

[162] *See* Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 115 F.R.D. 506, 513 (E.D. Pa. 1987); *see also* Belt v. EmCare, 299 F. Supp. 2d 664 (E.D. Tex. 2003).

[163] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (footnote omitted) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring)).

and other applicable jurisprudence. Furthermore, in situations where there is ample time "to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the [proper] remedy . . . is more speech, not enforced silence."[164]

[IX.4] Applying established First Amendment jurisprudence regarding lawyer advertising and solicitation allows courts to be aware of communication and allows courts overseeing class actions to fulfill their "duty" to putative class members. Such an approach allows courts the opportunity to solve problems before any harm occurs. Requiring notice of pre-certification communication with putative class members does not violate the defendant's First Amendment rights and gives plaintiffs' counsel an opportunity to rebut potentially misleading communication. Justice is served by insuring a fully informed party is armed with sufficient knowledge to make appropriate decisions.

[164] *Whitney*, 274 U.S. at 377 (Brandeis, J. concurring).