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Defendant Communications With Absent Class Members in Rule 23(b)(3) Class Action Litigation

DEFENDANT COMMUNICATIONS WITH ABSENT CLASS MEMBERS IN RULE 23(b)(3) CLASS ACTION LITIGATION

Rule 23 of the Federal Rules of Civil Procedure[1] provides for the maintenance of a class action suit when joinder of the class members is impracticable, questions of law or fact exist that are common to the class, the claims of the class representative are typical of those of the class, and the representative party will protect the interests of the class.[2] A federal district court may authorize the class representative to maintain a lawsuit as a class action under any one of three categories of class actions provided in rule 23(b).[3] In a rule 23(b)(3) class action, a plaintiff may prosecute an action

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1. FED. R. CIV. P. 23.

2. *Id.* 23(a). Rule 23(a) provides:

(a) Prerequisites to Class Action. One or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. The prerequisites stated in rule 23(a) are necessary but not sufficient conditions for maintaining a class action. *Id.* Rule 23(b) provides additional elements that are necessary to justify the use of the class action procedure. FED. R. CIV. P. 23 advisory committee note; *see infra* note 3 (text of rule 23(b)).

Rule 23 expresses a policy of judicial economy by authorizing district courts to dispose of many similar claims in a single lawsuit. *See* C. WRIGHT, CLASS ACTIONS, 47 F.R.D. 169, 170 (1969). The class mechanism resolves many claims in one action and eliminates repetitious litigation. *Id.* The class action device allows a class representative to prosecute a complaint on behalf of many "absent" class members, thereby providing a forum for relief on claims that individual plaintiffs otherwise could not or would not litigate. Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 n.11 (1981), *citing* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980). The customary role of the class representative is to vindicate the rights of individuals who otherwise would not pursue litigation because the cost of such litigation exceeds the potential benefit of a successful suit. *Bernard*, 452 U.S. at 99 n.11; *see* C. WRIGHT, *supra*, 47 F.R.D. at 170 (class action provides large groups of individuals who have similar interests with ability to enforce their rights).

3. FED. R. CIV. P. 23(b). Rule 23(b) provides:

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, or

on behalf of a class of plaintiffs if the questions of law or fact that are common to the whole class predominate over any other questions affecting the individual class members.[4] After a plaintiff institutes an action and designates it a class action, the district court determines whether and to what extent to certify the class.[5] Following certification under rule 23(b)(3) the district court directs individual notices to all potential class members advising

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id. In class action suits maintained under either rule 23(b)(1) or rule 23(b)(2), a judgment by a district court, whether or not favorable to the class, binds all persons whom the district court determines are members of the class. *Id.* 23(c)(3). In a rule 23(b)(3) class action, however, the federal rules require that the district court notify all potential class members and give such members an opportunity to exclude themselves from the class membership. *Id.* 23(c)(2) A final judgment in an action maintained under rule 23(b)(3) does not bind those persons who have requested exclusion from the class membership. *Id.* 23(c)(3); *see* C. WRIGHT, *supra* note 2, 47 F.R.D. at 181 (judgment in rule 23(b)(3) action binding only on members who have not excluded themselves from action).

4. FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) provides for a class action when such an action would save time, effort and expense but would not risk procedural fairness. FED. R. CIV. P. 23 advisory committee note. A district court, in its discretion, may authorize a rule 23(b)(3) class suit when such a suit is "convenient and desirable" and "superior" to any other procedure in the particular circumstances. *Id.*; *see* C. WRIGHT, *supra* note 2, 47 F.R.D. at 178 (district court has discretion whether to allow rule 23(b)(3) action); *id.* (district court must find proposed class action superior to other methods for fair and efficient adjudication). Actions maintained under rule 23(b)(3) are the most prevalent form of class actions. *See id.* at 179.

5. FED. R. CIV. P. 23(c)(1),(4). Rule 23(c)(1) and (c)(4) provide:

(c) Determination By Order Whether Class Action To Be Maintained; Notice, Judgment; Action Conducted Partially As Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits....

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Id. District courts have certified actions as class actions for adjudication of limited issues. *See In re* Federal Skywalk Cases, 97 F.R.D. 370, 372 (W.D. Mo. 1983) (class certified for determination of compensatory and punitive damages); Hernandez v. M/V Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1974) (class treatment for issue of negligence); *id.* (determination of proximate cause, contract liability and damages must proceed in individual actions). District courts also have certified actions as class actions for adjudication of claims of subclasses. *See In re* General Motors Corp. Engine Inter. Litig., 594 F.2d 1106, 1116 (7th Cir. 1979) (certification of subclass composed of plaintiffs who purchased automobiles before specified date).

them of their rights and obligations in the class suit and of their right to exclude themselves from the class membership within a specified period.[6] The district court has the responsibility to direct to the potential class members the "best notice practicable" and to safeguard them from unauthorized and misleading communications by the named parties or the named parties' attorneys.[7]

Defendants and their counsel, however, frequently attempt *ex parte* communications with absent class members in an effort to dissuade such members from participating in the class suit.[8] Such abusive communications

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6. FED. R. CIV. P. 23(c)(2). Rule 23(c)(2) provides:

> (2) In any class action maintained under subdivision (b)(3), the court shall 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. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Id.; *see* Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980) (class notice is crucial to proper functioning of rule 23(b)(3) class suit). Class notice provides an impartial statement of the nature of the lawsuit and informs potential class members of their rights, including the right to "opt-out" if the class members' interests conflict with those of other class members. *Id.* at 846. Additionally, class notice informs potential class members of their alternative right to proceed by individual action. *Id.*

A final judgment in a rule 23(b)(3) class suit binds all class members who do not opt-out. FED. R. CIV. P. 23(c)(3). Potential class members, therefore, must have an unfettered opportunity to decide whether to request exclusion from the class. See Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 670 (N.D. Ga. 1983) (prospective class members must receive unbiased information about merits of action to decide whether to participate in class litigation); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (class members must base their decision to participate in or withdraw from class action litigation on independent judgment of their own best interests).

7. Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980) (impartial class notice is crucial to entire scheme of rule 23(b)(3)); *id.* (district court has responsibility to direct best notice practicable and protect against unauthorized and misleading communications). Unapproved communications with class members that are incomplete, biased or false adversely affect the administration of justice. *Id.* The district court, therefore, should limit, within constitutional constraints, contacts by the parties and their attorneys with the class members. *Id.*; *see* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (district court and attorneys have responsibility to insure class members' free and unfettered decision of whether to remain in class membership); *see also* MANUAL FOR COMPLEX LITIGATION § 1.41, at 47 n.33 (1978) (district courts should exercise their power liberally to prevent abuse of class device by unapproved pre-trial communications) [hereinafter cited as MANUAL].

8. *See* MANUAL, *supra* note 7, § 1.41, at 48-49 (types of potentially abusive communications are so numerous and unpredictable as to defy "exhaustive definition"); 1 J. MOORE & I. CURRIER, MOORE'S FEDERAL PRACTICE § 1.41, at 32, 33 n.43 (1982) [hereinafter cited as MOORE'S FEDERAL PRACTICE]. Federal court judges have reported repeated instances of defendants' improper and unethical communications with class members that were either difficult or impossible to detect in time to prevent harm to the class members. MOORE'S FEDERAL PRACTICE, supra, § 1.41, at 32, 33 n.43. Such improper communications with class members have included misrepresentations concerning the status, purposes or effects of the class suit and communications that contradicted the court-directed class notice. *See* Kronenberg Hotel Governor Clinton,

undermine the effectiveness of the court directed class notice,[9] undermine the ability of legally unsophisticated class members to make an independent decision whether to exclude themselves from the class membership[10] and, in cases of threats of economic, legal or physical sanctions against the class members, create an environment in which the defendant coerces the class members to forfeit their rights against the defendant.[11] Additionally, a defendant's unauthorized *ex parte* communications with individual class members undermine the ability of the class counsel to adequately represent the interests of each class plaintiff.[12] For example, a defendant, by engaging in misleading communications with individual class members, may remove enough members from the potential class membership to cause the district

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Inc., 281 F. Supp. 622, 625 (S.D.N.Y. 1968). Improper communications also have included soliciting exclusions from the class membership. *See* Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 66 (E.D.N.Y. 1974). Additionally, attempts to secure affidavits denying that the class member was represented by the class representative or its counsel constitute improper communications. *See* Northern Acceptance Trust 1065 v. Amfac, Inc., 51 F.R.D. 487, 491 (D. Hawaii 1971); Moss v. Lane, 50 F.R.D. 122, 125 (W.D. Va. 1970). Simulating legal process designed to influence a class member to submit to discovery and furnishing false information about the consequences of potential actions by class members is also a form of abusive communications. *See* MOORE'S FEDERAL PRACTICE, *supra* § 1.41, at 32 n.43. Furthermore, misinforming class members so that a defendant could effect a settlement exclusively with the named plaintiff or with a small portion of the class constitutes abusive communication. Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970).

9. *See* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (defendant's unauthorized communication with class members included legal advice that district court specifically omitted from class notice); *see also supra* note 6 (discussion of importance of impartial, court-directed class notice).

10. *See* American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974) (danger exists that class action defendants will convince legally unsophisticated class members that claim is unlikely to succeed); *see also infra* text accompanying note 83 (discussion of attorneys' superior legal knowledge and skill).

11. *See In re* International House of Pancake Franchise Litig., 1972 Trade Cas. (CCH) ¶ 73,797, at 91,371 (W.D. Mo. 1972) (threats by defendant franchisor to terminate franchise agreements with franchisees who participate in the class action create coercive environment). In *International House*, plaintiffs initiated an antitrust action on behalf of all franchisees of the defendant. *Id.* In response to the action, agents of the defendant franchisor threatened to terminate the franchise contracts with any franchisee who participated in the class action or cooperated with the plaintiff's attempts to prepare for trial. *Id.* The United States District Court for the Western District of Missouri entered a preliminary injunction barring the defendants from terminating such franchise agreements unless the franchisee failed to pay its indebtedness to the defendant. *Id.* at 91,372; *see* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 726 (3d Cir. 1962) (district court has authority to issue preliminary injunction when defendant drug manufacturer cancelled accounts of plaintiff wholesaler after plaintiff initiated non-class antitrust action against defendant); 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 2715(d), at 1181 (1977) (threats of legal, economic or physical sanctions raise serious questions of legal propriety); *id.* § 2720(d), at 1189 (threats constitute abuse of class action and court is empowered to impose sanctions against party who engages in such communications).

12. *See infra* notes 84-87 and accompanying text (discussion of disciplinary rules' application in class action suits); *infra* notes 126-128 and accompanying text (discussion of attorney-client relationship between class counsel and potential class members).

court to deny certification of the action as a class action.[13] As a result of such misleading communications, individual class members might forfeit their rights against the defendant without the benefit of the legal advice of the class counsel.[14] Moreover, by engaging in unauthorized communications with absent class members a defendant might obtain information that the rules of discovery otherwise would not permit.[15]

Nevertheless, certain types of communications with individual class members by the defendant or its counsel are necessary to aid the defendant in preparing for trial,[16] to negotiate good faith, out-of-court settlements[17] or, in cases in which the parties are involved in an ongoing business relationship, to engage in communications necessary in the ordinary course of such business.[18] The federal courts, therefore, must balance the courts' duty to protect class members from abusive communications with the defendant's need to communicate with individual class members.

Federal district courts have both the duty and the broad authority to govern the conduct of the named parties and the attorneys in class action litigation because the class action mechanism presents the potential for abusive conduct.[19] A district court's authority to limit defendants' *ex parte* communications with class members derives from rule 23(d)(3) of the Federal Rules of Civil Procedure, which authorizes the court to control the conduct of the class action by issuing orders imposing conditions on the representative

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13. *See* Greisler v. Hardee's Food Sys., Inc., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (affidavits of noninterest signed by potential class members probative to determine numerosity at class determination hearing); *infra* notes 43-48 and accompanying text (discussion of *Greisler* and numerosity requirement of rule 23(a)(1)).

14. *See* Greisler v. Hardee's Food Sys., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (defendant obtained from potential class members affidavits releasing defendant of all liability); *see also infra* notes 82-87 and accompanying text (discussion of importance of legal advice from class attorney to protect interests of class members).

15. *See* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 1.41, at 32 n.43 (instance reported by federal judges of defendant simulating legal process designed to influence class member to submit to discovery).

16. *See* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (discovery as proper method of trial preparation); *id.* (defendant's attempted discovery without involvement of class counsel constituted unethical behavior); *id.* (defendant must identify class members from whom defendant needs to obtain discovery and must demonstrate need for exception from restrictions on communication).

17. *See* American Fin. Sys. Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974) (neutrally worded notice of settlement offer including position of both parties sent to individual class members); *infra* note 62 (discussion of settlement offers communicated to individual class members).

18. *See* Local 734 Bakery Drivers v. Continental Illinois Nat'l Bank, 57 F.R.D. 1 (N.D. Ill. 1972) (defendant bank prohibited from communicating with plaintiff trustees except to extent that bank's duties under trust accounts required communications); *infra* note 55 (discussion of communications made in the ordinary course of business).

19. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (district court has duty and broad authority to control class actions and to enter orders governing conduct of counsel and parties). Abusive and unauthorized communications with absent class members constitute a threat to fairness and due process. MANUAL, *supra* note 7, § 1.41, at 47 n.3. District courts should apply

parties.[20] Prior to 1981, many federal districts adopted local court rules that established automatic preventive judicial control of communications by formal parties with absent class members.[21] Other federal districts adopted pretrial noncommunication orders that imposed similar restrictions.[22] The district courts adopted these preventive measures in response to repeated

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liberally the powers granted by rule 23 to protect against such unapproved communications. *Id.* Moreover, federal district courts have almost unreviewable discretion in regulating communications with absent class members. *Id.*

20. FED. R. CIV. P. 23(d)(3). Rule 23(d)(3) provides that the district court may impose orders governing the conduct of the representative parties. *Id.*; *see id.* 23(e) (district court in class action must approve all compromises and dismissals of class suit).

21. *See* 2 H. NEWBERG, *supra* note 11, § 2720(f), at 1198 n.141 (list of federal court jurisdictions that have adopted local court rules).

22. *See* 2 H. NEWBERG, *supra* note 11, § 2720(h), at 1205 n.176 (list of federal courts that have adopted pretrial non-communication orders). The Manual for Complex Litigation has recommended that the district courts impose the following pretrial noncommunication order in every class action suit:

> 1.41 Sample Pretrial Order Preventing Potential Abuse of Class Actions
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> (To be promptly entered in actual and potential class action orders unless there is a parallel local rule)
>
> In this action, all parties hereto and their counsel are forbidden to communicate directly or indirectly, orally or in writing, concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Federal Rule of Civil Procedure 23; and (d) communications from counsel or a party that may tend to misrepresent the status, purposes, and effects of the class action, and of any actual or potential Court orders therein that may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal, and equitable obligations are unaffected by this order.
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> This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of a client or a prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.
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> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate

instances of *ex parte* communications with class members that impaired, frustrated and adversely affected the administration of justice.[23]

In 1981, the United States Supreme Court in *Gulf Oil Co. v. Bernard*[24] limited the authority of district courts to impose sweeping restrictions on communications between named plaintiffs and their counsel and prospective class members.[25] In *Bernard*, the United States District Court for the Eastern District of Texas adopted a blanket noncommunication order without first determining whether the circumstances of the case required such an order.[26] On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court, holding that the district court's orders constituted an unconstitutional prior restraint under the first amendment to the United States Constitution.[27] The Supreme Court did not decide the first amendment

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pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

A hearing at which applications may be presented for relaxation of this order and proposed communications with actual or potential members of the class is hereby set for _____ at _____ ____ .m.

Dated this _____day of _____19_____.

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Judge

MANUAL, *supra* note 7, Appendix § 1.41, at 238-39; *see infra* notes 24-30 and accompanying text (validity of noncommunication order addressed by Supreme Court in *Gulf Oil Co. v. Bernard*).

23. *See* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 1.41, at 31 n.43 (local rules or orders recommended because of repeated instances of improper communications with absent class members); *supra* note 8 (examples of defendants' improper *ex parte* communications).

The Manual for Complex Litigation recommended that every district court adopt a local rule or order forbidding unapproved communications with potential and actual absent class members. MANUAL, *supra* note 7, § 1.41, at 47. The Manual recommended such preventive local rules and orders because improper communications are either difficult or impossible to detect in time to prevent harm to the absent class members. 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 1.41, at 32, n.43. The Manual for Complex Litigation, which was published under the supervision of distinguished federal judges, is the most widely used source of class action guidance among judges and lawyers. *See* 3 H. NEWBERG, *supra* note 11, § 3025, at 5-6 & n.10; Gulf Oil v. Bernard, 452 U.S. 89, 93 n.4 (1981).

24. 452 U.S. 89 (1981).

25. *Id.* at 99. In *Gulf Oil Co. v. Bernard*, the plaintiffs filed an action on behalf of all present and former black employees of the defendant, alleging racial discrimination in the defendant's employment practices. *Id.* at 92. A lawyer for the plaintiff class attended a meeting of 75 employees and recommended that they not sign released of the defendant's liability that were sent to the employees under a conciliation agreement negotiated by the Equal Employment Opportunity Commission before the commencement of the present suit. *Id.* at 92-93. On Gulf Oil's motion, the district court entered an order imposing a complete ban on all communications by all of the parties concerning the litigation with actual or potential class members without the prior approval of the district court. *Id.* at 94-95.

26. *Id.* at 102-03. The district court in *Bernard* adopted in its noncommunication order the exact language of Sample Pretrial Order No. 15 in the Manual for Complex Litigation. *Id.* at 93, 94; *see supra* note 22 (text of Sample Pretrial Order No. 15).

27. 619 F.2d 459, 467 (5th Cir. 1980). A majority of the Fifth Circuit en banc in *Bernard* held that the case did not show a particularized need to justify the district court's imposition

issues on which the Fifth Circuit based its decision, but determined nevertheless that the policies underlying rule 23 prohibited the district court from imposing such an order without a particular showing of need.[28] The *Bernard* Court held that rule 23 requires the district court to balance the need for restrictions on communications against the potential interference with the rights of the parties that such restrictions would create.[29] Significantly, the *Bernard* case involved a district court order that restricted communications between the class representative and potential class members and interfered with the class representative's duty to protect the interests of all members of the potential class.[30] A district court order that would prohibit a defendant

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of prior restraint on communications. *Id.* at 476-78. The majority further held that the district court's prior restraint was overbroad and was not accompanied by the required procedural safeguards. *Id.* at 476-77. A concurring opinion in *Bernard* refused to reach the first amendment issue, stating that the district court's order was not based on adequate findings and therefore was not authorized under rule 23(d). *Id.* at 478, 481. *See generally*, Note, *Ban on Communications with Potential and Actual Class Members Voided As Unconstitutional*—Bernard v. Gulf Oil Co., 30 DEPAUL L. REV. 917 (1981) (discussion of first amendment aspects of pretrial noncommunication order in *Bernard*).

28. 452 U.S. at 102. The Supreme Court in *Bernard* did not pass on the requirements that the first amendment imposed on the district courts. *Id.* at 103-04. The *Bernard* Court stated that it would wait for a case with a fully developed record on abusive communications in class actions before examining the constitutional issues. *Id.* at 101 n.15; *see* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (Supreme Court in *Bernard* made plain that first amendment does not shelter contacts by adversary's lawyer).

29. 452 U.S. at 101. The *Bernard* Court stated that the district court should limit communications between the parties and potential class members only on a clear record and specific findings of particular threatened abuses. *Id.* at 101, 102. Moreover, the *Bernard* Court held that the district court should impose a noncommunication order, consistent with the rights of the parties to the action, that limits communications as little as possible. *Id.* at 102.

In *Bernard*, the plaintiffs attempted to mail a notice to potential class members, encouraging them to rely on the class action suit as their remedy for the defendant's discriminatory employment practices. *Id.* at 103. The district court found nothing improper or misleading about the plaintiffs' intended notice, but nevertheless refused to permit the plaintiff to mail the notice to the class members. *Id.* The Supreme Court held that the district court abused its discretion because the *Bernard* case revealed no grounds upon which the district court could have determined that such an order was necessary or appropriate. *Id.*

In response to the Supreme Court's decision in *Bernard*, the editors of the Manual for Complex Litigation recommended that the district courts interpret the decision liberally. *See* 1 MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 1.41, at 33. The editors further recommended that the district courts revoke all local rules that prohibit all unauthorized communications and impose noncommunication orders only after a clear record and specific findings demonstrate the need for such an order. *Id.* Cases involving defendant communications with absent class members arising subsequent to *Bernard*, however, have not interpreted the *Bernard* decision as broadly as recommended by the Manual for Complex Litigation. *See, e.g., In re* Federal Skywalk Cases, 97 F.R.D. 370, 376-77 (W.D. Mo. 1983) (prohibition on defendant communications under DR 7-104 consistent with *Bernard*); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (*Bernard* decision does not protect defendants' communications).

30. *See* 452 U.S. at 101. The Supreme Court in *Bernard* stated that the Court was considering the district courts' authority to impose restrictions on communications by plaintiffs and plaintiffs' counsel to prospective class members. *Id.* at 91. The district court's order in *Bernard* interfered with the class representative's efforts to apprise the employees of the existence of the class suit and of their choice to reject the defendant's settlement offer. *Id.* The order

from engaging in abusive or coercive communications with potential class members, therefore, would not conflict with the Supreme Court's decision in *Bernard*.[31] In fact, restrictions on a defendant's unauthorized, *ex parte* communications with potential class members often will promote the policy stated in *Bernard* of avoiding interference with the relationship between the class representative and the individual class members.[32]

I. DEFENDANT COMMUNICATIONS

A. Communications Before Class Certification

After the commencement of a class action suit and before the district court certifies the class, defendants often engage in *ex parte* communications with potential class members in an effort to obtain affidavits of noninterest or releases of the defendant's liability.[33] Some federal courts have found that the Federal Rules of Civil Procedure do not prohibit such unauthorized

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also impeded the class the representative's ability to obtain information about the merits of the lawsuit from the employees that the class representative attempted to represent. *Id.*

31. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981) (decision limited to specific situation before the court); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (principles stated in *Bernard* obviously do not apply to permit communications with class member by opposing counsel). Restrictions on defendants' contacts with absent class members do not interfere with any rights of defendants to communicate with class members. *See Bernard*, 452 U.S. at 102 n.21 (DR 7-104 properly imposes restrictions on some communications); *infra* notes 80-84 (discussion of restrictions imposed by disciplinary rules); MANUAL, *supra* note 7, § 1.41, at 47 n.33 (courts must balance rights of counsel and parties to communicate freely against absent members' right to fair trial); *id.* (courts may constitutionally restrict otherwise protected speech that presents "reasonable likelihood" of prejudice to absent members' right to fair trial).

32. *See* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (prohibition on defendants' communications consistent with *Bernard* because such prohibition does not interfere with class counsel's ability to represent class). The Supreme Court in *Bernard* stated that all noncommunication orders must be consistent with the policies embodied in rule 23 of the Federal Rules of Civil Procedure. *Bernard*, 452 U.S. at 99. The *Bernard* Court found that the order in *Bernard* was not consistent with the policy of rule 23 because the order interfered with the "formation and prosecution" of the class action by restricting communications to potential class members by the class representative and class counsel. *Id.* at 104. A district court order that prohibits defendants' unauthorized communications promotes the policies of rule 23 by preventing defendants' potentially misleading and coercive communications that interfere with the formation and prosecution of class actions. *See* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (prohibition on defendants' communications consistent with *Bernard* because such prohibition does not interfere with class counsel's ability to represent the class). Moreover, the Manual for Complex Litigation recommends that, immediately after a district court imposes the suggested pretrial order, the court should, after a hearing, permit any proposed communications that would not constitute an abuse of the class action. See MANUAL, *supra* note 7, § 1.41, at 50.

33. *See, e.g.*, Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 66 (E.D.N.Y. 1974) (solicitations of statements of noninterest and releases of liability); Greisler v. Hardee's Food Sys., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (solicitation of affidavits releasing defendant of all claims or expressing intention to opt out of class membership); Moss

communications before class certification.[34] For example, in *Matarazzo v. Friendly Ice Cream Corp.*,[35] the United States District Court for the Eastern District of New York rejected the plaintiff's contention that the defendant's precertification solicitations of statements of noninterest and releases of claims from potential class members were improper communications.[36] In *Matarazzo*, a former store manager for the defendant initiated a private antitrust action against the defendant on behalf of present and former store managers.[37] While the plaintiff's motion for class action determination was pending, the defendant solicited and obtained from the present store managers statements that they would not participate in the class suit and that they intended to release the defendant from any claims relating to the plaintiff's antitrust class action suit.[38] The *Matarazzo* court found no evidence of fraud or coercion in connection with the defendant's solicitation of the statements and therefore, rejected the plaintiff's claim that such communications were improper.[39] The district court in *Matarazzo* stated that it could find no basis for a per se rule that would prohibit a defendant's communications with potential class members at the moment a class representative plaintiff commences a class suit.[40] In a footnote, however, the *Matarazzo* court stated that the "better practice" would be for the defendant to obtain the district court's prior approval before engaging in precertification communications with potential class members and solicitations of releases of liability.[41]

Although the district court in *Matarazzo* removed the present store owners from the potential class membership, the district court nevertheless

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v. Lane Co., 50 F.R.D. 122, 124 (W.D. Va. 1970) (solicitation of affidavits denying authority of class representative to represent class member).

34. *See, e.g.*, Nessenoff v. Muten, 67 F.R.D. 500, 503 (E.D.N.Y. 1974) (court permitted defendant to obtain waivers of interest from potential plaintiffs); Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D.N.Y. 1974) (precertification solicitations of noninterest not improper communications); Greisler v. Hardee's Food Sys., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (affidavits releasing defendant of claims or expressing intention to opt-out of class membership).

35. 62 F.R.D. 65 (E.D.N.Y. 1974).

36. *Id.* at 69.

37. *Id.* at 66. The plaintiff in *Matarazzo v. Friendly Ice Cream Corp.* alleged that the defendant's employment contracts with its store managers constituted illegal tying arrangements, price fixing and resale price maintenance in violation of the Sherman Antitrust Act. *Id.* at 66, 67; *see* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982).

38. 62 F.R.D. 65, 66.

39. *Id.* at 69.

40. *Id.*

41. *Id.* at 69 n.4. The district court in *Matarazzo* relied on the Manual for Complex Litigation for its statement that defendants should obtain the district court's prior approval before engaging in *ex parte* communications with the class members. *Id.*; *see* MANUAL, *supra* note 7, § 1.41, at 47 n.33 (district courts should exercise power liberally to prevent unauthorized communications). The *Matarazzo* court admitted that the defendant's solicitations in the present case did not conform to the requirement of the opt out notice in rule 23(c)(2) of the Federal Rules of Civil Procedure. 65 F.R.D. at 69 n.4.

certified the plaintiff's action on behalf of all former store managers.[42] In other cases, however, defendants' unauthorized solicitations of affidavits of noninterest and released of liability have prevented class certification by depriving the potential class of the numerosity requirement of rule 23(a)(1) of the Federal Rules of Civil Procedure.[43] For example, in *Greisler v. Hardee's Food Systems, Inc.*,[44] the United States District Court for the Eastern District of Pennsylvania determined that affidavits signed by potential class members effectively removed enough members of the potential class to deprive the action of the requisite numerosity under rule 23(a)(1).[45] In *Greisler*, the plaintiff initiated a class suit on behalf of all present and former franchisees of the defendant corporation, alleging violations of federal antitrust laws, fraud and breach of contract.[46] At the class determination hearing, the defendant introduced affidavits signed by potential class members which either released the defendant of all claims or expressed an intention to exclude the affiant from the class membership.[47] Relying on the potential class members' affidavits, the *Greisler* court held that the plaintiff could not satisfy the burden of establishing the requirement of numerosity, and accordingly, dismissed the plaintiff's class suit with prejudice.[48]

In contrast to *Matarazzo* and *Greisler*, other federal court decisions have prohibited precertification *ex parte* communications relating to the litigation without the district court's prior approval.[49] For example, in *Local 734*

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42. 65 F.R.D. at 70.

43. *See, e.g.*, Nessenoff v. Muten, 67 F.R.D. 500, 503 (E.D.N.Y. 1974) waivers of interest destroyed numerosity requirement); Greisler v. Hardee's Food Sys., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (affidavits releasing defendant of claims or expressing intention to opt out deprived action of class status); Shulman v. Ritzenberg, 47 F.R.D. 202, 207-08 (D.D.C. 1969) (affidavits of noninterest probative at class determination hearing).

Rule 23(a)(1) provides that a plaintiff may maintain a class action only if joinder of all class members would be impracticable. FED. R. CIV. P. 23(a)(1); *see supra* note 2 (text of rule 23(a)(1)). *See generally* C. WRIGHT, *supra* note 2, 47 F.R.D. 169, 172 (discussion of numerosity requirement). The federal courts have not imposed a specific number of class members required to maintain a class action. *See* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967). District courts should apply the numerosity requirement in light of the particular circumstances of the case. *Id.* Some federal courts have determined that evidence of noninterest of potential class members is not probative on the issue of numerosity at the class determination hearing. *See, e.g.*, Knoth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420, 428 (3d Cir. 1968) (district court incorrectly dismissed class suit based on affidavits of noninterest); J.W.T., Inc. v. Joseph E. Seagram & Sons, Inc., 63 F.R.D. 139, 142 n.8 (N.D. Ill. 1974) (depositions of class members indicating noninterest in litigation inappropriate at class determination hearing); Moss v. Lane Co., 50 F.R.D. 122, 124 (W.D. Va. 1970) (affidavits denying authority of class representative would not defeat class certification).

44. 1973 Trade Cas. (CCH) ¶ 74,455 (E.D. Pa. 1973).

45. *Id.* at 94,039.

46. *Id.*

47. *Id.*

48. *Id.*

49. *See, e.g.*, Belcher v. Bassett Furniture Indus., Inc., 22 Fed. R. Serv.2d 1171, 1172 (W.D. Va. 1976) (court prohibited defendant from engaging in any communications with potential class members without prior court approval); American Fin. Sys. Inc. v. Harlow, 65

Bakery Drivers v. Continental Illinois National Bank,[50] the United States District Court for the Northern District of Illinois prohibited the defendant bank from responding to inquiries relating to the class action from the potential class members.[51] In *Continental*, two union pension funds initiated a federal securities claim against the defendant bank on behalf of all persons for whose trust accounts the bank advised the purchase of certain investment stock.[52] The defendant bank moved the district court for permission to respond to inquiries made by persons interested in the trust accounts without obtaining the district court's prior approval of the language or substance of such responses.[53] The *Continental* court denied the defendant's motion, citing rule 22 of the district court's civil rules, which forbade communications between potential class members and all parties and counsel to the action.[54] Instead, the district court in *Continental* directed the parties to submit for the district court's approval a mutually satisfactory statement that the defendant would give in response to all subsequent inquiries made by the bank's customers.[55]

F.R.D. 572, 576 (D. Md. 1974) (court permitted defendant to send neutrally worded settlement offer with district court's prior approval); Local 734 Bakery Drivers v. Continental Illinois Nat'l Bank, 57 F.R.D. 1, 2 (N.D. Ill. 1972) (court prohibited defendant from responding to inquiries of potential class members without prior court approval); *cf.* Hartford Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131, 137 (S.D.N.Y. 1971) (court approved communication of settlement offer to absent class members because class attorney involved in negotiations).

50. 57 F.R.D. 1 (N.D. Ill. 1972).

51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. *Id.*; *see* N.D. ILL. CIV. R. 22 (local court rule prohibiting communications with potential and actual class members).

55. 57 F.R.D. at 2. The *Continental* court stated that the defendant bank could continue to communicate on matters concerning the trust accounts to the extent that the bank's fiduciary duties and obligations under the trust accounts required such communications. *Id.*

In many class action situations, the defendant and the class members are engaged in a continuing business relationship that requires frequent communication. *See generally* 2 H. NEWBERG, *supra* note 11, § 2730(d), at 1220 (discussion of communications permitted in ordinary course of business). Consequently, the federal courts have developed a rule allowing the defendant to communicate with the class members if such communications are limited to those necessary in the ordinary course of business. *See, e.g.*, High v. Braniff Airways, Inc., 20 Fed. R. Serv.2d 439, 439 (W.D. Tex. 1975) (defendant-employer permitted to distribute employee personnel questionnaire); Local 734 Bakery Drivers v. Continental Illinois Nat'l Bank, 57 F.R.D. 1, 2 (N.D. Ill. 1972) (communications in ordinary course of business as exception to noncommunication order). In *High v. Braniff Airways, Inc.*, the United States District Court for the Western District of Texas considered whether a defendant employer could distribute to the class member employees a personnel questionnaire requesting information about each employee. 20 Fed. R. Serv.2d at 439. In *High*, an employment discrimination class action against the defendant employer, the plaintiff requested the district court to issue an order preventing the defendant from obtaining from the class members information that was relevant to the issues in the litigation. *Id.* The district court denied the plaintiff's motion because the information requested in the questionnaire related to the day-to-day relationship and contacts of the defendant with its employees. *Id.* Although the *High* court found that the defendant's distribution of the

In the absence of a local court rule similar to the one in *Continental*, district courts should invoke their authority under rule 23(e) of the Federal Rules of Civil Procedure to prohibit defendants' unauthorized precertification communications with potential class members.[56] Such *ex parte* communications by defendants constitute a challenge to the district court's ability to control the class litigation and may undermine the proper functioning of the class action device.[57] For instance,defendants' *ex parte* communications with potential class members defeat the purpose and effectiveness of the impartial class notice, thus impairing the district court's obligation to direct the "best notice practicable" and safeguard potential class members from misleading communications.[58] Moreover, such communications by defendants may deprive potential class members of their ability to make an unfettered, independent decision whether to remain in the class membership.[59] More importantly, when defendants obtain releases of liability, potential class members forfeit their legal rights against a defendant without the benefit of the impartial explanation of the subject matter of the lawsuit provided by the class notice or of the class counsel's opinion of the merits of the class suit.[60] Consequently, district courts should exercise their authority under rule

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questionnaire was in the ordinary course of its business, the court imposed an order prohibiting the defendant's counsel from reviewing the questionnaires to prevent the defendant's use of such information in the class litigation. *Id.*

56. *See* Weight Watchers v. Weight Watchers Int'l, Inc., 53 F.R.D. 647, 651 (E.D.N.Y. 1971) (district court's authority under rule 23(d) to control class litigation does not depend on prior class certification), *aff'd*, 455 F.2d 770 (2d Cir. 1972); 53 F.R.D. at 651 (district court must control precertification communications to prevent counsel from engaging in race to complete questionable communications before certification); *see also* 2 H. NEWBERG, *supra* note 11, § 2725(a), at 1205-06 (district court has general equity power to enjoin communications designed to interfere with class members' attempt to obtain judicial redress).

57. *See* Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487, 491 (D. Hawaii 1971) (unauthorized efforts to obtain affidavits of noninterest violate spirit and letter of rule 23); *see also* 2 H. NEWBERG, *supra* note 11, § 2720(d), at 1189-90 (solicitation of exclusions from potential class members constitutes challenge to court's authority to control class litigation).

58. *See* Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980) (court has responsibility to direct "best notice practicable" and to protect against unauthorized communications); *supra* note 7 (discussion of district courts' responsibility to protect absent class members from unauthorized and misleading communications).

59. *See* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 670 (N.D. Ga. 1983) (class members must receive impartial information about merits of class action in order to decide whether to remain in class membership); *supra* note 6 (discussion of important function of impartial class notice).

60. *See* Greisler v. Hardee's Food Sys., Inc., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (potential class members signed affidavits releasing defendant of any claims such member might have had). In *Weight Watchers v. Weight Watchers Int'l., Inc.*, the district court avoided the problem of potential class members' forfeiting their legal rights against the defendant without the benefit of legal counsel. 55 F.R.D. 50, 51 (E.D.N.Y. 1971), *aff'd*, 455 F.2d 770 (2d Cir. 1972). In *Weight Watchers*, the defendant requested an exception to a court order prohibiting unauthorized communications so that the defendant could negotiate dispositions of the class action claims with certain franchisees before entering into new franchise agreements. 55 F.R.D.

23(e) and impose a precertification order in every suit prohibiting unauthorized, *ex parte* communications between defendants and potential class members.[61] Thereafter, defendants could communicate with potential class members only after obtaining the district court's approval and determination that such communication would not mislead, unduly influence or adversely affect the interests of potential class members.[62]

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at 51. The district court granted the defendant's request on the condition that all parties and their counsel would be present at such negotiations. *Id.* Moreover, the *Weight Watchers* court ordered that the class counsel have a full opportunity to express his views concerning the rights of the class members with respect to the subject matter of the class action. *Id.*

61. *See* MANUAL, *supra* note 7, § 1.41, at 47 (recommendation that district court prohibit all unauthorized communications).

62. *See id.* at 50 (district court should freely permit proposed communications that would not constitute abuse of class action device). The prohibition on communications with absent class members should not be a permanent or absolute prohibition. *Id.* The district court should hold a hearing, upon the request of either party, to determine the propriety of the parties' proposed communications. *Id.* Thereafter, the court should grant exceptions to the prohibition on communications when counsel demonstrates a need to communicate with absent class members. *Id.* at 50-51; *see supra* note 60 (district court in *Weight Watchers* granted exception to noncommunication order).

Rather than solicit affidavits of noninterest or releases of liability, defendants frequently attempt to negotiate out-of-court settlements with individual potential class members. *See, e.g.*, Vernon J. Rockler & Co. v. Minneapolis Shareholders, 425 F. Supp. 145, 146-47 (D. Minn. 1977); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 574 (D. Md. 1974); Hartford Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131, 135 (S.D.N.Y. 1971). Rule 23(e) of the Federal Rules of Civil Procedure provides that the parties may not dismiss or compromise a class action suit without the prior approval of the district court. FED. R. CIV. P. 23(e). To the extent that a defendant's settlement negotiations with individual potential class members do not compromise the class suit, however, such negotiations do not fall within the scope of rule 23(e). *See Rockler*, 425 F. Supp. at 149-50 (individual settlements do not violate rule 23(e) because such settlements do not compromise rights of nonsettling potential class members); *id.* (individual settlements permitted even if such settlements deprive action of class status). *But see* Note, *Developments In the Law—Class Actions*, 89 HARV. L. REV. 1318, 1547 (1976) (settlements may prevent realization of policies of rule 23(e)). Even though individual settlements do not violate the letter of rule 23, such settlements practically impair the interests of nonsettling plaintiffs. Note, 89 HARV. L. REV. at 1547. In addition defendants' settlements with selected potential class members may deprive the remaining class members of the resources needed to continue the litigation. *Id.*

Although rule 23(e) does not require judicial approval of individual settlements with class members, district courts retain their authority under rule 23(d) to control such settlement negotiations with potential class members. *See supra* note 56 (discussion of district courts' authority under rule 23(d) to control precertification communications). Consequently, district courts have invoked their authority under rule 23(d) to protect potential class members from improper communications of settlement offers. *See, e.g.*, American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 576 (D. Md. 1974) (defendant permitted to communicate neutrally worded settlement offer to potential class members); *id.* (notice of settlement offer must include position of class representative); *id.* (settlements with potential class members will not affect continuation of class suit if denial of class certification precludes relief to appreciable segment of class membership); Weight Watchers v. Weight Watchers Int'l, Inc., 55 F.R.D. 50, 51 (E.D.N.Y. 1971) (defendant permitted to negotiate settlements with potential class members with presence of plaintiff and involvement of class counsel), *aff'd*, 455 F.2d 770 (2d Cir. 1972); Hartford

B. *Communications During Opt-Out Period*

After a district court certifies a class action under rule 23(b)(3) and directs the notices to the class members informing them of the suit, the class members have a limited period in which to exclude themselves from the class membership.[63] During this so-called opt out period, the federal courts unanimously hold that the defendant may not communicate *ex parte* without court supervision with the individual class members in an effort to solicit exclusions from the class.[64] For example, in *Kleiner v. First National Bank*[65] the United States District Court for the Northern District of Georgia prohibited a defendant bank from advising individual class members to opt out of the class litigation.[66] In *Kleiner*, two customers of the defendant bank brought an action against the defendant on behalf of all bank customers who sustained injuries from the defendant's alleged breach of contract and violations of the Truth in Lending Act.[67] After the district court granted the plaintiffs' motion for class certification, but before the class members' deadline for filing exclusion requests, the defendant bank undertook a systematic campaign of telephone calls to the class members in an effort to solicit their exclusion from the class membership.[68] Consequently, the plaintiffs moved the district court to enjoin the bank from continuing these communications with the class members.[69] The *Kleiner* court rejected outright

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Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131, 137 (S.D.N.Y. 1971) (presence of class counsel required in settlement negotiations with potential class members).

63. FED. R. CIV. P. 23(c)(2)(A); *see supra* note 6 (discussion of class notice and requests for exclusion from class membership). At the moment of certification, federal court cases refer to the absent members as "class members." *See, e.g.*, Erhardt v. Prudential Group, Inc., 629 F.2d 843, 845 (2d Cir. 1980) (absent members are "members of class"); *In re* General Motors Corp. Engine Interch. Litig., 594 F.2d 1106, 1138 (7th Cir. 1979) (absent members are "class members").

64. *See In re* General Motors Corp. Engine Interch. Litig., 594 F.2d 1106, 1140 n.60 (7th Cir. 1979) (solicitations to opt out reduce effectiveness of rule 23(b)(3) class actions with no legitimate reason); Kleiner v. First Nat'l Bank, 99 F.R.D. 77, 79 (N.D. Ga. 1983) (defendant prohibited from soliciting exclusions from class members during opt out period).

During the opt out period, defendants may communicate settlement offers to individual class members after obtaining prior approval of the district court. *General Motors*, 594 F.2d at 1140 n.62. Offers to settle provide redress to the absent class members and reduce the burden on the courts. *Id.* at 1140 n.60. Judicial examination of individual settlement offers entails only considerations of accuracy and completeness of disclosure. *Id.* at 1140. District courts must determine, however, that a defendant's settlement offer is not so nominal as to amount to nothing more than a request for exclusion. *See id.* at 1140 n.60; *supra* note 62 (discussion of settlement offers made before class certification).

65. 99 F.R.D. 77 (N.D. Ga. 1983).

66. *Id.* at 79.

67. *Id.* at 77.

68. *Id.* at 78. In *Kleiner v. First Nat'l Bank*, in addition to contacting class members by telephone, the defendant's bank officers contacted class members urging them to consider the customers' past good relationship with the bank when deciding whether to remain in the class membership. *Id.*

69. *Id.* In addition to seeking injunctive relief, the plaintiff in *Kleiner* sought an order

the defendant's argument that the Supreme Court's decision in Bernard prohibited the district court form enjoining the defendant's communications.[70] The *Kleiner* court held that no legal precedent existed permitting a defendant's *ex parte*, unsupervised solicitation of exclusion requests and that such communications were antithetic to the objectives of rule 23 of the Federal Rules of Civil Procedure, which require the district court's control of the class notification process.[71]

Likewise, in *Erhardt v. Prudential Group, Inc.*,[72] the United States Court of Appeals for the Second Circuit approved the district court's order permitting class members who previously opted out of the class membership as a result of the defendant's unauthorized solicitations to "opt back in" to the class suit.[73] In *Erhardt*, the plaintiff initiated a class action suit against the general partner of a development fund on behalf of all past and present limited partners, alleging breach of contract and violation of fiduciary duties.[74] The United States District Court for the Southern District of New York certified the plaintiff's action as a class action and issued a notice to all class members prescribing the period in which the class members could exclude themselves from the class membership.[75] Prior to the expiration of the opt-out period, the defendant mailed letters to the class members warning them of their liability for the costs of the litigation if the defendant prevailed and urging the members to exclude themselves from the class membership.[76] On plaintiff's motion, the district court ordered the defendant to send a new class notice allowing all class members who opted out as a result of the defendant's solicitation to opt back in to the class membership.[77] Additionally, the district court held the defendant in contempt of court and enjoined the defendant from communicating with the class members without the court's prior approval.[78] On appeal, the United States Court of Appeals for the Second Circuit approved all of the district court's remedial measures but vacated the contempt order because the district court failed to include in its

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voiding all exclusion requests received from the class members. *Id.* In a subsequent memorandum opinion, the *Kleiner* court granted the plaintiff's request to void all exclusion requests and further ordered that a new class notice be sent to the class members. *See* 37 Fed. R. Serv.2d 655, 674-77 (N.D. Ga. 1983).

70. *Kleiner*, 99 F.R.D. at 79. The district court in *Kleiner* stated that the Supreme Court's decision in *Bernard* did not sanction the *Kleiner* defendant's communications because such communications tended to mislead and confuse the class members. *Id.*; *see* Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981) (district court should base noncommunication order on clear record and specific findings that indicate need for such order).

71. *Kleiner*, 37 Fed. R. Serv.2d at 660.

72. 629 F.2d 843 (2d Cir. 1980).

73. *Id.* at 845-46.

74. *Id.* at 844.

75. *Id.*

76. *Id.* at 845.

77. *Id.*

78. *Id.*

certification order a restriction on unauthorized communications with the class members.[79]

II. Defense Attorney Communications

In addition to exercising their authority under rule 23(b)(3), district courts may restrict *ex parte* communications by a defendant's counsel with potential and actual class members by enforcing Disciplinary Rule (DR) 7-104 of the Model Code of Professional Responsibility.[80] DR 7-104(A)(1) states that an attorney representing a client may not communicate with another party who is represented by an attorney on the subject of the representation without the prior consent of the other party's attorney.[81] DR 7-104 operates on the premise that the adversarial legal system functions best when qualified counsel represent the interests of persons in need of legal advice.[82] DR 7-104 protects lay adverse parties from improper communications by an attorney who has the advantage of superior legal knowledge and skill.[83] Moreover, the rule prevents a lawyer from bypassing the opposing counsel, thus preserving the proper functioning of the attorney-client relationship between the adverse party and its counsel.[84]

The federal courts consistently have employed the provisions of the Model Code as sources of procedural and substantive law.[85] Significantly,

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79. *Id.* at 846.

80. Model Code of Professional Responsibility DR 7-104 (1969) [hereinafter cited as Model Code]; *see, e.g.,* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (DR 7-104 prohibits defendant communications with absent class members); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (Model Code is part of standard conduct required of attorneys practicing before court); *In re* Federal Skywalk Cases, 97 F.R.D. 370, 377 (W.D. Mo. 1983) (DR 7-104 clearly applies in suits that proceed as class actions).

81. Model Code, *supra* note 80, DR 7-104(A)(1). DR 7-104(A)(1) provides:

> (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 as is authorized by law to do so.

Id.

82. Model Code, *supra* note 80, EC 7-18 (1969); *see also* Model Code, *supra* note 80, DR 7-104 comment (1969), at 333 (rule facilitates settlement of disputes by placing notice in hands of those professionally trained to make such judgments). *See generally* Kurlantzik, *The Prohibition on Communication With an Adverse Party*, 51 Conn. B. J. 136 (1977) (in depth discussion of policies underlying DR 7-104).

83. Model Code, *supra* note 80, DR 7-104 comment (1969), at 333.

84. ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934); *see* ABA Comm. on Professional Ethics and Grievances, Formal Op. 187 (1938) (attorney may not communicate with adverse party in absence of counsel about facts of case even if adverse party is willing to do so); Model Code, *supra* note 80, DR 7-104 comment (1969), at 332 (DR 7-104 designated to prevent counsel from impeding attorney's ability to represent client); Kurlantzik, *supra* note 82, at 153 (lawyer cannot represent his client adequately if opposing counsel is speaking *ex parte* with client).

85. Resnick v. American Dental Ass'n, 95 F.R.D. 372, 378 (N.D. Ill. 1982); *see* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 675 (N.D. Ga. 1983) (district court has fundamental

the federal courts have determined that DR 7-104's prohibition on attorneys' communications with adverse parties applies with equal force in suits that proceed as class actions.[86] The United States Supreme Court in *Bernard* expressed its agreement that the district courts should enforce the prohibition of DR 7-104 when the Court, citing DR 7-104, stated that the rules of ethics properly impose restraints on attorneys' communications in class action suits.[87] Determination of the exact moment in the course of the litigation that the absent class members become "parties ... represented by" the class attorney has been the critical problem in class action cases invoking DR 7-104.[88] Rule 23 of the Federal Rules of Civil Procedure does not characterize the relationship between the class attorney and the absent class members, nor does it consider specifically the status of the absent members as "parties" to the action.[89] As a result, the nature of the relationship and the status of the class members as "parties" are simply conclusions of the district court based on the policy considerations of DR 7-104 and the particular purpose for which the determination becomes relevant.[90]

The few federal cases that have addressed the issue of when DR 7-104 applies in class suits have found that the disciplinary rule operates as a restriction on a defendant's counsel's communications with the class members only after the district court certifies the class.[91] For instance, in *Resnick v. American Dental Association*,[92] the United States District Court for the Northern District of Illinois determined that class counsel represented unnamed class members at the moment a district court certifies a class.[93] In

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responsibility to supervise attorneys who practice before it); *id.* (district court authorized to raise ethical problems involving attorney misconduct).

86. *See, e.g.*, Resnick v. American Dental Ass'n, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (reasons for prohibition of DR 7-104 apply with full vigor to class suits); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (DR 7-104 applied in class suit); *In re* Federal Skywalk Cases, 97 F.R.D. 370, 377 (W.D. Mo. 1983) (DR 7-104 clearly applies in suits that proceed as class actions).

87. Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981); *see* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (DR 7-104 still applies even though Supreme Court vacated communication ban in *Bernard*).

88. *See* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 670 (N.D. Ga. 1983) (difficult to discern precise point at which attorney-client relationship arises between class counsel and absent class members); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (impossible to state with precision status of relationship between class attorney and absent class members throughout class litigation). *See generally* 2 H. NEWBERG, *supra* note 11, § 2705, at 1171 (nature of relationship between class counsel and absent class members is uncertain).

89. See FED. R. CIV. P. 23. *See generally* 2 H. NEWBERG, *supra* note 11, § 2830, at 1259 (status of absent members as "parties").

90. *See* 2 H. NEWBERG, *supra* note 11, § 2830, at 1259 (status of class members may depend on purpose for which status becomes relevant).

91. *See* Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (DR 7-104 applies once class is certified); Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (DR 7-104 is inapplicable before class certification).

92. 95 F.R.D. 372 (N.D. Ill. 1982).

93. *Id.* at 376.

Resnick, the plaintiff brought an employment discrimination suit against the defendant on behalf of all women who were victims of the defendant's alleged discriminatory employment practices.[94] After the district court certified the class, the plaintiff requested a court order barring the defendant from communicating with the class members without the prior consent of the class counsel.[95] The plaintiff argued that DR 7-104(A)(1) prohibited such communications by the defendant and its counsel because the class attorney currently represented the members of the plaintiff class.[96] The defendant in *Resnick* argued against the motion, contending that an attorney-client relationship did not exist,[97] that the Supreme Court's decision in *Bernard* proscribed such an order absent a clear showing of abuse,[98] and that such an order unreasonably impaired the defendant's ability to prepare for trial.[99] The *Resnick* court reasoned that, although DR 7-104(A)(1) is inapplicable before class certification, a court may invoke the disciplinary rule in a class suit after certification because the class counsel has a fiduciary obligation to protect the interests of the class members and possesses all the other indicia of an attorney representing a client.[100] The *Resnick* court rejected the portion of the defendant's argument that was based on the *Bernard* decision, stating that the *Bernard* case involved communications not between the defendant and the class members, but between the class counsel and the class members.[101] The communication ban in *Bernard* interfered with the class counsel's ability to represent the class members and therefore conflicted with the purpose of rule 23.[102] The *Resnick* court concluded, therefore, that the considerations in *Bernard* do not protect communications by opposing counsel with class members.[103] Finally, the district court in *Resnick* stated

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94. *Id.* at 373.

95. *Id.* at 373-74.

96. *Id.* at 376.

97. *Id.* In addition to arguing that an attorney-client relationship did not exist, the defendant in *Resnick v. American Dental Ass'n* argued that the district courts should not enforce the provisions of the disciplinary rules in litigation. *Id.* at 378. The district court in *Resnick* stated that the courts consistently employ the Model Code as a source of procedural and substantive law, and therefore rejected defendants second argument. *Id. See generally* MODEL CODE, *supra* note 80 (discussion of application of Model Code in Class action suits).

98. 95 F.R.D. at 376, 378; *see* Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981); *supra* text accompanying notes 24-32 (discussion of Supreme Court's decision in *Bernard*).

99. 95 F.R.D. at 376.

100. *Id.* at 376 & n.6. The *Resnick* court stated that neither the underlying purposes of DR 7-104 nor judicial precedent supported the defendant's contention that the class members must initiate the contact with the class counsel to establish an attorney-client relationship. *Id.* at 377; *see supra* notes 88-90 and accompanying text (discussion of attorney-client relationship between class counsel and absent class members). *But see* Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (class members not represented by counsel because members did not retain counsel to represent them in matter).

101. 95 F.R.D. at 376.

102. *Id.*

103. *Id.*

that the discovery mechanisms provided for in the Federal Rules of Civil Procedure, rather than the defendant's unauthorized, *ex parte* communications, constituted the appropriate means by which the defendant could prepare for trial.[104]

Similarly, in *Winfield v. St. Joe Paper Co.*,[105] the United States District Court for the Northern District of Florida considered whether DR 7-104(A)(1) prohibited communications by a defendant with potential class members before class certification.[106] In *Winfield*, employees of the defendant commenced a class action suit against the defendant employer alleging violations of the Civil Rights Act of 1964.[107] During the pendency of the plaintiff's motion to certify the class, the parties requested a ruling from the district court to determine whether the defendant could contact members of the proposed class to obtain information relating to the litigation.[108] The *Winfield* court held that the class members were not parties in the strict sense of the term and therefore rejected the plaintiff's argument that DR 7-104(A)(1) should prohibit the defendant's communications.[109] The district court reasoned that the class members had not yet retained the class counsel to represent their interests and thus were not parties represented by counsel under DR 7-104(A)(1).[110]

The holding in *Winfield* that potential class members are not "parties" to the class action suit before class certification in inconsistent with the federal courts' treatment of potential class members in other circumstances.[111] Moreover, the courts that have interpreted the term "a party ... represented by a lawyer" in nonclass action situations have construed the term broadly

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104. *Id.* at 377. The *Resnick* court stated that the defendant would violate DR 7-104 by attempting discovery from the class members without the "involvement" of the class counsel. *Id.* The district court stated that, to the limited extent that the defendant must communicate with the certain class members for trial preparation, the defendant must identify to the court such class members and demonstrate the reason for excepting them from the restriction. *Id.*

105. 20 Fair Empl. Prac. Cas. (BNA) 1093 (N.D. Fla. 1977).

106. *Id.* at 1094.

107. *Id.* at 1093; *see* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 302-17 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)) (Title VII); Truth in Lending Act, 15 U.S.C. §§ 1601-1613 (1982).

108. 20 Fair Empl. Prac. Cas. (BNA) at 1094.

109. *Id.*

110. *Id.*

111. *See, e.g.*, National Super Spuds, Inc. v. New York Merc. Exch., 75 F.R.D. 40, 42 (S.D.N.Y. 1977) (potential class members are "opposing parties" for purpose of having counterclaims asserted against them); J.W.T., Inc. v. Joseph E. Seagrams & Sons, Inc., 63 F.R.D. 139, 142 n.8 (N.D. Ill. 1974) (discovery of potential class members permitted). In *National Super Spuds*, the United States District Court for the Southern District of New York determined that potential class members were "opposing parties" for the purpose of having counterclaims asserted against them under rule 13 of the Federal Rules of Civil Procedure. 75 F.R.D. at 42. In *National Super Spuds*, holders of Maine potato futures contracts initiated a class action against the defendant, alleging violations of the Commodities Exchange Act. *Id.* at 41. Before the district court certified the action, the defendant filed counterclaims against certain unnamed and some unidentified class members alleging a conspiracy to force large scale

for the purpose of applying DR 7-104(A)(1).[112] For example, in *Abeles v. State Bar*,[113] the California Supreme Court held that a party who had counsel of record was a party represented by a lawyer for the purpose of DR 7-104 regardless of whether such counsel had the authority to act on behalf of the party in that matter.[114] In *Abeles*, an attorney for a defendant obtained from one of the plaintiffs named in a lawsuit an affidavit stating that the plaintiffs' counsel did not have authority to file the complaint on behalf of the plaintiff.[115] The *Abeles* court determined that for the purposes of DR 7-104 the plaintiff was represented by counsel and held that the attorney had breached his ethical duty.[116] The *Abeles* court reasoned that a narrower interpretation of DR 7-104 might interfere with the administration of justice and harm potential attorney-client relationships.[117] Likewise, in a 1970 Informal Opinion[118] relating to DR 7-104, the Committee on Professional Ethics ruled that an attorney could not communicate directly with an insured party even though the insurance company bore the sole risk of liability in the lawsuit.[119] The Committee held that the insured remained a party for the purpose of applying DR 7-104(A)(1) because he was more than a "disinterested bystander."[120] Similarly, potential class members are not merely "disinterested bystanders" in the class litigation, but in fact may have a personal stake in the outcome of the action.[121]

Nevertheless, no federal court decision has invoked DR 7-104 to prohibit communications in class action suits before class certification.[122] The policy

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defaults in potato futures contracts. *Id.* at 42. The *National Super Spuds* court interpreted the term "opposing party," as used in rule 13 of the Federal Rules of Civil Procedure, to include potential class members and therefore permitted the defendant to assert counterclaims against them. *Id. But see* Hawkins v. Holiday Inns, Inc., 24 Fed. R. Serv.2d 357, 358 (W.D. Tenn. 1977) (absent members are not parties for purpose of discovery).

112. MODEL CODE, *supra* note 80, DR 7-104 comment (1969), at 335.

113. 9 Cal.3d 603, 108 Cal. Rptr. 359 (1973).

114. *Id.* at 609 & n.7, 108 Cal. Rptr. at 363 & n.7.

115. *Id.* at 607, 108 Cal. Rptr. at 361.

116. *Id.* at 609-10, 108 Cal. Rptr. at 363.

117. *Id.*, 108 Cal. Rptr. at 363.

118. ABA Committee on Professional Ethics, Informal Op. 1149 (1970).

119. *Id.*

120. *Id.*

121. *See id.* In a class action under rule 23(b)(3), the actual scope of the class is uncertain until the expiration of the exclusion period. *See supra* note 3 (discussion of rule 23(b)(3)). Unless an individual affirmatively excludes himself from the class membership, he will be bound by a final judgment in the class suit. *See supra* note 6 (final judgment binds all members who do not opt out of class action). During the entire course of the class litigation, therefore, potential class members ultimately may have a personal interest in the outcome of the class action. *See id.*

122. *See* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 670 (N.D. Ga. 1983) (class counsel does not fully represent potential class members before class certification); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 n.6 (N.D. Ill. 1982) (DR 7-104 does not apply before class certification); Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA)

of DR 7-104,[123] the disciplinary rule's application in nonclass action contexts,[124] and the relationship that actually exists between the class attorney and the absent class members,[125] however, support the conclusion that federal courts should extend the application of DR 7-104 to the moment of commencement of the class action. From the beginning of a class action the class attorney has a duty to protect the interests of the whole class, thereby establishing a constructive attorney-client relationship with the class members.[126] Moreover, the moment of class certification is an arbitrary distinction for determining when potential class members need DR 7-104's protection from improper communications by an adverse attorney possessing the advantage of superior legal knowledge and skill.[127] The potential for defendants' abusive communications to unduly influence legally unsophisticated individuals into forfeiting their rights and to interfere with the class attorney's ability to protect the interests of the whole class exists both before and after a district court certifies the class.[128]

Every district court decision passing on the applicability of DR 7-104 in class action suits has addressed only subsection (A)(1) of that rule, which

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1093, 1094 (N.D. Fla. 1977) (DR 7-104(A)(1) does not prohibit communications between defendant's counsel and class members before class certification). Many federal court decisions, however, have required the presence of the class counsel in settlement negotiations with potential class members without expressly invoking DR 7-104. *See, e.g.,* Weight Watchers v. Weight Watchers Int'l, Inc., 55 F.R.D. 50, 51 (E.D.N.Y. 1971) (class counsel must be present at precertification settlement negotiations with individual potential class members), *aff'd,* 455 F.2d 770 (2d Cir. 1972); Hartford Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131, 137 (S.D.N.Y. 1971) (same); *see supra* note 62 (discussion of precertification settlements with individual potential class members).

123. *See supra* notes 82-84 and accompanying text (discussion of underlying principles of DR 7-104).

124. *See supra* notes 82-84 and accompanying text (discussion of underlying principles of DR 7-104).

125. *See supra* notes 113-121 and accompanying text (application of DR 7-104 in nonclass action litigation).

126. *See* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (class counsel clearly has duty to represent interest of absent class members at institution of lawsuit); *see also* Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.) (courts should treat suit brought as class action as such until class determination that class action not proper), *cert. denied,* 398 U.S. 950 (1970). The parties may not dismiss or compromise a class action without prior court approval once a plaintiff files a class suit. FED. R. CIV. P. 23(e); *see supra* note 62 (discussion of rule 23(e)). Consequently, rule 23(e) places on the class attorney the responsibility to protect the interests of the class. *See* 2 H. NEWBERG, *supra* note 11, § 2705(a), at 1174; *id.* at 1172 (class representative enters into fiduciary relationship with class at moment class representative files complaint).

127. *See supra* notes 82-84 and accompanying text (discussion of purpose of DR 7-104 to protect lay adverse parties from improper communications by adverse counsel).

128. *See, e.g.,* Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D.N.Y. 1974) (defendant obtained releases of liability from potential class members without benefit of legal advice from class counsel); Greisler v. Hardee's Food Sys., 1973 Trade Cas. (CCH) ¶ 74,455, at 94,039 (E.D. Pa. 1973) (defendant obtained releases of liability from potential class members without legal advice from class counsel); *id.* (defendant's solicitation of releases of liability deprived remaining class members of class action remedy).

governs an attorney's contact with parties represented by a lawyer.[129] DR 7-104(A)(2), however, expressly prohibits an attorney from giving any advice, other than advice to seek counsel, to any person who is not represented by an attorney if that person's interests have a "reasonable possibility" of being in conflict with those of the attorney's client.[130] The interests of a defendant in a class action suit have a reasonable possibility of conflicting with the interests of the potential class members at the moment a class representative files a complaint on behalf of the potential class members.[131] Accordingly, DR 7-104(A)(2) governs the conduct of the defendant's attorney at least at the moment the class representative files a class suit.[132] The district courts, therefore, should have the authority under DR 7-104(A)(2) to restrict a defendant's abusive communications before class certification even if the class members are not "represented by" the class attorney.

The Model Code of Professional Responsibility applies, of course, only to defendants' attorneys and not to the defendants themselves.[133] Consequently, defendants in class action suits may attempt to avoid the prohibition of DR 7-104 by engaging in *ex parte* communications with the class members without the participation of the defendants' attorneys.[134] The federal courts,

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129. *See, e.g.*, Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 670 (N.D. Ga. 1983) (court applied DR 7-104(A)(1)); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (same); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) (same); Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (N.D. Fla. 1977) (same).

130. MODEL CODE, *supra* note 80, DR 7-104(A)(2). DR 7-104(A)(2) provides:

> (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 interest of his client.

Id. DR 7-104(A)(2) forbids attorney communications with any "person" whose interests are adverse to those of the attorney's client. *Id.* The drafters of the Model Code used the term "person" instead of "party" in order to widen the scope of the disciplinary rule's prohibition. MODEL CODE, *supra* note 80, DR 7-104, comment (1969), at 341-42. Under DR 7-104(A)(2), an attorney may not advise an unrepresented party concerning a certain course of conduct that the individual should pursue. ABA Committee on Professional Ethics, Informal Op. 1034 (1968).

131. *See supra* note 2 (class representative initiates claim on behalf of absent class members). The interest of a class action defendant conflict with potential class members to the extent that the class representative has asserted a claim against the defendant on behalf of the potential class members. *See id.* Attempts by defendants to obtain from potential class members releases of liability or to negotiate settlements of the alleged class claim demonstrate that class action defendants and potential class members have adverse interest. *See supra* notes 34-38 and accompanying text and note 62 (discussion of attempts by defendants to dispose of individual claims of potential class members); *cf.* ABA Committee on Professional Ethics, Informal Op. 1140 (1970) (improper for attorney to solicit from unrepresented party waivers of legal process); ABA Committee on Professional Ethics and Grievances, Formal Op. 58 (1931) (improper for attorney of husband to secure from unrepresented wife consent agreement for divorce).

132. *See supra* note 131 (discussion of adverse interests of class defendant and potential class members).

133. *See* MODEL CODE, *supra* note 80, DR 7-104(A)(1).

134. *See* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 671 (N.D. Ga. 1983);

however, have interpreted the provision in DR 7-104(A)(1) that an attorney "shall not ... cause another to communicate"[135] as placing on the attorney an affirmative duty to dissuade his client from communicating with an adverse party.[136] For instance, in *Impervious Paint Industries v. Ashland Oil*,[137] the United States District Court for the Western District of Kentucky considered whether an attorney for a class action defendant violated DR 7-104(A)(1) when the attorney failed to advise against the defendant's unauthorized communications.[138] After the district court in *Ashland Oil* certified the plaintiff's antitrust suit as a class action, the defendant engaged in communications with the class members in an effort to persuade them to opt out of the class membership.[139] The district court in *Ashland Oil* acknowledged that the defendant's attorneys themselves did not communicate with the class members and that the attorneys probably did not advise the defendant to engage in such communications.[140] The *Ashland Oil* court held, nevertheless, that the defendant's attorneys violated DR 7-104(A)(1) because the attorneys, being aware of the defendant's communications, should have advised against the defendant's course of action.[141] Consequently, the *Ashland Oil* court restored to the class membership all of the class members who opted out of the class suit as a result of the defendant's unauthorized communications.[142]

Similarly, in *Kleiner v. First National Bank*,[143] the United States District Court for the Northern District of Georgia imposed sanctions on the defendant and its counsel for the defendant's unauthorized communications with absent class members.[144] In *Kleiner*, the defendant bank engaged in a

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Impervious Paint Indus. V. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981); *infra* text accompanying notes 137-47 (discussion of attorneys' knowledge of defendants' *ex parte* communications with absent class members).

135. *See* MODEL CODE, *supra* note 80, DR 7-104(A)(1).

136. *See* Kleiner v. First Nat'l Bank, 37 Fed. R. Serv.2d 655, 671 (N.D. Ga. 1983) (unethical for attorney to sanction defendant-clients' unauthorized communication); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (attorney has affirmative duty to dissuade defendant from engaging in unauthorized communications).

137. 508 F. Supp. 720 (W.D. Ky. 1981).

138. *Id.* at 723.

139. *Id.* at 722. The defendant in *Impervious Paint Indus. v. Ashland Oil* sent to potential class members additional copies of the class notice, reminding them of the need to affirmatively opt out within the exclusion period. *Id.* Additionally, the defendant advised the potential class members that the members might be subjected to discovery and other legal procedures if they failed to exclude themselves from the class membership. *Id.* The district court in *Ashland Oil* stated that the defendant's contact with the class members was especially disturbing because such contact included advice that the district court specifically omitted from the class notice. *Id.* at 723.

140. *Id.*

141. *Id.*

142. *Id.* at 724. The *Ashland Oil* court, in addition to restoring the class members to the class, issued an injunction against subsequent communications by the defendants and ordered the delivery of special notices to the class members whom the defendants contacted. *Id.*

143. 37 Fed. R. Serv.2d 655 (N.D. Ga. 1983).

144. *Id.* at 673, 675-77. The *Kleiner* court ordered the defendant to reimburse plaintiff's

systematic program of communication with potential class members on the advice of its counsel that such communications were permissible.[145] Moreover, the defendant's counsel helped prepare the information that the bank distributed to other potential class members.[146] The *Kleiner* court concluded that the attorney's conduct was, in effect, an unethical direct communication with class members made without the required consent of the class counsel.[147] The *Kleiner* court, in accord with the *Ashland Oil* decision, preserved the integrity of DR 7-104(A)(1) and the class action device by placing on the defendant's attorney a duty to dissuade his client from engaging in unauthorized communications with potential class members.

III. CONCLUSION

A final judgment in a rule 23(b)(3) class suit binds all members who do not exclude themselves from the class membership.[148] Potential class members, therefore, must receive unbiased information about the merits of the case to make an independent decision whether to participate in the class litigation.[149] Consequently, federal district courts have the responsibility to ensure that potential class members receive the "best notice practicable" and to protect such members from unauthorized and misleading communications.[150] District courts have both the duty and broad authority to govern the conduct of class action defendants and their attorneys.[151] Although all federal courts prohibit defendants' *ex parte*, unauthorized communications with absent class members after class certification,[152] many courts have refused to prohibit such unauthorized communications before class certification.[153] Defendants' precertification communications, however, present, to the same extent as unauthorized post-certification communications, the danger of undermining the purpose and effectiveness of the impartial class notice

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counsel for the expenses incurred in the present litigation, imposed a fine on the defendant's attorney and disqualified the defendant's attorney from subsequent participation in the case. *Id.* at 675-77.

145. *Id.* at 671.

146. *Id.*

147. *Id.*

148. FED. R. CIV. P. 23(c)(3).

149. *See supra* note 6 (discussion of potential class members' need to obtain unbiased information about merits of class suit).

150. *See supra* note 7 (discussion of district courts' duty to protect interests of potential class members).

151. *See supra* note 19 (discussion of district courts' authority to regulate communications with absent class members).

152. *See supra* note 64 and accompanying text (discussion of rationale for prohibiting defendants' post certification communications with absent class members).

153. *See supra* note 34 (list of federal courts that allow defendants' precertification communications with absent class members).

and impair the district courts' ability to safeguard potential class members from misleading and coercive communications.[154] Defendants' precertification communications may deprive potential class members of their ability to make a knowedgeable and independent decision whether to remain in the class membership.[155] Moreover, such communications may result in potential class members forfeiting their legal rights against the defendant without the benefit of legal counsel or of the impartial explanation of the class suit provided by the class notice.[156]

Federal district courts, therefore, should enter a precertification order in every class action suit prohibiting defendants' and defendants' attorneys' unauthorized, *ex parte* communications that attempt to dissuade potential class members from participating in the class litigation or that would mislead, unduly influence, or adversely affect the interests of potential class members.[157] Such a district court order would allow defendants' communications made in the ordinary course of business[158] and authorize defendants' trial preparation through ordinary discovery procedures.[159] Defendants could distribute settlement offers to potential class members after the district court's determination that the communication is neutrally worded[160] and could engage in settlement negotiations with potential class members with the presence of the class counsel.[161] This type of district court order promotes the dictate of DR 7-104(A)(2) prohibiting an attorney's communications with persons whose interests are likely to be adverse to those of the attorney's client[162] and the policy of the Supreme Court's decision in *Bernard* of preventing interference with the formation and prosecution of class action suits.[163]

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154. *See supra* note 7 (discussion of district courts' responsibility to protect absent class members form unauthorized and misleading communications).

155. *See supra* notes 6 & 59 (discussion of potential class members' need to obtain unbiased information about merits of class suit).

156. *See supra* note 60 (instances of potential class members' forfeiting legal rights against defendants).

157. *See supra* note 62 and accompanying text (discussion of proposed district court order).

158. *See supra* note 55 (discussion of communications made in the ordinary course of business).

159. *See supra* notes 16 & 104 (discussion of discovery as proper method of trial preparation).

160. *See supra* note 62 (instances of district courts invoking their authority to ensure unbiased settlement offers).

161. *See supra* note 62 (instances of district courts invoking their authority to ensure unbiased settlement offers).

162. *See supra* notes 130-31 and accompany text (discussion of DR 7-104(A)(2) in class action suits).

163. *See supra* note 32 and accompanying text (discussion of Supreme Court's decision in *Bernard*).