Communications with Putative Class Members in Employment-Related Class and Collective Actions

By Steven W. Moore

Employment-related class actions and collective actions are high-stakes litigation for employees and employers alike. Many of these cases involve hundreds, if not thousands, of class members. They also present unique and expensive challenges in discovery and the development of evidence, with many ethical traps for the unwary practitioner along the way. This paper presents a review of the most common ethical problems that both plaintiffs’ and defense counsel may encounter regarding communications with putative class members, including the applicable ABA Model Rules of Professional Conduct which govern such situations.

Rule 23 Class Actions

Class actions brought under Fed. R. Civ. P. 23 in the employment context generally have been filed in situations where an employer’s policy, practice, or procedure has systemically affected a group of applicants or employees based on their race, gender, or some other protected characteristic. These class actions have focused on hiring, examinations, qualification standards, promotions, training, compensation, benefits, drug and alcohol testing, discipline, reductions in force, and other terminations from employment. Perhaps the most common

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2 Although a number of theories have been used to litigate class-wide discrimination claims, plaintiffs typically bring class-wide claims alleging violations of Title VII and other related civil rights statutes under two primary theories. First, claims alleging intentional discrimination on a class-wide basis have generally followed the pattern and practice theory first articulated by the Supreme Court in International Brotherhood of Teamsters v. United States, 431 U.S. 329 (1977), wherein the discrimination was alleged to be so pervasive that it was the standard operating procedure of the employer. Additionally, many class actions in this area of law are filed under an adverse impact theory in line with Griggs v. Duke Power Co., 401 U.S. 424 (1971), wherein a neutral practice or policy was alleged to adversely impact a protected group. Both theories rely heavily on statistical analyses performed by labor economists or statisticians, as well as anecdotal evidence.
employment-related class actions under Rule 23 are those filed under theories that Title VII of the Civil Rights Act of 1964 has been violated with respect to a class of applicants or employees on the basis of their race or gender. Class actions under Rule 23 also may assert other employment-related claims such as racial discrimination under 42 U.S.C. § 1981, disability discrimination under the Americans with Disabilities Act, employee benefit claims under the Employee Retirement Income and Security Act, and constitutional violations under 42 U.S.C. § 1983, as well as myriad state law claims.

In a typical employment-related class action under Rule 23, the battle is often won or lost at the class certification stage. As a result, at the beginning of a Rule 23 case, it is typical for both sides to engage in a flurry of activity to gather evidence to either support or oppose class certification, which invariably includes interviewing and obtaining declarations or affidavits from putative class members.

Perhaps because the stakes are so high in this type of complex litigation, counsel are often quick to cast aspersions against each other regarding communications with putative class members before a class has been certified. Where parties file motions regarding such communications, the courts themselves often resolve these issues through their general authority under Rule 23 or related state procedural law to control communications by counsel with putative class members, particularly those communications that are misleading and coercive in nature. See e.g., Gulf Oil v. Bernard, 452 U.S. 89, 101-02 (1981) (district court has authority under Fed. R. Civ. P. 23 to enter orders limiting communications between counsel and class members based on a “clear record and specific finding that reflect a weighing of the need for a limitation and a potential interference with the rights of the parties”). However, both plaintiffs’ and defense counsel must also be cognizant of the applicable rules of professional conduct which also govern their communications with putative class members.

The American Bar Association, in Formal Opinion 07-445, addresses the parameters within which both class and defense counsel may ethically communicate with persons who in the future may become class members. According to the ABA, “[t]he key to evaluating the propriety of contacting putative class members is whether they are deemed to be represented by the lawyer or lawyers seeking to certify a class.” This is so because Rule 4.2 of the ABA Model Rules of Professional Conduct prohibits a lawyer from communicating about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter. In class litigation, however, the ABA explains, “[a] client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.” In other words, putative class members are not represented parties within the meaning of Model Rule 4.2 before certification of the class and the expiration of the opt-out period.

The ABA Formal Opinion explains that “[b]oth plaintiffs’ counsel and defense counsel have a legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified.” Thus, counsel for either side may communicate with putative class members in an effort to gather evidence to either support or oppose class certification. However, lawyers communicating with class members must still comply with Model Rule 4.3, which
requires both sides to refrain from giving legal advice other than advice to retain counsel, if warranted.

If the intent of plaintiffs’ counsel in communicating with a putative class member is to seek to represent that person as a named plaintiff, adherence to Model Rule 7.3 is required. This Rule provides that a “lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain,” unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Rule 7.3(c) states that any permissible communication must include the words “Advertising Material” on the outside of the envelope or at the beginning or ending of any recorded or electronic communication.

Collective Actions under Section 216(b) of the FLSA

While Formal Opinion 07-445 is very helpful in providing guidance in the traditional Rule 23 context of class litigation, the opinion does not address ethical issues in the context of the collective action mechanism. In recent times, collective actions under the Fair Labor Standards Act of 1938 have been one of the fastest growing areas of representational litigation, far outpacing Title VII class actions in terms of case filings across the nation. Although FLSA collective actions are all the rage these days, collective actions can also be brought under other federal labor and employment laws. For example, 29 U.S.C. § 626(b), which incorporates the opt-in mechanism of the FLSA requiring that the employees at issue be “similarly situated,” authorizes collective actions under the Age Discrimination in Employment Act. Additionally, Equal Pay Act claims can be brought under the collective action mechanism, as the EPA’s remedies are the same as those of the FLSA. None of these collective actions, however, follow the traditional certification paradigm of Rule 23 and its opt-out procedures under Rule 23(b)(3). Instead, Section 216(b) of the FLSA provides for an opt-in class action where the complaining employees are “similarly situated.”

In a Rule 23 class action, each person who falls within the definition of a class member is bound by the judgment, whether favorable or not, unless the case is under Rule 23(b)(3) and the person has opted out. By contrast, in an FLSA collective action, a putative plaintiff must affirmatively “opt in” to the action in order to be considered to be a class member and to be bound by the outcome of the action, by filing a written consent with the court. Another major difference between Rule 23 class actions and collective actions is that the commencement of a

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3 In FLSA collective action litigation, employee challenges have focused on two primary theories. First, employees have alleged that they have been misclassified as exempt when in fact they are really non-exempt employees who are owed overtime compensation for hours worked in excess of 40 in a given workweek. These claims are generally premised upon the theory that the employees at issue do not fall within one of the white-collar exemptions for executive, administrative, or professional employees, or the theory that they were not paid on a true salary basis as the FLSA requires. Second, non-exempt employees have alleged that they have not been paid for off-the-clock compensable work ordinarily in the context of pre-shift and post-shift work or during meal and rest periods. There also has been a steady increase of “donning and doffing” cases recently, wherein employees claim that the time spent putting on and taking off their work-related clothing and/or other gear is compensable time under the FLSA. While donning and doffing theories first became popular in the poultry industry, the theory has been expanded to other industries where workers customarily wear protective gear.
collective action does not toll the statute of limitations for putative class members as in a Rule 23 class action. But perhaps the most substantive difference between Rule 23 and Section 216(b) is the lenient standard employed in collective actions to conditionally certify a class under the “similarly situated” analysis, compared to Rule 23’s rigorous analysis for certification.4

Like the parties to a Rule 23 class action, parties to a collective action are also focused on gathering evidence from putative class members on the issue of whether a class should be certified. Brown v. Mustang Sally’s Spirits and Grill, Inc., 2012 WL 4764585 (W.D.N.Y. Oct. 5, 2012) (commenting in FLSA collective action that “[b]oth parties need to be able to communicate with putative class members—if only to engage in discovery regarding issues relevant to class certification—from the earliest stages of class litigation”). This may include factual inquiries resulting in the gathering of declarations and affidavits. Additionally, because the statute of limitations is not tolled with the filing of the collective action, it is often the case that many putative class members will opt into the case before the court has conditionally certified a class. Given the running of the statute of limitations, plaintiffs’ counsel may feel obliged to communicate with class members to educate them about the pending case, that the statute of limitations has not been tolled, and the need to file a consent form.

However, the Supreme Court of the United States has made manifestly clear that a district court has a managerial responsibility to oversee the process by which putative class members are given notice of, and allowed to join, a Section 216(b) collective action. See Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 169 (1989). Court supervision of any notice issued to putative class members is necessary because “the potential for misuse of the class device, as by misleading communications, may be countered by court-authorized notice.” Id. at 171; see also Maddox v. Knowledge Learning Corp., 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007) (it is within the court’s discretion to prohibit plaintiffs from issuing pre-certification statements that are factually inaccurate, unbalanced, or misleading); Taylor v. CompUSA, Inc., 2004 WL 1660939, at *3 (N.D. Ga. June 29, 2004) (“[U]ntil the Court rules on the motion for conditional certification and approval of notice, Plaintiffs shall not include such unqualified, misleading statements in their communications with potential plaintiffs”)

Where plaintiffs’ counsel sends notice and “consent to sue” forms to putative class members prior to a court’s ruling on a motion for conditional certification, such communications have been held to “usurp[] th[e] [c]ourt’s power and statutory duty to oversee the FLSA-mandated process for court-facilitated notice to potential collective action members, including the fair content of such notice.” Boudier v. Prudential Fin., Inc., 2007 WL 3396303, at * 2

4 In this regard, most circuits have approved a two-step “ad hoc” approach in determining whether plaintiffs are “similarly situated” for purposes of Section 216(b). Under this approach, a court typically makes an initial “notice stage” determination of whether plaintiffs are “similarly situated.” In other words, the district court determines whether a collective action should be certified for purposes of sending notice of the action to potential class members. For conditional certification at the notice stage, a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” At the end of the discovery period, the court then revisits the certification issue and makes a second determination (often in response to a motion to decertify filed by the defendant employer) of whether the plaintiffs are “similarly situated” using a stricter standard. During this “second stage” analysis, a court generally reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant which appear to be individual to each plaintiff; and fairness and procedural considerations.
(D.N.J. Nov. 8, 2007) (“Outside the context of a notice process supervised by the Court, plaintiffs’ attorneys are not permitted unilaterally to send unsolicited notices regarding the case to putative FLSA class members not yet parties to an action conditionally certified by the Court.”). Further, plaintiffs’ counsel use of advertisements to notify putative class members of a lawsuit has the potential for abuse and confusion, as conflicts can arise between communications made by plaintiffs’ counsel and the eventual court-authorized notice. See Ruggles v. Wellpoint, Inc., 591 F. Supp. 2d 150, 164 (N.D.N.Y. 2008) (ordering that because of plaintiffs’ counsel’s misleading advertisements and website, the court would take over the notice process altogether). See also Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630-31 (D. Colo. 2002) (prohibiting plaintiffs from providing notice via electronic means or over the Internet because providing notice by mail “ensures the integrity of a judicially controlled communication directed to the intended audience.”). As further stated in Reab: “[E]lectronic communication inherently has the potential to be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court. Electronic mail heightens the risk that the communication will be reproduced to large numbers of people who could compromise the integrity of the notice process. In addition, email messages could be forwarded to nonclass members and posted to internet sites with great ease.” Id.

Courts have also taken remedial action against defendants where they have issued misleading and coercive communications in FLSA collective actions. Longcier v. HL-A Co., Inc., 595 F. Supp. 2d 1218, 1246 (S.D. Ala. 2008) (striking declarations obtained from putative class members prior to conditional certification in an FLSA opt-in collective action, and barring defendant from utilizing declarations for any purpose in the litigation, where the declarations had been obtained improperly and in bad faith); Belt v. Emcare Inc., 299 F. Supp. 2d 664, 669 (E.D. Tex. 2003) (enjoining defendant from further unauthorized communication with absent class members where the court found evidence that defendant had acted willfully and in bad faith).

Most of these issues arising in the context of Section 216(b) collective actions have been addressed under courts’ general authority to regulate the notice process and to address any misleading or coercive communications to putative class members. As a result, there is a dearth of case law addressing these issues in the context of rules of professional conduct being implicated. While some of the same guiding principles supporting the rationale of ABA Formal Opinion 07-445 would apply to collective action litigation, there also are some differences. First, as in Rule 23 class litigation, both plaintiffs’ counsel and defense counsel should be able to communicate with potential class members before a Section 216(b) case is conditionally certified for purposes of fact gathering related to the merits or certification of the case. But once a collective action is conditionally certified, that does not mean that class counsel, as in a typical Rule 23 case, would presumptively represent each member of the putative class. This is so because Section 216(b) requires class members to affirmatively opt into the pending action by filing consent forms. Thus, if an employee has decided not to opt into a conditionally certified collective action after receiving notice of conditional certification and the opt-in period has expired, it logically follows that defense counsel would be free to communicate with that employee for purposes of fact gathering. This is significantly different than the situation where a court has certified a class under Rule 23 because all employees who fall within the class definition and who have not otherwise opted out are part of the certified class and thus deemed a represented party within the context of Model Rule 4.2.
Having said this, defense counsel in a collective action should avoid communications with absent class members during the notice period, that is, the time frame between notice of conditional class certification and expiration of the opt-in period in a collective action. See e.g. Gortat v. Capalla Bros., Inc., 2010 WL 1879922 (E.D.N.Y. May 10, 2010) (commenting that “plaintiffs” counsel does not ‘technically’ represent the individuals who have not yet opted in to the FLSA collective action. This distinction, however, is irrelevant in light of the fact that the class definition covers anyone who would be eligible to join the collective action).

The discussion in Formal Opinion 07-445 regarding Model Rule 7.3 would also apply in the context of collective action litigation. In other words, plaintiffs’ counsel may not by in-person, live telephone, or real-time electronic contact solicit an employee to become a client when a significant motive for the lawyer’s doing so is pecuniary gain. See Bennett v. Advanced Cable Contractors, Inc., 2012 WL 1600443 (N.D. Ga. May 7, 2012). As mentioned above, class counsel in FLSA litigation may feel obliged to influence as many potential class members as possible to opt into the collective action, as the statute of limitations is not tolled with the filing of a putative collective action. But it may be difficult in such circumstances for a court to decipher whether any pre-certification communications were for any reason other than the pecuniary gain of plaintiffs’ counsel. See e.g., Frye v. Baptist Mem. Hosp., Inc., 2008 U.S. Dist. LEXIS 41511 (W.D. Tenn. Sept. 16, 2008). To the extent such communications may be in writing, Rule 7.3(c) would also apply, requiring the written communication to include the words “Advertising Material” on the outside of the envelope or at the beginning or ending of any e-mail.