Talk is not always cheap

Beware of coercion: Monitoring defense communications with class members is particularly important between defendant employers and their employees

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Plaintiffs' class action attorneys (class counsel) must keep a close watch on communications between defendants and class members – including during pre-certification or opt-in periods – to protect the interests of the class. In employment class and collective actions especially, defendants' communications with class members pose significant dangers. The risks of undue influence or coercion from power imbalances between employers and their employees loom large. Accordingly, courts place reasoned restrictions on defendant contacts with class members to protect them from misleading, confusing, and coercive communications.

Since the Supreme Court's seminal case *Gulf Oil Co. v. Bernard*,[1] "the trend is to require some form of court supervision of all communications between defendants and potential class members."[2] This article provides a basic overview of California law on communications with class members and best practices to encourage defendants to "do the right thing" when communicating with class member employees by providing *Miranda*-style disclosures and obtaining written consent.

Ethical considerations in class communications

California's professional responsibility rules, which were recently amended effective November 1, 2018, guide counsel communications. Pursuant to California Rule of Professional Conduct 4.2, counsel "shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer," or if the party is "seeking advice or representation from" counsel. Clearly, the coverage of Rule 4.2 extends to nonparties represented by

counsel. Moreover, Rule 1.13(f) explains that "[i]n dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing."

Additionally, Federal Rule of Civil Procedure 23(d) empowers courts to require notice to class members, "for the protection of the members of the class or otherwise for the fair conduct of the action," or impose "conditions" on the parties. Courts have held that Rule 23(d) authorizes the judicial regulation of communications with potential class members even before certification. As the California appellate court in *Parris v. Superior Court*[3] held, "pre-certification communications are properly subject to prior court approval" because "it is the court's authority and duty to exercise control over the class action to protect the rights of all parties, and to prevent abuses which might undermine the proper administration of justice."

Pre-certification/pre-opt-in communications between employers and their employees

While defense counsel may have the right to speak to employees as witnesses who are proposed class members in defending against a class suit, and some California courts recognize that proposed class members are not represented parties,[4] courts will take corrective measure if communications are misleading, coercive, or confusing.

For example, in *Mevorah v. Wells Fargo Home Mortgage., Inc.*,[5] the court held that the proper remedy for defense counsel's misleading and improper interviews of employee class members pre-certification (which were conducted to get information and declarations) was the disclosure by the defendant of all employees contacted for interviews, an opportunity for the plaintiff to depose them, and a prohibition on all class member contacts without approval by the court. The court found that the pre-certification interviews were misleading and improper because they failed to advise employees of (1) the pendency of the litigation and (2) the potentially adverse nature of the corporation's interest and the employees' interests.

Similarly, in *Acosta v. Southwest Fuel Mgmt., Inc.*,[6] the defendant had interviewed thirty-seven potential class members and submitted their declarations to the court. The court found that the communications between the employees and the employer were coercive and misleading because employees were not being given key information about the lawsuit, such as the time period it covered. The district court excluded those witnesses and their declarations, enjoined the defendants and their counsel from communicating with potential class members about matters related to the case, and fashioned other forms of relief designed to ensure that class members did not feel obligated to speak to defense counsel.

Moreover, for those that cross the line, sanctions can be severe.[7] This line of precedent teaches parties in class litigation to limit any communications between employers and employees that might "misrepresent the status or effect of the pending action, or which may cause confusion, adversely affect the administration of justice."[8]

Defense counsel should provide *Miranda*-style disclosures to proposed class members

Counsel on both sides of the class action should discuss how to minimize the potential dangers in pre-certification communications. To best protect proposed class members' rights, defense counsel should provide *Miranda*-style disclosures prior to any discussions or interviews by the employer. Such disclosures should include: (1) written consent to continue the interview; and (2) written explanations that inform employees of the pending class action, that information obtained in the interview could be used against them in the pending suit, that they have no obligation to speak to defense counsel, and that if they refuse to do so, they will not be retaliated against.

Why are *Miranda* warnings important? In the criminal context, the U.S. Supreme Court requires preemptory disclosures to address the power imbalance between police and those they interview. *Miranda* warnings are required because mandatory disclosures are needed to offset the inherent coercion embedded in police interrogation. Accordingly, unless police interrogators inform interviewees of their constitutional rights and obtain an express waiver of those rights, responses are suppressed based on a presumption that they are the product of coercion.[9]

Fear of coercion and voluntariness are equally applicable in the civil context, where the interrogator – the employer – has the power to take away the interviewee's livelihood. Embedded in any interview between employer and employee is an inherent coercion; therefore, full disclosure and actual knowledge and express consent to be interviewed must be provided.

The importance of such disclosures by employers is exemplified in *Richardson v. Interstate Hotels & Resorts, Inc.*,[10] where the defense counsel represented 14 potential class members at their depositions and submitted the declarations of those potential class members. The district court held that defense counsel plainly violated the California Rules of Professional Conduct when they represented the declarants at their depositions "without obtaining informed written consent beforehand." The court found such a violation despite the defendant informing employees of the pending class action, that they had no obligation to speak to defense counsel, information obtained could be used in the lawsuit, they could

retain counsel, and they would not be retaliated against. The district court concluded that "defense counsel could be disqualified entirely from the case as a result," but allowed defense counsel to continue representing the defendant with the following conditions: (1) nothing procured by defense counsel from the employees that they represented could be used in the case; (2) defense counsel could not cross-examine any employees they represented; and (3) "[p]ossibly, the jury will be informed as to the facts underlying defense counsel's representation of hotel employees."

On the other side of the spectrum, the decision in *Chindarah v. Pick Up Stix, Inc.*[11] represents the harm of allowing unfettered communications between defendant employers and proposed class members. The defendant employer entered into settlement agreements with 200 proposed class members asserting claims for misclassification and unpaid overtime. The court concluded "there is no statute providing that an employee cannot release his claim to past overtime wages as part of a settlement of a bona fide dispute over those wages."

Perhaps because plaintiffs' counsel failed to raise the issue that such agreements should be void based on the coercive effects of the settlement "negotiations," the issue of actual knowledge and consent was not addressed by the court. A policy that allows for the "picking off" of class members prior to certification should be prohibited given the inherent coercion, exploitation, and unfairness such a policy permits. *Chindarah* should be overturned in light of these principles.

Conclusion

Given the importance of the workplace rights involved and the power imbalance embedded in employment relationships, class counsel must keep a close watch on communications between defendant employers, their counsel, and proposed class members. Class counsel should engage defense counsel in setting ground rules for any interviews of proposed class members that include *Miranda*-type disclosures. Class counsel should also talk frequently with named plaintiffs and other employee witnesses so that they are aware if and when defendants are speaking to proposed class members about the litigation. Better to be proactive and aware than caught off guard and have to litigate these critical issues after the fact.

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Endnotes

[1] 452 U.S. 89 (1981).
[2] 1 Bus. & Comm. Lit. in Fed. Courts § 15.21(b) (Robert L. Haig ed.) (West 1998).
[3] 109 Cal.App.4th 285, 296 (2003).
[4] See *Atari, Inc. v. Superior Court*, 166 Cal.App.3d 867, 873 (1985) ("[W]e cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party . . . represented by counsel' even before the class is certified.").
[5] No. C-05-1175, 2005 U.S. Dist. Lexis 28615, 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005).
[6] 2018 WL 2207997, at *2 (C.D. Cal. Feb. 20, 2018).
[7] See *Quezada v. Schneider Logistics Transloading & Distribution*, No. 12-2188 CAS (DTBx) (C.D. Cal. March 25, 2013) (prohibiting defendant's communications with class members, striking defendant's 106 declarations, and ordering curative notice); *Wright v. Adventures Rolling Cross Country, Inc.*, No. 12-0982 EMC, 2012 U.S. Dist. LEXIS 83505 (N.D. Cal. June 15, 2012) (granting corrective notice and prohibiting defendants from making contact with proposed class members).
[8] *Howard Gunty Profit Sharing Plan v. Superior Court* 88 Cal.App.4th 572 (2001). See also *Pollar v. Judson Steel Corp.*, 1984 WL 161273, at *2 (N.D. Cal. 1984) (holding that the employer's communication with class members in an uncertified class action lawsuit were misleading because they did not disclose the existence of the class action lawsuit or identify class counsel).
[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[10] No. C 16-06772 WHA, 2018 WL 1258192, at *7 (N.D. Cal. Mar. 12, 2018).
[11] 171 Cal.App.4th 796 (2009).