RESTRICTIONS ON COMMUNICATION BY CLASS ACTION PARTIES AND ATTORNEYS

Many have criticized the class action device, claiming that it invites abuse by class members and their opponents, as well as by counsel for both sides. In particular, critics have noted that attorneys may solicit class action clients or fees and that parties and their attorneys may misrepresent the benefits or drawbacks of a class action in order to encourage potential class members to opt out or remain in the suit. In response to these potential abuses, the Federal Judicial Center has promulgated a suggested local rule requiring that parties and their attorneys obtain court approval prior to communicating with potential class members.[1] Several district courts have adopted this proposed rule, and other district courts have used the rule as a model for orders issued in particular cases.

This Comment will survey abuses of the class action device, as well as the orders and rules used to prevent them. It will then examine challenges to the statutory authority of district courts to promulgate such rules and orders, and the constitutional challenges to "gag orders." Finally, this Comment will discuss alternatives to gag orders and consider whether these alternatives can be both effective and constitutional.

I. REGULATING COMMUNICATION IN CLASS ACTIONS: PRESENT APPROACHES

A. *Potential Communication Abuses in Class Actions.*

Many legal scholars believe that the class action device is particularly subject to abuse by both class and nonclass parties.[2] The *Manual for Complex Litigation* discusses four prevalent class action communication abuses:

(1) solicitation of direct legal representation of potential and actual

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THE FOLLOWING CITATION WILL BE USED IN THIS COMMENT:

FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (1978) [hereinafter cited as MANUAL].

1. MANUAL pt. II, § 1.41.

2. *See, e.g.*, MANUAL pt. I, § 1.41, at 46-47; 3B MOORE'S FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1979); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 7 LINCOLN L. REV. 20, 35-37 (1971).

> class members who are not formal partics to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by defendants of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice.[3]

Attorney solicitation of clients, funds, and fee agreements is one of the most prevalent perceived evils of the class action procedure. The class action device, with its potential for tremendous legal fees, encourages attorneys to seek out litigants.[4] Further, as one court has noted, since Rule 23[5] makes recourse to the courts convenient when it would otherwise be infeasible, that rule encourages class action litigation and thus invites even more solicitation.[6]

Numerous recent cases have discussed the problem of attorneys' "stirring up" litigation.[7] In addition to the traditional fear that such solicitation will encourage baseless, harassing litigation, courts fear that solicitation will harm the solicited client.[8] The Code of Professional Responsibility reflects the courts' concerns by forbidding client solicitation.[9] This in turn encourages courts to inveigh even more heavily

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3. MANUAL pt. I, § 1.41, at 46.

4. Simon, *supra* note 2, at 35-37; *see* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 (1967) (noting that requirement of notice to class makes it difficult to preserve "a general tone which will not lend itself to unseemly solicitation of clients").

5. FED. R. CIV. P. 23.

6. Cotchett v. Avis Rent a Car Sys., Inc., 56 F.R.D. 549, 554 (S.D.N.Y. 1972).

7. *See, e.g.*, Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (attorney for association of franchisees mailed letters of solicitation to franchisees seeking potential class members for suit against franchisor); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D.D.C. 1973) (class certification denied when the named class parties were also the class attorneys); Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972) (attorney filed individual action, then offered to file a class action if other shareholders wished to join); Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971) ("[T]he plain truth is that in many cases Rule 23(b)(3) is being used as a device for solicitation of litigation"); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1971) (class action not permitted when the named plaintiff was also attorney for the class; such action seen as a questionable method of soliciting legal business).

8. The potential harms to the solicited client include "undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference [with the conduct of litigation]." *In re* Primus, 436 U.S. 412, 426 (1978).

9. [Advice to take legal action] is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

against the evil of solicitation.[10]

In several cases the named plaintiff, rather than his attorney, has attempted to persuade other potential class members to participate in the suit.[11] The advantage to the plaintiff is that legal fees may then be shared with the additional class members.[12] Indeed, sharing legal expenses may be the only means of obtaining court access for cases in which the potential individual recovery is small.[13] Unless litigants with small claims are able to join together to achieve economies of scale, legal fees and court costs will normally exceed any individual recovery. In addition to making more suits economically feasible, persuading others to join a class action may enhance chances for settling claims without the expense of litigation.[14] Despite these potential benefits to plaintiffs with worthwhile suits, however, courts have, for fear of stirring up baseless litigation and abusing the judicial process, disapproved of parties' soliciting additional class members.[15]

The drafters of the *Manual* also feared that the party opposed to the class might solicit potential class members to opt out. The spectre

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ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3 (1978).

Disciplinary Rule 2-104(A)(5) of the Code is of special relevance in the class action context: "If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but *shall not seek*, employment from those contacted for the purpose of obtaining their joinder." *Id.* DR 2-104(A)(5) (emphasis added). Courts, however, have been unwilling to impose sanctions upon attorneys under this rule when the attorneys are not motivated by pecuniary considerations. *See, e.g.*, Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931 (7th Cir. 1972) ("A lawyer whose client will benefit from joinder of others similarly situated may seek out claimants if his motive is not to secure fees for himself").

The limits of the ethical constraints imposed by the Code are not always clear. For instance, the Code provides generally that a lawyer who has advised a layman to obtain counsel or take legal action may not accept employment stemming from that advice; however, "[a] lawyer may accept employment by . . . one whom the lawyer reasonably believes to be a client." ABA CODE, *supra* DR 2-104(A)(1). This provision has been utilized to find that a lawyer who sent letters requesting that other members of an association join a proposed class action did not act unethically. The court found that the attorney, retained to represent the association on another matter, could reasonably believe that all association members were his clients. Halverson v. Convenient Food Mart, Inc., 458 F.2d at 930.

10. See note 7 *supra*.

11. *See, e.g.*, Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977).

12. *See* J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58 (S.D. Ohio 1974).

13. *See generally* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501 (1969).

14. See text accompanying notes 16-19 *infra*.

15. *See, e.g.*, J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58 (S.D. Ohio 1974) (denial of class certification proper on ground that named plaintiff solicited class members with intent of sharing expenses). *But see* Coles v. Marsh, 560 F.2d 186 (3d Cir.) (party solicitation of potential class members, while perhaps ethically impermissible, serves to effectuate purposes of Rule 23), *cert. denied*, 434 U.S. 985 (1977).

of long and complex class action litigation and a potentially large class recovery may well encourage the potential defendant to attempt to prevent the certification of the opposing class.[16] One means of preventing certification is to decrease the number of potential class members willing to join in the suit so that the "numerosity" requirement of Rule 23[17] will not be met. This strategy can be effected by reaching settlements with individuals,[18] or, ideally, by convincing potential class members simply to opt out or release their claims.[19]

Rule 23's natural tendency to encourage the potential defendant to solicit opt-outs, releases, and settlements is heightened by the context in which many class suits are brought. Class actions are often brought by employees against employers,[20] or by franchisees against franchisors.[21] In such cases, the employer or the franchisor is in a particularly advantageous position to pressure potential class members to opt out or to release their claims. The class opponent in these cases has the advantage of day-to-day contact with potential members of the class, as well as a superior bargaining position. Consequently, solicitation of releases and requests to opt out has been a common occurrence.[22]

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16. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

17. FED. R. CIV. P. 23(a) requires as a prerequisite to a class action that "the class [be] so numerous that joinder of all members is impracticable."

Courts have been unwilling to establish rigid numerical cutoff points for satisfying the numerosity requirement, though some guidelines at the extremes have emerged. A class action is not proper when there are only seven other potential class members. Hiss v. Hampton, 338 F. Supp. 1141, 1146 (D.D.C. 1972). On the other hand, a class potentially including over 650 members clearly meets the numerosity requirement. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967). Between these extremes, the guidelines are not clear. Courts have held that a class of 26 members does not satisfy the numerosity requirement, Moreland v. Rucker Pharmacal Co., 63 F.R.D. 611, 614 (W.D. La. 1974), while a class of 35 to 70 members may be properly certified, Fidelis Corp. v. Litton Indus., Inc., 293 F. Supp. 164, 170 (S.D.N.Y. 1968). Thus, a class opponent who is able to persuade even a few potential class members to opt out or release their claims may in these marginal cases be able to defeat the entire class action.

18. *E.g.*, American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572 (D. Md. 1974) (class opponent sought to offer compromise to individual class members).

19. *E.g.*, Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65 (E.D.N.Y. 1974) (defendant obtained from members of class statements that they intended to release their claims).

20. *See, e.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Coles v. Marsh, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977).

21. *See, e.g.*, Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65 (E.D.N.Y. 1974); Griesler v. Hardee's Foods Sys., Inc., 1973 Trade Cas. ¶ 74,455 (E.D. Pa. 1973); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 53 F.R.D. 647 (E.D.N.Y.), *modified*, 55 F.R.D. 50 (E.D.N.Y. 1971), *appeal dismissed*, 455 F.2d 770 (2d Cir. 1972).

22. In one case, the court found no coercion when the class opponent obtained statements from potential class members that they intended to release the opponent from all claims. Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D.N.Y. 1974). *See also* Greisler v. Hardee's Foods Sys., Inc., 1973 Trade Cas. ¶ 74,455 (E.D. Pa. 1973). Such tactics, however, are not always effective. *See* Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970) (court refused to

The final problem of abuse in class actions is that of misrepresentation of the benefits and drawbacks of class suits. As discussed earlier, class proponents and class opponents both have an interest in potential class members' joining or opting out of the suit.[23] In order to influence potential class members, either side may be tempted to make misleading statements. For example, in one case the class attorney accompanied the court-ordered notice with an unauthorized letter. The court characterized this action as "improper . . . since there are inferences which might easily be drawn from it which do not reflect accurately the legal position of the members of the class."[24]

Many courts fear that simple reference to the court in a communication may be misleading to the recipients. Potential class members may perceive references to the court or to the title of the action as an expression of judicial support for the claim asserted.[25]

B. *Responses.*

In an effort to prevent or remedy these potential and actual abuses, some courts have gone so far as to deny class certification when abuses of the class device were shown.[26] However, other courts consider this remedy too drastic and harmful primarily to unnamed class members who have not participated in any abusive practices.[27] Other remedies less drastic than denial of certification have been suggested, including remedial notice to class members[28] or disciplinary action against the attorney.[29] These after-the-fact remedies, however, have been criticized as ineffective to combat the abuses. Critics fear that remedial

dismiss suit even after defendant employer secured affidavits from all employees disclaiming any authority to commence suit).

23. See notes 7-21 *supra* and accompanying text.

24. Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 625 (S.D.N.Y. 1968).

25. *See* MANUAL pt. I, § 1.41, at 47.

26. *See* Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 16 Fed. R. Serv. 2d 1021 (N.D. Tex. 1972), *aff'd on other grounds*, 482 F.2d 880 (5th Cir. 1973) (class certification denied when named representatives solicited); Taub v. Glickman, 14 Fed. R. Serv. 2d 847 (S.D.N.Y. 1970) (class status denied when counsel sent nonapproved letter characterized as attempt to stir up litigation); Korn v. Franchard Corp., [1970] FED. SEC. L. REP. (CCH) ¶ 92,845 (S.D.N.Y.) (class decertified because, *inter alia*, plaintiff's attorney sent letter to all class members soliciting their participation in separate suit), *rev'd*, 456 F.2d 1208 (2d Cir. 1972) (former attorney had withdrawn from all connection with case).

27. *See* Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 626 (S.D.N.Y. 1968) (motion to dismiss a class action for misleading statements denied on grounds that statute of limitations had run and unnamed class members would be barred); *accord*, Flaksa v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir.) (dismissal is drastic remedy and should be used only in extreme circumstances), *cert. denied*, 392 U.S. 928 (1968).

28. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972).

29. *Id.*

notice may not undo the ill effects of an abusive practice,[30] that class members may opt out, because of misleading notice, before remedial notice is given,[31] or that the expense of the new notice may be so high that it would be impossible to correct the erroneous information.[32] Similarly, disciplinary actions taken against attorneys cannot reverse the effects of misleading notice, and this remedy will not prevent solicitation by named class members.

In response to these perceived failings of the intermediate remedies and in order to anticipate and prevent abuses, the Federal Judicial Center promulgated its proposed local rule. This rule is aimed at preventing abuses, rather than curing them, through the imposition of a local rule or order "forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members who are not formal parties."[33] The proposed local rule grants exceptions for

> (1) Communications between an attorney and his client or a prospective client, who has on the initiative of the client or the 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. Nor does the rule forbid communications protected by a constitutional right. However, in the latter instance the person making the communication 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.[34]

Thus, the *Manual* establishes a comprehensive "gag order" requiring prior approval of all communications other than those specifically excepted. The authors of the proposed rule, however, set out recommendations for the use of the rule in order to temper its restrictive effect on speech. The *Manual* rule contemplates that hearings on proposed communications will be handled promptly,[35] and that

30. Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 792 n.10 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

31. MANUAL pt. I, § 1.41, at 2 (West Supp. 1978).

32. *Id.* § 1.41, at 3.

33. MANUAL pt. I, § 1.41, at 47 (emphasis in original).

34. *Id.* pt. II, § 1.41, at 263.

35. *Id.* pt. I, § 1.41, at 48-49. The actual protective effect of this requirement of prompt action, however, may be questionable. In one recent case, a hearing on plaintiff's motion for leave to communicate with potential class members was delayed for over a month. During this period, defendant was allowed to solicit settlements actively. Bernard v. Gulf Oil Co., 596 F.2d 1249, 1267 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

nonabusive communications will be freely allowed.[36] Additionally, it suggests that in exceptional cases in which class members do not understand considerations affecting their interests, a court may authorize miscellaneous communication by counsel for representative parties without express prior approval.[37] The effectiveness of these limitations is open to question, however, particularly since these suggestions are not a part of the text of the proposed local rule. Only the text has been adopted substantially verbatim by many courts.[38]

This proposed local rule has found widespread approval. Several district courts have adopted local rules based upon the *Manual*'s proposed rule.[39] Further, courts that have not specifically adopted the rule have nonetheless often based orders upon the proposed local rule.[40]

Needless to say, these local rules have not gone unchallenged. The preferred position of first amendment freedoms insures that constitutional attacks will be made on gag orders, because of their obvious inhibition of speech. Other attacks have focused on the statutory authority of the district courts to promulgate the rules and orders. These attacks, while not uniformly successful, expose problems with the operation of gag rules that deserve attention.

II. STATUTORY AUTHORITY AND POLICY CONFLICTS

The most notable successful attack on a local gag rule came in the case of *Rodgers v. United States Steel Corp.*,[41] which held that the district court lacked the statutory authority to promulgate a local gag rule.[42] The Third Circuit found that the rule was both a regulation of

36. MANUAL pt. I, § 1.41, at 49.

37. *Id.* at 48.

38. See note 39 *infra*.

39. *See, e.g.*, S.D. FLA. R. 19; N.D. GA. R. 221.2-.3; N.D. ILL. R. 22; E.D. LA. R. 2.12; D. MD. R. 20; M.D.N.C.R. 17(b)(6); S.D. OHIO R. 3.9.4; W.D. WASH. R. 23(g).

40. *E.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Vance v. Fashion Two Twenty, Inc., 16 Fed. R. Serv. 2d 1513 (N.D. Ohio 1973); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 728 (N.D. Cal. 1967).

41. 508 F.2d 152 (3d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975). For a complete discussion of the *Rodgers* decision, see 88 HARV. L. REV. 1911 (1975).

42. W.D. PA. R. 34(d), the local rule involved in *Rodgers*, provides:

> No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

The *Rodgers* court took care to note that the local rule it was considering did not contain the exemptions currently embodied in the *Manual*'s proposed rule. *See* 508 F.2d at 164-65 n.18. The same court later ruled upon an order restricting communications that was modeled upon the *Manual*'s rule. It also found this less restrictive rule invalid. Coles v. Marsh, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977).

the general practice of law[43] and inconsistent with the policies underlying Rule 23.[44] According to the court, these findings placed the local rule beyond the rulemaking authority granted to district courts in Rule 83[45] and 28 U.S.C. § 2071.[46]

The *Rodgers* court first noted that the local rule was adopted in order to prevent barratry.[47] The court characterized the rule as an attempt to regulate the practice of law, rather than the conduct of attorneys before the court, and thus beyond the district court's power.[48] This distinction is apparently based on the limitation of a district court's rulemaking powers to the promulgation of rules "governing [the district court's] practice"[49] and "rules for the conduct of [the court's] business."[50] Yet local rules that indirectly regulate attorney conduct have been adopted and upheld.[51] Some courts find authority for such regulations governing ethical practices in the court's power to control the admission of attorneys to practice before the court.[52] This distinction drawn by the *Rodgers* court has not been followed consistently, and it is not a very promising avenue of attack on local gag rules.[53]

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43. 508 F.2d at 163.

44. *Id.*

45. FED. R. CIV. P. 83 provides in part that "[e]ach district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

46. 28 U.S.C. § 2071 (1976) provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

47. 508 F.2d at 163.

48. *Id.* at 163-64.

49. FED. RULE CIV. P. 83. See note 45 *supra.*

50. 28 U.S.C. § 2071 (1976). See note 46 *supra.*

51. *See, e.g.*, United States v. Hvass, 355 U.S. 570 (1958) (local rule aimed at preventing solicitation of personal injury litigation by nonresident attorneys); Schlesinger v. Teitelbaum, 475 F.2d 137 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973) (schedule of contingent fees for use in personal injury actions); DeParcq v. United States Dist. Court, 235 F.2d 692 (8th Cir. 1956) (local rule required nonresident attorneys to associate with local counsel to prevent client solicitation).

52. *See* Atchison, T. & S.F. Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956) (noting the court's power to refuse to allow attorneys engaging in solicitation to appear before the court); Shelley v. Maccabees, 184 F. Supp. 797 (E.D.N.Y. 1960), *cert. denied*, 365 U.S. 818 (1961) (motion to disqualify based upon alleged violation of Canons of Professional Ethics, which were adopted as "general rule[s]" of the court).

53. *But see* Coles v. Marsh, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977), in which the same circuit relied at least partially on this rationale in invalidating a portion of a gag order.

The limits of the district courts' power to promulgate rules have not been clearly drawn. The *Rodgers* court cited Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), *cert. denied*, 371 U.S. 888 (1962), as support for its proposition that courts have no general authority to regulate the practice of law. 508 F.2d at 163. *Gamble* held that the imposition of monetary penalties upon counsel was beyond the rulemaking authority of the local court. The imposition of such fines has, however, been upheld in similar circumstances. *See In re* Sutter, 543 F.2d 1030 (2d Cir. 1976).

The second ground for the *Rodgers* decision was that the local rule conflicted with the policy underlying Rule 23, which the court stated is "a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit."[54] To accomplish this purpose, class attorneys and parties must be able to assess the merits of their claim and the possibility of class certification.[55] The mere existence of a gag rule probably limits this evaluation of the claim since an attorney may be less willing to attempt to communicate when the proposed communication must always be cleared with the court. Additionally, even when permission to communicate with the class is sought and granted, the possibility of open-ended, responsive discussions with class members is hindered by the rule,[56] thereby decreasing the potential informative value of class communications. The prior approval requirement of gag rules also tends to chill discovery by class members, arguably in contravention of the wide-ranging discovery policy embodied in the Federal Rules.[57] Potential class members often also need to obtain information from the class counsel or parties in order to make an enlightened decision about whether or not to opt out or execute a release of claim.[58] A denial of communication may be especially egregious in the not uncommon case in which class opponents are permitted to solicit settlements or releases while named class parties and attorneys are under a gag rule.[59]

The class opponent may also have valid reasons for wishing to communicate with class members without prior court approval. The

54. 508 F.2d at 163. Other courts and commentators, however, have gone much further in their views of the policy goals of Rule 23. One court, for example, suggested that named parties be permitted to solicit funds from other members of the class in order to carry out the purposes of the class action. Norris v. Colonial Commercial Corp., 77 F.R.D. 672, 673 (S.D. Ohio 1977); *see* 88 HARV. L. REV. 1911, 1918 (1975).

55. *See* 88 HARV. L. REV. 1911, 1917-18 (1975).

56. *See* Killiam v. Kroger Co., 24 Fed. R. Serv. 2d 1315 (S.D. Ohio 1978).

While it is theoretically possible for an attorney or party repeatedly to seek permission to communicate with the class in order to engage in responsive discussions, both class attorneys and opponents would more likely limit communications than engage in the cumbersome process of presenting each communication to the court for clearance.

57. *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

58. *See, e.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249, 1269-70 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

59. *See* Bernard v. Gulf Oil Co., 596 F.2d 1249, 1258-59 n.9 (5th Cir. 1979); Rodgers v. United States Steel Corp., 508 F.2d 152, 156 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975). While potential class members may communicate with counsel at the potential party's request, such a solution is problematical at best. The potential member must first determine who the attorneys are and where they are located, while the attorneys are not allowed to disseminate this information without prior approval. Bernard v. Gulf Oil Co., 596 F.2d 1249, 1269-70 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

opponent may wish to engage in discovery regarding the merits of class certification; this discovery is hindered by requiring the opponent to acquire court approval of each discovery request. Further, since class actions are often brought by employees or franchisees, normal business communications may be hampered by a gag rule.[60]

While this policy conflict analysis has some appeal, it is subject to two serious reservations. First, courts have been hesitant to strike down local rules as inconsistent with the Federal Rules unless faced with direct *textual* conflict.[61] Thus, since any conflict that exists here is a matter of policy rather than of text, the local rule may be immune to attack. Nevertheless, a few courts have been willing to strike down local rules that, while not textually in conflict with federal rules, unduly hamper the effectuation of federal policies.[62] This approach is preferable to the narrow "textual conflict" approach, but the degree of its acceptance, and hence the likelihood of striking down gag orders as inconsistent with the policies of the Federal Rules, is uncertain.

The second and more important reservation lies in the fact that there is no consensus about the purpose of the class action device.

> The basic controversy remains whether the proper goal for the class action should be limited to the minimum one of providing a short-cut to otherwise multitudinous litigation, or on the other hand, should be extended to the maximum one of opening court access to otherwise nonlitigable claims.[63]

Commentators taking the former view of the class action procedure tend to emphasize the potential unfairness of the class action device to class opponents and to criticize the use of the class action as a means of solicitation.[64] Courts accepting this view would be much less likely to

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60. *See* Local 734, Bakery Drivers Pension Fund Trust v. Continental Ill. Nat'l Bank & Trust Co., 57 F.R.D 1, 2 (N.D. Ill. 1972).

61. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149 (1973) (local rule providing for six-man jury in civil cases not inconsistent with Rule 48 since federal rule does not specifically guarantee a jury of 12); Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959) (local rule providing for dismissal of action on court's motion not inconsistent with Rule 41(b) providing for dismissal on motion of defendant).

62. *See* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) (rule limiting practice of nonresident attorneys held invalid as applied because it prevented free legal services in civil rights cases); Brown v. City of Meridian, 356 F.2d 602 (5th Cir. 1966) (technical requirements of local rules should not be enforced when requirements would operate to deprive petitioners of effective access to federal courts); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) (local rules may not operate so as to abridge rights of litigants to use federal courts).

63. 3B MOORE'S FEDERAL PRACTICE ¶ 23.02(1), at 42 (2d ed. 1979).

64. *Compare* Ford, *supra* note 13, at 514 n.64 (suggesting that class attorneys be allowed to suggest to class representatives that they informally solicit others to join the litigation) *and* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714-15 (1941) (urging that goal of class suit is to allow representation of claims that would not otherwise be brought because of litigation economics) *with* Simon, *supra* note 2, at 38-39.

strike down gag orders, because they would view the orders as insuring "fairness," rather than hampering the effectuation of Rule 23. Nevertheless, there is consensus at least that Rule 23 was promulgated to allow more efficient litigation of closely related claims.[65] Given the possibility that the imposition of broad gag rules may hinder the achievement of this objective,[66] the continuing utility of these rules must be carefully evaluated.

Even if it is conceded that the courts enjoy this statutory authority to promulgate gag rules and that such rules are consistent with the policies of the Federal Rules, the degree to which gag rules are effective in achieving their stated objectives should be examined. One of the major abuses of the class action device is attorney solicitation of individuals to become named parties.[67] Yet gag orders, which are entered only upon the filing of a class action, cannot reach this prefiling activity. Similarly, gag rules or orders do not reach actions taken by class parties to "drum up" support prior to filing. Finally, both class parties and opponents may use other practices not reached by gag orders to achieve the ends the gag order is designed to prevent. For example, the mere filing of a counterclaim may serve the same purpose of decreasing numerosity as would the active solicitation of requests to opt out.[68]

When the minimal utility of these gag rules that fail to stop abuses of the class action is weighed against the harms that result from hindering the policies of Rule 23, the desirability of gag rules and orders becomes questionable. As these restrictions on communications come under increasing constitutional attack, they will receive even greater scrutiny.

III. CONSTITUTIONAL PROBLEMS

Several cases have unsuccessfully challenged the constitutionality of class action gag orders. Two cases challenged the orders as over-

65. *See* Advisory Committee Notes, Rule 23, 39 F.R.D. 95, 102-03 (1966) (purpose of Rule 23 is to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results").

66. See text accompanying notes 55-60 *supra*.

67. *See* MANUAL pt. I, § 1.41, at 50 & n.35.

68. *See* Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489 (S.D.N.Y. 1973) (noting that "the right to counterclaim is readily subject to abuse as a tactical device to encourage plaintiffs to opt out"). An unnamed class member may prefer to withdraw from the class suit rather than to subject himself to the court's jurisdiction to determine a counterclaim against him. The defense of even a frivolous counterclaim would require a class member to incur legal fees not properly shared with other class members.

broad and as unconstitutional prior restraints on speech.[69] Another case challenged the local rule as an infringement upon politically expressive speech.[70] In order to evaluate the validity of these first amendment challenges to local gag orders, it is necessary first to examine the standard of scrutiny applied to restrictions on communications in similar contexts.[71]

The initial inquiry is whether the order constitutes a prior restraint on speech. This determination is vital because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,"[72] carrying a "heavy presumption" against the validity of the restraint.[73] The majority of courts considering whether judicial orders limiting communications are prior restraints have concluded that the gag orders on parties or counsel are not prior restraints.[74] The cases offer two reasons for this conclusion. First, courts have recognized that protecting the fairness of the judicial process is a substantial interest that could be impaired if litigants and their counsel were to communicate without restriction.[75] Courts so reasoning regard restriction on communication by parties as an acceptable alternative, less restrictive than restraints upon the press.[76] Consequently, judicial gag orders are seen as an alternative to, rather than a species of, prior restraint. Courts using this rationale to distinguish judicial gag orders from prior restraints could note that the distinction was developed in criminal rather than civil cases, and that it should not be applied unthinkingly in the class action context. Although the strong state interest in the fairness of the judicial process has been a major factor in the approval of restrictions on communications in crim-

69. Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

70. Brown v. Gillette Co., 21 Fed. R. Serv. 2d 372 (D. Mass. 1975).

71. Few cases directly discuss the appropriate standard of scrutiny for class action gag orders. Instead, most instances of judicial restrictions on communications have involved orders or rules forbidding extrajudicial communications by attorneys in order to preserve an atmosphere conducive to a fair trial.

72. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

73. *See, e.g.*, Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

74. *In re* Halkin, 598 F.2d 176, 183-86 (D.C. Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248-49 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Society of Professional Journalists v. Martin, 431 F. Supp. 1182, 1188-89 (D.S.C. 1977), *cert. denied*, 434 U.S. 1022 (1978); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1152 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

75. *See In re* Halkin, 598 F.2d 176, 192 (D.C. Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

76. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 & n.8 (1976); *id.* at 601 n.27 (Brennan, J., concurring).

inal cases,[77] this interest is appreciably weaker in civil cases. The strict constitutional demands of impartiality and fairness are attenuated in civil cases; at the same time, it is likely that a gag order in a civil case will restrict expression for a much greater length of time.[78] Thus, restrictions that can be justified in criminal proceedings may well be unjustifiable in civil class actions. Additionally, this distinction was developed to uphold judicial restrictions on extrajudicial comments, rather than to proscribe discussion with potential class members. Although unlimited communication with the class may be abused, any harmful results are likely to be less serious than the feared result of extrajudicial comment—impairment of the ability to impanel an impartial jury.

Second, courts have noted that one hallmark of judicial orders characterized as prior restraints is that individuals charged with violating them may not challenge the constitutionality of the orders as a defense to contempt.[79] In contrast, several courts have attempted to reduce the restrictive effect of orders limiting communications by parties and counsel by holding that the constitutionality of these orders may be challenged as a defense to a charge of their violation.[80] This provision for constitutional challenge is thought to lessen the "chilling" effect of gag orders, because the speaker will not be forced blindly to obey the order to preserve his right to challenge its constitutionality. One commentator, however, has questioned whether this procedural innovation will notably lessen the chilling effect of the orders.[81] Gag orders are aimed at *only* the particular individuals before the court,

77. *See* Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966); United States v. Tijerina, 412 F.2d 661, 667 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

78. *In re* Halkin, 598 F.2d 176, 193 n.40 (D.C. Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

79. *See, e.g., In re* Halkin, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

80. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (3d Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111, 113-14 (7th Cir. 1971); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 789 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1152 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

The rationale offered for this distinction is that gag rules are a product of a court's "legislative," rather than "adjudicative," role. A gag rule, therefore, is not issued as a result of a dispute between adversaries before the court, but rather as a general regulation akin to a statute. *In re* Oliver, 452 F.2d 111, 113-14 (7th Cir. 1971). Under this view, challenges to the constitutionality of such rules may be made in prosecutions for their violation, just as statutes may be challenged. Courts taking this position hold that the collateral bar rule, which precludes one charged with violating a judicial order from raising the order's unconstitutionality as a defense to a contempt citation, does not apply in these cases. For an illustration of the operation of the collateral bar rule, see Walker v. City of Birmingham, 388 U.S. 307 (1967).

81. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 726 n.2 (1978).

creating a much greater likelihood that violation will be detected and punished.[82] This increased likelihood of punishment is likely to counteract any decrease in deterrent effect caused by allowing constitutional challenges to be raised.

Although courts have not deemed gag orders to be presumptively invalid as are prior restraints, they have subjected them to careful scrutiny. For example, the United States Court of Appeals for the District of Columbia applied the following test:

> Initially, the trial court must determine whether a particular protective order in fact restrains expression and the nature of that restraint. . . .
>
> The court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.
>
> In assessing the propriety of a protective order in each case . . ., the trial court must consider and make the necessary findings on each element of the standard.[83]

An examination of class action gag orders under each prong of this test clearly illustrates the constitutional difficulties raised.

A. *The Nature of the First Amendment Interests Implicated.*

Analysis of the propriety of gag orders in class actions requires an awareness of the Supreme Court's recent attempts to categorize "types" of speech and their corresponding levels of first amendment protection. A recent decision considering restrictive orders discussed this categorization process: "First amendment interests will vary according to the type of expression subject to the order. An order restraining publication of official court records open to the public, or an order restraining political speech, implicates different interests than an order restraining commercial information."[84] In a series of recent cases outside the class action context, the Supreme Court has granted heightened first amendment protection to litigation-related activities. These cases are of importance to the class action gag order problem because the activities in

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82. *In re* Halkin, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979); L. TRIBE, *supra* note 81, at 726 n.2.

83. *In re* Halkin, 598 F.2d 176, 191-92 (D.C. Cir. 1979) (footnotes omitted); *cf.* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 788 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978) (quoting NAACP v. Button, 371 U S. 415, 433, 438 (1963)) ("the governmental interests being weighed in balance [must] be 'compelling' and be furthered only by regulation drawn with 'narrow specificity' ").

It must be emphasized that this is only the *general* standard to be applied. As will be discussed later, the *specific* implementation of the standard is a matter of cousiderable controversy. See notes 116-17 *infra* and accompanying text.

84. *In re* Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979) (footnotes omitted).

question in these cases resemble the solicitation and other communications restricted by gag orders.

The litigation-activity cases recognize two situations that give rise to first amendment protection, each of which occurs frequently in class actions. One group of cases emphasizes the importance of protecting speech that stems from the litigation activities of politically motivated groups, or litigation that advances political goals. In *NAACP v. Button*[85] and *In re Primus*[86] the Court found that the nonprofit organizations involved engaged in litigation as a form of political expression and political association. Solicitation of litigation in such circumstances constituted expressive and associational conduct entitled to substantial first amendment protection. These cases stand in stark contrast to *Ohralik v. Ohio State Bar Association*,[87] where the Court upheld a sanction imposed upon an attorney for improper solicitation. The Court drew an important distinction between a lawyer's mere in-person solicitation of remunerative employment and similar actions that also involved political expression, exercise of associational freedom, or the rendering of mutual assistance in asserting legal rights.[88] Because of the different first amendment interests implicated in these cases, substantially different levels of constitutional scrutiny were employed.[89]

In a second series of cases, the Court has held that "*collective activity* undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[90] Despite arguments that the unions' activities constituted solicitation[91] and the unauthorized practice of law,[92] the Court allowed unions to engage attorneys to litigate members' claims[93] or actively to seek out members

85. 371 U.S. 415 (1963).

86. 436 U.S. 412 (1978).

87. 436 U.S. 447 (1978).

88. *Id.* at 458-59.

89. In *Ohralik*, upon finding that the attorney's actions were not clothed with substantial first amendment interests, the Court upheld the application of rules prohibiting solicitation "under circumstances *likely* to pose dangers that the State has a right to prevent." 436 U.S. at 449 (emphasis added). In contrast, the politically expressive solicitation involved in *Primus* could be proscribed only upon a showing that the "activity *in fact* involved the type of misconduct at which South Carolina's broad prohibition is said to be directed." 436 U.S. at 434 (emphasis added).

90. United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971) (emphasis added); *see* UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

91. United Transp. Union v. State Bar, 401 U.S. 576, 578 (1971); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 2, 6 n.10 (1964).

92. UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 218 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 2 (1964).

93. UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

with potential claims and recommend specific attorneys.[94] Though acknowledging the state's strong interest in regulating the practice of law,[95] the Court held that this interest did not outweigh the "basic right to group legal action."[96] Broad rules enacted to protect the public and the administration of justice were not allowed to hinder group efforts to vindicate legal rights, absent a showing of more than a possibility of harm.[97]

These cases recognizing first amendment protection for litigation-related activities, including solicitation and group discussion of claims, are of great importance in the class action context. Class actions are often brought to vindicate civil rights, and are litigated by groups, such as the National Association for the Advancement of Colored People or the American Civil Liberties Union, that engage in litigation as a form of political expression.[98] Also, class actions are often brought by "protected" associations, such as unions.[99] *Button* and its progeny suggest that gag rules, insofar as they serve to inhibit solicitation of parties and to forestall the class members from "helping and advising one another,"[100] may not be applied constitutionally without a finding of harm in fact.[101] However, gag *rules*, by their very nature, apply in all cases, not merely upon a finding of an evil the state may proscribe. Additionally, gag *orders* are often entered in cases without a finding that abuses are either present or imminent.[102] *Button* and its progeny demand that such a determination be made in cases in which expressive or associational interests are present.[103]

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94. United Transp. Union v. State Bar, 401 U.S. 576 (1971); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S 1 (1964).

95. UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. I, 6 (1964).

96. United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971).

97. UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222-23 (1967).

98. *See, e.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977); Rodgers v. United States Steel Corp., 508 F.2d 152, 156 & n.5 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

99. *See, e.g.*, Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 786-87 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978) (class action brought by property owners' association; collective right of an organizational membership to achieve effective judicial access recognized); Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 381 (E.D. Pa. 1974) (special right of union's counsel to discuss pending class action with union members upheld as protected by "the right of associations, including labor unions, to advise members of their rights and of ways to vindicate them").

100. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. I, 5 (1964).

101. See note 89 *supra*.

102. *E.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249, 1267-68 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

103. Indeed, this requirement of a finding of specific harm may not be avoided by recitation of potential abuses of the class action. "[L]aws which actually affect the exercise of these vital rights

In contrast, the purely "commercial" solicitation involved in *Ohralik* may be proscribed by the state upon a finding of *potential* harm. It is important to note, however, that the communication foreclosed by gag rules is not purely commercial speech proposing commercial exchanges; the communications typically include valuable information and advice.[104] The Court has noted a distinction between "pure" commercial speech and commercially motivated speech that also contains information and opinion.[105] Such "mixed" communications are given greater protection than purely commercial speech.[106] It thus appears that any determination of the strength of the first amendment interests opposed to the imposition of a gag order must be based upon a careful examination of the motives and nature of the class and the character of the expression sought to be made.[107]

B. *Harm Posed by the Dissemination.*

After a conclusion that class action solicitation and communication may enjoy first amendment protection, the question becomes whether these activities have effects that are sufficiently harmful to justify restrictions on otherwise protected speech. One asserted goal of gag orders, the protection of the fairness of the judicial process, is clearly a "substantial interest."[108] Courts considering gag orders must evaluate whether abuses likely to occur in class actions pose an actual threat to the fairness of the process.[109]

The potential for harm to the judicial process through abuse of the

cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means for dealing with such an evil." UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

104. In fact, the Court in *Ohralik* took care to note the distinction between solicitation and the dissemination of information:

> [N]either of the Disciplinary Rules here at issue prohibited appellant from communicating information to these young women about their legal rights and the prospects of obtaining a monetary recovery, or from recommending that they obtain counsel. . . . The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.

436 U.S. 447, 458 (1978).

105. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (advertisement "contained factual material of clear 'public interest' . . . [and] involve[d] the exercise of the freedom of communicating information and disseminating opinion").

106. *Id.* at 820-22.

107. *See In re* Primus, 436 U.S. 412, 438 n.32 (1978).

108. *In re* Halkin, 598 F.2d 176, 192 (D.C. Cir. 1979). The need to protect the administration of justice from "abuses, oppression and injustice," Gumbel v. Pitkin, 124 U.S. 131, 144 (1888), has long been recognized.

109. "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

class action device will vary widely depending on the nature of the case. Class actions are sometimes brought by the state or an agency of the state.[110] In such cases, there is no risk of solicitation of fees.[111] The risk that fee solicitation will occur is also minimal when actions are brought by nonprofit organizations.[112] The oft-expressed fear that an attorney will "sell out" a client's interest and settle in favor of a quick recovery is also less likely to be borne out in these cases, as the attorney will receive no monetary gain by such actions.[113] In such cases, the risk of harmful attorney-client conflict of interest flowing from solicitation is minimal. Another asserted danger in class actions, efforts by class opponents to persuade class members to opt out or settle, may be especially acute in employee-employer or franchisee-franchisor class actions,[114] but of minimal danger in other situations. Further, the very existence of an organization or association formed or used to litigate class action suits may provide a substantial measure of protection against coercive efforts by the class opponent.[115] Given the widely varying potential for abuse, courts should not reach general conclusions about the harms of class action communication. A court must carefully examine the circumstances of a particular class action before it may determine the harms threatened by unrestricted communications with potential class members.

When analysis of a particular class action situation indicates that harms may result, the question then is whether the harms are sufficient to justify restrictions. The courts have developed two formulations of

110. *See, e.g.*, Ohio v. Richter Concrete Corp., 69 F.R.D. 604 (S.D. Ohio 1975); EEOC v. Red Arrow Corp., 392 F. Supp. 64 (E.D. Mo. 1974); EEOC v. Mobil Oil Corp., 362 F. Supp. 786 (W.D. Mo. 1973).

111. At least one court has recognized this distinction between the "typical" class action and one brought by the state:

> Further, we agree with the plaintiff that the thrust of § 1.41 of the Manual for Complex Litigation . . . is aimed at "non-public attorneys whose interest in solicitation centers on the aggrandizement of fees," not at public attorneys whose remuneration is based upon "a set salary paid by the State."

Ohio v. Richter Concrete Corp., 69 F.R.D. 604, 607 (S.D. Ohio 1975) (citations omitted).

112. *Cf.* NAACP v. Buttou, 371 U.S. 415, 420 (1963) (NAACP attorneys not allowed to accept fees from litigants or other sources).

113. *Cf. id.* at 442-43 (1963):

> There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor.

114. See notes 20-22 *supra* and accompanying text.

115. In a closely related context, the Supreme Court recognized that one reason for the establishment of a union's Department of Legal Counsel was to protect against "adjusters eager to gain a quick and cheap settlement for their railroad employers." Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 3-4 (1964).

the requisite degree of likelihood of harm. One group of courts requires only a "reasonable likelihood" of harm as a prerequisite to the imposition of a gag order,[116] while another group demands that a "serious and imminent threat of harm" be shown before comment by lawyers and parties will be restricted.[117] Each test has distinct advantages. The "reasonable likelihood" test offers greater flexibility to a court designing orders to curb potential abuses. On the other hand, the "serious and imminent threat" standard offers greater protection to freedom of expression, yet is consistent with a policy of preventing serious abuses of the judicial process.

The dispute over which of the probability tests to apply should not obscure an important point: courts correctly analyzing this problem should evaluate the likelihood of actual harm. Some courts have taken what is clearly an improper approach by balancing *potential* rather than *probable* abuses against the asserted speech interests.[118] This approach permits restrictions on speech without a sufficient showing of necessity.

C. *The Restraining Order Must be Narrowly Drawn and Precise.*

It is standard first amendment doctrine that any regulation of expression must be drawn with "narrow specificity"[119] to avoid unnecessarily restricting constitutionally protected speech.[120] Several recent

116. *See, e.g.*, United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); Society of Professional Journalists v. Martin, 431 F. Supp. 1182, 1188 (D.S.C.), *aff'd with qualifications*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1148-52 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

117. Chicago Council of Lawyers v. Baner, 522 F.2d at 249, *cert. denied*, 427 U.S. 912 (1976). *See, e.g., In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971); *cf.* CBS Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) (clear and present danger standard applied). One case that rejected a constitutional challenge to the imposition of a gag order in a class action suit apparently utilized *both* standards. *See* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 788, 791 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978) (quoting both tests with apparent approval).

118. *See* Bernard v. Gulf Oil Co., 596 F.2d 1249, 1268 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part); Brown v. Gillette Co., 21 Fed. R. Serv. 2d 372 (D. Mass. 1975).

119. NAACP v. Button, 371 U.S. 415, 433 (1963). Perhaps the best statement of the rule is the following:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).

120. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970).

> [A] statute broad enough to support infringement of speech, writings, thoughts, and public assemblies . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.

cases have struck down court orders restricting communication on the grounds that the orders were not sufficiently specific.[121] Overbreadth attacks in two recent class actions[122] were rejected, however, primarily because the gag rules in question incorporated the *Manual*'s recommended exemption for communications for which the communicating party asserted constitutional protection.[123] But as the dissenting judge in *Bernard v. Gulf Oil Co.*[124] observed, this exemption raises problems. The class attorneys in *Bernard* found that the vagueness of the exemption created uncertainty as to whether communications without prior court approval would be acceptable, even though they asserted the constitutional right to make them.[125] Additionally, although the mere "good faith" assertion of a constitutional right to make such communications should protect the communicating counsel or party, the "court would still be entitled to inquire into the bona fides of counsel's belief."[126] The exemption also is ambiguous in light of the entire rule: the rule proscribes *all* communications, then exempts those communications for which the communicating party asserts constitutional protection.[127] As the Supreme Court stated in *Button*, however, "[i]f there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."[128] When there is tension between a broad prohibition and a narrow exemption, it is unlikely that the exemption will eliminate the chilling effect of the prohibition.[129] Finally, the effectiveness of this exemption is diminished by the fact that several districts adopting the *Manual*'s proposed rule have not incorporated it into their versions of

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Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting).

121. *See, e.g.*, CBS Inc. v. Young, 522 F.2d 234, 239-40 (6th Cir. 1975) (order in civil case held overbroad: "According to its literal terms no discussions whatever about the case are permitted by the persons upon whom the ban is placed—whether prejudicial or innocuous, whether subjective or objective, whether reportorial or interpretive"); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam) ("an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice").

122. Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

123. Bernard v. Gulf Oil Co., 596 F.2d 1249, 1261 (5th Cir. 1979); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 792-93 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

124. 596 F.2d 1249, 1262 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

125. *Id.* at 1266-67.

126. *Id.* at 1275 (Godbold, J., concurring in part and dissenting in part).

127. MANUAL pt. II, § 1.41.

128. NAACP v. Button, 371 U.S. 415, 438 (1963).

129. "This provision [exempting constitutionally protected communication] does not eliminate—indeed, it highlights—the overbreadth and resultant chilling effect of the proposed rule." 88 HARV. L. REV. 1911, 1922 n.74 (1975).

the rule.[130]

These criticisms of the exemption undercut any claims that it will prevent the chilling effect of the *Manual*'s proposed rule on protected communications. Insofar as the rule's sole escape clause fails adequately to protect speech, the search for less restrictive alternatives to the proposed rule's across-the-board restraint is particularly important.

D. *Less Intrusive Means of Achieving the Proposed Rule's Objectives.*

Many commentators and courts acknowledge the possibility of abuses of the class action procedure, but contend that these evils can be curbed by methods less sweeping than the proposed rule's total ban on all unapproved communications. One alternative frequently suggested is that of redrafting the rule to prohibit only those communications that would constitute abuses of the class action device.[131] While one court rejected this alternative as infeasible,[132] other courts *have* designed and imposed more limited gag orders.[133] Indeed, one district court assessed the constitutional requirements and redrafted its rule, retaining only specific prohibitions.[134] This local rule requires prior approval by the court *only* for communications concerning:

> (a) solicitation directly or indirectly of legal representation of asserted 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 asserted and actual class members who are not formal parties to the class action; and (c) solicitation by formal parties to the class action of requests by class members to opt out

130. *E.g.*, S.D. FLA. R. 19(b)-(c); N.D. GA. R. 221.2-.3; S.D. OHIO R. 3.9.4.

131. *See, e.g.*, Bernard v. Gulf Oil Co., 596 F.2d 1249, 1274-75 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

132. *See* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 791-92 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978). The *Waldo* court felt that a rule prohibiting specific practices would be easily circumvented by parties determined to commit abusive practices:

> As a practical matter, it is extremely dubious that the local rule could be drafted so as to exhaustively define potential abuses of the class action device through unauthorized communication with class members. Unfortunately, the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any such attempt at prohibition by itemization. The end result would be instances of compliance with the letter of the rule even as the spirit of effective regulation was flouted.

433 F. Supp. at 791-92.

133. *E.g.*, Belcher v. Bassett Furniture Indus., Inc., 22 Fed. R. Serv. 2d 1171, 1171-72 (W.D. Va. 1976).

The *Belcher* court noted that the named class plaintiffs needed to develop their case in order to establish their discrimination claim. A *limited* order was entered forbidding communications for purposes of: "(a) Soliciting fees and agreements to pay fees from class members who are not formal parties to this action; (b) Intentionally misrepresenting the status, purposes, or effects of this lawsuit or of any actual or potential court orders issued herein." *Id.* at 1172.

134. *See* Bernard v. Gulf Oil Co., 596 F.2d 1249, 1274 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part) (discussing comments of Bue, J., district judge, Southern District of Texas).

in class actions under subparagraph (b)(3) of Rule 23 . . . .[135]

These detailed rules are more difficult to draft than the *Manual*'s proposed rule and could be circumvented by parties or counsel intent on abusive practices. Nevertheless, such rules are less likely to "chill" constitutionally protected, nonabusive speech, and are more consistent with traditional first amendment principles than the *Manual*'s rule.[136] These narrowly drawn rules, however, could still infringe on first amendment rights in some circumstances.[137] For example, a rule that prohibits only solicitation of potential class members would remain subject to constitutional attack when applied to a class that engages in litigation as a means of political expression. In these instances, an even more limited remedy[138] or a very narrowly drawn restrictive order[139] would be appropriate.

Another frequently suggested alternative is to allow unrestrained communication and rely on corrective notices to counteract any misrepresentations.[140] This approach is attractive primarily because it grants the parties and counsel freedom to assess the merits of their case through discovery and to present essential information to potential class members. The drafters of the *Manual* concluded that this solution was ineffective,[141] however, and it is unlikely to be adopted as the sole remedy for abusive practices.[142]

Several other limited alternatives to an across-the-board restraint

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135. S.D. TEX. R. 6.

136. Such detailed rules also eliminate much of the problem caused by restricting the access of potential class members to information necessary to make an informed decision about whether to opt out or sign releases. The named parties and their counsel also would gain access to information necessary to develop their case and assess the merits of class certification. See notes 54-60 *supra* and accompanying text.

137. See notes 98-103 *supra* and accompanying text.

138. See text accompanying notes 140-52 *infra*.

139. For instance, the court could enter an order banning communications that misrepresent the status, purposes, or effects of the suit or orders entered therein.

140. *See, e.g.*, Halverson v. Convenient Food Mart, Inc, 458 F.2d 927, 932 (7th Cir. 1972) ("If class designation is granted, notice to the class members can remedy whatever misleading elements there might have been in the original letter [sent by counsel along with the court-prescribed notice]"); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1788, at 168 (1972) ("In many cases it will be sufficient to use a second notice to correct the error and simply assess the cost against the offending side").

141. MANUAL pt. I, § 1.41, at 2-3 (West Supp. 1978). The drafters noted two problems in relying on corrective notice to cure abuses. First, class members may have opted out based upon erroneous information, and would therefore not receive the corrective notice. Second, the cost of the new notice may be so prohibitive as to make correction of erroneons information impossible. *Id.*

142. Rule 6 of the Southern District of Texas, discussed in text accompanying note 135 *supra*, contains a variation of this "corrective notice" rule. Under this rule, any communication between any formal party or couusel and potential class members that purports to represent the status, purposes, or effects of the suit or orders therein must be filed with the court within five days. If the

have been suggested to curb the chilling effect inherent in the *Manual*'s proposed rule. Traditional sanctions for unethical conduct by attorneys could be employed to control attorneys' solicitation of clients.[143] Additionally, if the class attorney has engaged in unethical behavior, especially solicitation of the named class parties, substitution of counsel may be an appropriate remedy.[144] Another option responds to the concern that there may be irreparable harm to class members as a result of misleading statements during the limited period when the class members may opt out or execute releases.[145] A rule that banned unapproved communications only during this limited period could eliminate this problem.[146] Alternatively, if class plaintiffs showed that the defendant made misrepresentations in soliciting opt-outs, the court could insist that the defendant send corrective notice and could require reaffirmation of the decision to opt out. If the solicitation of opt-outs destroyed class action numerosity,[147] the court could examine the settlements to insure that the interests of those opting out were protected.[148]

Other more limited alternatives address only certain aspects of class action abuses. One commentator has asserted that misrepresentations by named class members or their attorneys could be corrected by allowing the opponent's attorney to communicate directly with the class.[149] Another method of presenting both views that reduces the chance of harmful misrepresentation is to allow discussions with potential class members only when both parties and their counsel are present.[150] A final limited preventative device addresses the fear that mere reference to the title of the action or the court will imply court sanction

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communication violates the specific prohibitions of the rule or is misleading, the court must take "appropriate corrective action." S.D. TEX. R. 6.

143. *See* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972) ("ordinary remedy is disciplinary action against attorney and remedial notice to class members"); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1602 n.102 (1976); 88 HARV. L. REV. 1911, 1921 & n.66 (1975).

144. *See* Korn v. Franchard Corp., 456 F.2d 1206, 1208 (2d Cir. 1972).

145. *See* Bernard v. Gulf Oil Co., 596 F.2d 1249, 1260 (5th Cir. 1979).

146. 88 HARV. L. REV. 1911, 1921 (1975).

The advantage of this solution is that it allows greater discovery and dissemination of information during the remainder of the class suit. However, the decision to opt out is a crucial one, and forbidding unapproved communications during this time may well force class members to make this important decision with only limited or one-sided information.

147. See note 17 *supra*.

148. *See* American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 572, 576 (1974).

149. *Developments, supra* note 143, at 1598-99.

This view runs counter to the traditional view that communications with an opposing party may be made only through that party's counsel. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1978).

150. *Cf.* Weight Watchers, Inc. v. Weight Watchers Int'l, Inc., 55 F.R.D. 50, 51 (E.D.N.Y.

of the action.[151] This could be avoided by requiring the parties to include a clause in all communications to potential class members or to class opponents disclaiming any expression of opinion, direction, or sanction by the court.[152]

Since there are so many alternatives to an across-the-board prohibition on unapproved communications, courts should be able to select alternatives that cure or prevent abuses, but do not hinder nonabusive communication. This would minimize the chilling effect of gag orders on constitutionally protected communications.

E. *Specific Findings.*

Several cases emphasize that the courts should be required to make specific findings that justify an order restricting communications. This requirement rests principally on the first amendment demand that specific harms be proven in order to justify restraints on speech,[153] although some courts base this requirement upon either the limits of the district court's power[154] or the requirement of the sound exercise of discretion.[155]

Practical considerations also support the requirement that the court make specific findings. This requirement may force the court to engage in a careful evaluation of the circumstances of the case. This careful, case-by-case analysis is important in applying many of the tests and distinctions already discussed. For example, in distinguishing between "commercial" and "expressive" speech, with their corresponding

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1971) (allowing contract negotiations by class opponent with members of franchisee class when counsel for plaintiffs was present), *appeal dismissed*, 455 F.2d 770 (2d Cir. 1972).

151. See text accompanying note 25 *supra*.

152. *This notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation or as to any amount that any claimant would receive on settlement*, but is sent for the sole purpose of informing you of the pendency of this litigation and the settlement described herein so that you can make appropriate decisions as to what steps you may wish to take in relation thereto.

Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 371 (E.D. Pa. 1970) (emphasis in original).

153. "We stress . . . that *in each* case, before entering a protective order that restricts expression, the trial judge must determine that it meets those criteria mandated by the First Amendment." *In re* Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) (emphasis in original); *accord*, Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) ("We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serions and imminent threat to the administration of justice' ") (citations omitted).

154. *See* Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977).

155. *See* Bernard v. Gulf Oil Co., 596 F.2d 1249, 1267-70 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

levels of constitutional protection, such a case-by-case analysis is plainly necessary.[156] A court should also consider the likelihood that the asserted abuses will actually occur.[157] Such consideration requires a careful examination in each case and would force a court to identify the particular abuses feared, enabling it to choose narrow remedies that correct the abuses without infringing on constitutionally guaranteed freedoms.[158]

IV. CONCLUSION

Abuse of the class action procedure is a legitimate concern. Nevertheless, court orders and rules that restrict all unapproved communications with potential class members create a serious conflict with first amendment values and the policies underlying Rule 23. These conflicts are avoidable. Through a careful examination of the expressive interests asserted, as well as a realistic assessment of the potential for abusive practices present in the class action, a court can choose either a narrowly drawn restrictive order or a method of remedying any abuses that have already occurred. This should minimize abuses without substantially infringing on either first amendment interests or nonabusive communications with potential class members.

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156. The Supreme Court has noted the difficulty a court faces in distinguishing "commercial" and "expressive" speech. *See In re* Primus, 436 U.S. 412, 438 n.32 (1978) ("The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw") (citatious omitted).

157. See text accompanying notes 110-18 *supra*.

158. See note 119 *supra*.