Solicitation in Class Action Situations

The ethical propriety of solicitation in the class action context is not a new issue. It was seen as a problem under Rule 23 of the Federal Rules of Civil Procedure in its original form[1] and it has become even more of an issue under the present Rule 23. Yet, although solicitation is not a new issue in this area, the boundary between what is and is not proper is far from clear.

One reason for this lack of clarity is the recent Supreme Court decisions holding that some forms of solicitation are constitutionally protected.[2] This aspect has become clearer as case law has developed and should continue to do so. The other main reason for uncertainty in this area is the lack of guidance from the American Bar Association *Model Rules of Professional Conduct*.[3] Despite the recent revision of these rules this area remains largely uncharted.

The threshold question in any discussion of the propriety of attorney solicitation of business is: Why prohibit solicitation at all? In *Ohralik v. Ohio State Bar Ass'n*,[4] the Supreme Court noted that solicitation of clients by attorneys has long been viewed as inconsistent with the ideals of the legal profession.[5] According to the *Ohralik* Court: "The substantive evils of solicitation have been cited over the years in sweeping terms: stirring up of litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation."[6]

The *Ohralik* decision made it clear that while the general prohibition of solicitation may give way where the dangers normally

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1. *See, e.g.*, Baim v. Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 103 (S.D.N.Y. 1956).

2. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers of America v. Illinois State Bar Ass'n, 399 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); *In re* Primus, 436 U.S. 412 (1978).

3. ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES].

4. 436 U.S. 447 (1978).

5. *Id.* at 454.

6. *Id.* at 461 (footnote omitted).

associated with it are not present,[7] or where it collides with the guarantees of the First Amendment,[8] the state still "has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed."[9]

The nature of the class action device, however, requires a different evaluation of the state's interest in prohibiting solicitation. The use of solicitation often extends beyond simple "ambulance chasing" to such things as soliciting funds or information from nonclient class members or persuading potential class members to join the class or become named parties. Whether or not solicitation of this type is allowed may mean the difference between a client's case succeeding as a class action. This, in turn, may determine whether his claim may realistically be brought. As a result, the distinctions between permissible and impermissible solicitation often become blurred and the rules prohibiting solicitation become ambiguous and hard to enforce.

In view of the special problems faced by a lawyer facing the possibility of a class action or involved in a class action in determining the propriety of a proposed course of action that may involve some form of solicitation, it is useful to survey this area to determine as near as possible what boundaries have been drawn and what areas are unclear. The issues that arise concerning solicitation *vis a vis* class action tend to vary with the stage in the proceeding. Therefore, it is necessary to look at each stage and its problems in order to understand the various problems that may arise.

I. *Solicitation Before a Class Action is Filed*

When the solicitation at issue occurs before a class action is filed, it is most often the litigation itself which is claimed to have been solicited. One of the strongest statements condemning this type of class action solicitation appears in *Buford v. American Finance Co.*,[10] where the court stated:

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7. *E.g.*, Bates v. State Bar of Arizona, 433 U.S. 576 (1977) (allowing "truthful" advertising of "routine" legal services).

8. *E.g., In re* Primus, 436 U.S. 412 (1978) (allowing solicitation of litigants by nonprofit groups which engage in litigation as "a form of political expression").

9. *Ohralik*, 436 U.S. at 464.

10. 333 F. Supp. 1243 (N.D. Ga. 1971).

> The plain truth is that in many cases Rule 23(b)(3) is being used as a device for solicitation of litigation. This is clearly an undesirable result. Until otherwise directed this court, for one, intends to carefully scrutinize every action in which plaintiffs seek monetary relief and wish to represent a class of similarly situated persons to determine if all the requirements of Rule 23 are fully satisfied, and it will not hesitate to exercise whatever discretion it is granted by the Rule in such matters.[11]

It is evident from this statement that the *Buford* Court was primarily concerned with protecting defendants against the use of class action as a form of blackmail, the threat of a huge judgment being used to exact a settlement of a non-meritorious claim.[12]

More commonly, however, when the issue of solicitation of class action is raised, it is the courts' concern in protecting the absent class members that is the focus of attention. Rule 23(a) lists among the prerequisites for class action: "(4) The representative parties will fairly and adequately protect the interests of the class."[13] This statement is often interpreted as requiring that class counsel demonstrate adequate ethical conduct, as well as the necessary legal skill to handle class litigation. As a result, if there is any evidence of solicitation, a defendant who wishes to prevent a suit from being brought as a class action may claim that the solicitation is an ethical breach that demonstrates that counsel will not adequately protect the interests of the class and, therefore, class certification should be denied or withdrawn.

An example of this tactic is found in *Stavrides v. Mellon Nat'l Bank & Trust Co.*,[14] where the defendant sought to compel discovery concerning an allegation that plaintiffs' counsel had solicited the case. The court granted the motion stating that "defense counsel may inquire into the professional conduct of plaintiffs' counsel to discover disabling breaches of the Code of Professional Responsibility which would prevent plaintiffs' counsel from vigorously and forthrightly taking up the cause of the class they seek to represent."[15]

As the court noted in *Stavrides*: "Unethical conduct by plain-

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11. *Id.* at 1251.

12. *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 8-9 (1971).

13. The same general requirement was embodied in the original Rule 23.

14. 60 F.R.D. 634 (W.D. Pa. 1973).

15. *Id.* at 637 (footnote omitted).

tiffs' counsel may result in denial of the class action motion."[16] However, solicitation of the class action by counsel ordinarily should not, by itself, be enough to warrant denial of this motion. In cases where a court has cited solicitation of the plaintiff as a reason for denial of the class action motion, solicitation has not been the sole reason for the denial. For example, in both *Simon v. Merril, Lynch, Pierce, Fenner and Smith*[17] and *Carlisle v. LTV Electrosystems, Inc.*,[18] motions to proceed as a class action were denied partially because it was apparent that the class representatives had been sought out by their lawyer. However, in both cases there were other significant reasons for denial of class action status.[19]

The above principle is further supported by the oft cited opinion in *Halverson v. Convenient Food Mart, Inc.*[20] In *Halverson* the Seventh Circuit vacated a district court order dismissing an antitrust class action because of a letter prepared by plaintiffs' attorney and sent to all Chicago area Convenient store owners urging them to become plaintiffs. Since the attorney had represented an association of area convenience store owners in previous dealings with Convenient Food Mart and negotiated a settlement that benefited all of these owners the court held that "he could reasonably believe each one of them was his client"[21] and therefore there was no "improper solicitation."[22] The court concluded that while "the lawyer did commit a slight breach of ethics" (relating to the form of the solicitation rather than to the act itself) such minor misconduct "should not prejudice the rights of his clients."[23] The court then took this reasoning a step further stating that: "Only the most egregrious misconduct on the part of plaintiffs' lawyer could ever justify the denial of class status."[24] Instead, the court suggested that the appropriate action in such situations is "disciplinary action against the lawyer and remedial notice to class mem-

16. *Id.* at 636.

17. 16 F.R. Serv. 2d (Callaghan) 1021 (N.D. Tex. 1972).

18. 54 F.R.D. 237 (N.D. Tex. 1972).

19. In *Simon* the court also found that it was unclear that the representations made to the plaintiff were the same as those made to other class members, and that the plaintiff had made misrepresentations to other class members.

20. 452 F.2d 927 (7th Cir. 1972).

21. *Id.* at 930.

22. *Id.* at 931.

23. *Id.*

24. *Id.* at 932.

bers."[25] This conclusion was echoed in *In re Nissan Motor Corp. Antitrust Litigation*[26] where the court suggested that "Bar organizations may be better equipped than this court to handle possible antitrust grievances."[27]

In the above cases one reason for objecting to the solicitation of the class was the possibility of a large pecuniary reward flowing to class counsel. This objection is frequently raised in actions brought under Rule 23(b)(3) where contingent fee arrangements and the possibility of large awards can lead to "stirring up litigation" and conflicts of interest.[28] When these problems are not likely to be a factor in the litigation the courts' view of solicitation may change.

In *J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp.*,[29] the plaintiff admitted soliciting class members both before and after filing the case. The Court, after finding that this solicitation was done as a means of sharing the expenses of the litigation, stated that cases denying certification of a class because of solicitation were "aimed at the prevention of misleading information and unethical solicitation of class representatives by attorneys."[30] Since these dangers were not present the solicitation did not defeat the class action motion. Even where such problems do result from solicitation of the litigation, replacement of the offending lawyer should usually be enough to cure the problem and allow the class action to proceed.[31]

As already noted, the state is substantially less free to prohibit solicitation where nonprofit interest groups advancing political concerns or legitimate associational rights are involved. This is recognized by ABA Model Rule 7.3.[32] One author has suggested that this decrease in state interest is at least partially because "the

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25. *Id.*

26. 22 F.R. Serv. 2d (Callaghan) 63 (S.D. Fla. 1975).

27. *Id.* at 65.

28. For a discussion on whether these and other problems necessitate a general ban on solicitation, particularly in the class action context *see* Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1976).

29. 62 F.R.D. 58 (S.D. Ohio 1974).

30. *Id.* at 62.

31. *See, e.g.*, duPont Glore Forgan Inc. v. American Telephone and Telegraph Co., 69 F.R.D. 481 (S.D.N.Y. 1975).

32. The first sentence of Rule 7.3 reads: "A lawyer may not solicit professional employment from a prospective client . . . when a significant motive for the lawyer's doing so in the lawyer's pecuniary gain."

group *itself* provide[s] the protection and regulation that [is] the essence of the interest by the state."[33] This is often true. However, the right of a nonprofit group to solicit class membership and funds has been upheld even where the sole purpose of the group is to seek recovery in a specific instance.[34] It would also seem under Model Rule 7.3 and case law that where significant pecuniary gain is not a motive—for example an action seeking an injunction under Rule 23(b)(2)—solicitation is not necessarily improper. In these cases the attorney's fee is set by the court thus lessening the dangers of overreaching, overcharging, underrepresentation and the like. Furthermore, as was noted in *Zarate v. Younglove*,[35] "since there would not be any opportunity to opt out of the class, it would be desirable to permit class members to become involved at an early stage of the litigation."[36] As a result of these factors the dangers of solicitation may be outweighed by its benefits under the circumstances.

One solicitation related problem that is peculiar to solicitation of the class itself is the situation where an attorney is a class member and he or his firm seeks to represent the class. Courts generally look upon such arrangements with disfavor.[37] This problem is illustrated by the circumstances in *Cochett v. Avis Rent A Car Systems, Inc.*,[38] where a lawyer sought to bring a class action on behalf of all those who had paid an allegedly illegal one dollar surcharge when renting a car from one of three car rental agencies in New York City. Although it denied class status for other reasons, the court felt compelled to address the solicitation issue. It noted that the lawyer's possible recovery as a member of the class was "far

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33. Schoor, *supra* note 28 at 225.

34. Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827 (N.D. Ill. 1979).

35. 86 F.R.D. 80 (C.D. Cal. 1980).

36. *Id.* at 97 (footnote omitted).

37. In Waid, *Ethical Problems of the Class Action Practitioner; Continued Neglect by the Drafters of The Proposed Model Rules of Professional Conduct*, 27 LOYOLA L. REV. 1047, 1057-61, the author suggests that the main problem in this area is the disqualification of a lawyer who reasonably expects that he will be called as a witness in a case where he or his firm is employed. Given MODEL RULE 3.7 he suggests that this disqualification may no longer be called for in class action and therefore perhaps courts should reevaluate their opposition here. However, it seems that most litigation on this subject centers on whether the possible conflict of interest renders class representation inadequate under the requirements of Rule 23(a)(4).

38. 56 F.R.D. 549 (S.D.N.Y. 1972).

exceeded by the interest [he] might have in the legal fees engendered by this lawsuit. . . ."[39] Such a situation would appear to be unethical as well as potentially antagonistic to the interests of the other members of the class. Other courts have labeled similar arrangements an "unacceptable situation"[40] that might lead to a situation analogous to "ambulance chasing," and "a questionable method of soliciting legal business . . . [that] should not be encouraged."[41]

Finally it should be noted that according to Informal Opinion 1280[42] it is "the act of solicitation by the lawyer, and not the acceptance of employment," which constitutes unprofessional conduct.[43] As a result, the committee approved an arrangement where the lawyer accepted funds and employment from class members solicited by his client. If this is ethically proper then it should also conform to the standards of Rule 23 in this area. However, as one commentator has suggested, even here the lawyer should be careful that no misrepresentation or misinformation occurs in this process.[44]

In general, it is not solicitation itself but the improper conduct so often associated with it that most often leads to sanctions in this area. However, it seems advisable that any plan of solicitation should still be approached with great caution.

II. *Solicitation During the Post-filing, Precertification Stage*

As will become apparent, some issues at this stage are quite similar to those found in the prefiling stage. Other issues are unique to this stage. However, one overriding difference must be noted: now that an action has been filed with the court, the court has considerably more control over the proceedings, especially under its Rule 23(c)(2) power to direct "the best notice practicable under the circumstances" and its Rule 23(d) power to issue "Orders Concerning Conduct of Actions."

The effect of solicitation by class counsel on his ability to ade-

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39. *Id.* at 554.

40. *In re* Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485, 490 (D.C. Md. 1982).

41. Shields v. Valley Nat'l. Bank of Arizona, 56 F.R.D. 448 (D.C. Ariz. 1971).

42. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1280 (1973).

43. *Id.*

44. Waid, *supra* note 37 at 1054-55.

quately represent the interests of the class is largely unchanged at this point. In *Korn v. Franchard Corp.*,[45] class counsel used a list provided by the defendant for use in sending out court-prepared class notice to send a separate unapproved letter to each class member soliciting information concerning another class action instituted by him against the defendant. After finding that the plaintiffs did not demonstrate that the class was sufficiently numerous or that the claims of the plaintiffs were sufficiently typical of those of the rest of the class, the court stated that "[t]he letter displayed contempt for such fundamental canons as that relating to *'Stirring up Litigation Directly or Through Agents'*. . . ."[46] As a result, the court found that the lawyer "would not fairly and adequately protect the interests of the class."[47] This was cited by the court as a further reason for revoking the conditional grant of class action status.

The *Korn* decision is often cited for the proposition that unethical conduct of this nature is enough to justify denial of a class action motion.[48] This conclusion does not seem to be warranted. When the decertification order in *Korn* was appealed, the Second Circuit held that since the plaintiff was now represented by new, ethically competent counsel, and all other defects had been remedied, the case met all the requirements for class status.[49] The district court's order was therefore set aside.[50] A similar conclusion was reached more recently in *Brame v. Ray Bills Finance Corp.*,[51] where it was stated that while the "ethical competence of attorneys desiring to represent a class is relevant to the adequacy of representation, . . . not all breaches of the Code of Professional Ethics will necessarily require the denial of class status."[52] Indeed, it would seem that to justify denial of class status, the breach would have to be so serious that it could not be remedied by other means and denial or dismissal would not prejudice the interests of the class.

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45. [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,845 (S.D.N.Y. 1970) *rev'd on other grounds*, 456 F.2d 1276 (2d Cir. 1972).

46. *Id.* at 90, 169.

47. *Id.*

48. *See Stavrides*, 60 F.R.D. at 636.

49. 456 F.2d at 1214.

50. *Id.*

51. 85 F.R.D. 568 (N.D.N.Y. 1978).

52. *Id.* at 577.

One aspect of solicitation that does not arise until after a class action has been filed is solicitation by the defendant of statements by class members that they are not interested in pursuing the action, or that the plaintiff is not authorized to represent them. If this is allowed by the court, it could prevent the plaintiff from fulfilling the "numerosity" requirement or be taken as proof that the plaintiff is not an adequate representative of the class. Judicial treatment of such activity has varied.

In *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l Inc.*,[53] the defendant was allowed to conduct discussions with franchisees concerning the subject matter of a proposed antitrust class action and "in connection with contract negotiations requested in each instance by the franchisee."[54] The court ruled that there is nothing under Rule 23 to "prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do so. . . ."[55] However, the court recognized that there was a possibility for abuse under the circumstances. As a result, it also left in place the lower court's requirement that each franchisee be represented by counsel who would be present at any negotiations, and that plaintiff's counsel be given the opportunity to attend all negotiations and give his views fully.[56]

A similar instance of this type of solicitation in an antitrust case is seen in *Matarazzo v. Friendly Ice Cream Corp.*[57] There the defendant solicited and received statements from all store owners that they did not wish to participate in the proposed litigation and intended to release Friendly from any claim they might have in relation to it.[58] While the court did not rest its denial of class status for this group on the statements, it found further support in them for its conclusion that the plaintiff would not adequately represent the class.[59] However, the court also pointed out that there are potential problems that can arise from this sort of solicitation and therefore recommended that the "better practice" would be to

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53. 455 F.2d 770 (2d Cir. 1972).

54. *Id.* at 772.

55. *Id.* at 773 (footnote omitted). *Accord*, American Financial System Inc. v. Harlow, 65 F.R.D. 572 (D.C. Md. 1974).

56. *Weight Watchers, id.* at 772.

57. 62 F.R.D. 65 (E.D.N.Y. 1974).

58. *Id.* at 66.

59. *Id.* at 68-69.

seek court approval in such situations.[60]

The possibility of coercion is often an important consideration in cases of this sort. In *Matarazzo* the court found no evidence that the class members had been coerced by the defendant, while in *Weight Watchers* the court took steps to prevent the solicitation from having this result. Where the danger of coercion is present, or it is likely that it has occurred, statements of noninterest should not, by themselves, be enough to defeat a class action motion. This was the result in *Moss v. Lane Co.*,[61] where the defendant tried to defeat a class action brought under the Civil Rights Act of 1964[62] by soliciting affidavits from the class members (his employees) stating that the plaintiff did not have authority to bring suit on their behalf.[63] The affidavits were not enough to convince the court that the employees disapproved of the suit. It noted that the employees were not likely to put their jobs on the line by refusing to sign and allowed the suit to proceed as a class action.[64] Affidavits expressing lack of interest were also considered insufficient to defeat a proposed class in *Northern Acceptance Trust 1065 v. AMFAK, Inc.*[65] In that court's opinion there was also "authority" to support the plaintiff's claim that such action violated "both the spirit and the letter of Rule 23 F.R. Civ. P. in this connection."[66]

In general, it seems that the treatment of exclusions or other agreements the defendant might solicit from class members at this stage in the proceedings depends upon the circumstances of the case. The strength of the possibility that coercion may result makes a difference, as does the individual class members' ability and incentive to bring suit on their own.[67] It would also seem advisable for the defendant's lawyer to advise his client to seek court approval and for the lawyer to inform the court of the activity. He

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60. *Id.* at 69 n.4.

61. 50 F.R.D. 122 (W.D. Va. 1970).

62. 42 U.S.C. § 2000 *et. seq.*

63. 50 F.R.D. at 126.

64. *Id.*

65. 51 F.R.D. 487 (D.C. Hawaii 1971).

66. *Id.* at 491. *See also* Merit Motors Inc. v. Chrysler Corp., 16 F.R. Serv. 2d (Callaghan) 543 (D.D.C. 1972) (The proper way for a defendant to test such a contention is to use the Rule 23(c) procedure of notifying class members and permitting them to opt out if they choose).

67. *E.g., Matarazzo v. Friendly Ice Cream Corp.*, 62 F.R.D. 65.

should also warn the defendant to avoid any possible coercion. If the attorney himself is involved in the solicitation these steps may rise to the level of an imperative.[68]

The Supreme Court's recent decisions allowing solicitation in a limited number of circumstances, most notably when public interest groups are involved, has been the focus of a conflict peculiar to this phase of the class action. This centers around the adoption by district courts of a "Sample Pretrial Order Preventing Potential Abuse of Class Actions" from the Manual for Complex Litigation[69] and a suggested local rule that had the same effect. This order prohibits parties and their counsel from communicating with potential class members about the pending action unless the court first reviews and approves the communication.[70]

The extent that a local rule based on the Manual's suggestion was first addressed in *Rodgers v. United States Steel Corp.*[71] In *Rodgers* the plaintiffs challenged the use of this rule to prevent them and their attorneys, from the NAACP Legal Defense and Education Fund, from communicating with potential class members. On appeal the Third Circuit lifted these restrictions. Though it noted the possible constitutional problems the court did not base its decision on this issue. Instead, it held that the rule was "outside the power granted to the district court and its enforcement may be prevented by this court. . . ."[72]

Two years later the third circuit extended its holding in *Rodgers* to cover adoption of Orders based on section 1.41 of the Manual in *Coles v. Marsh.*[73] This case differed from *Rodgers* in two ways. First, unlike the local rule invalidated in *Rodgers*, the Order issued here specifically exempted certain kinds of communication. Perhaps more importantly, there was not merely the general danger of solicitation in this case, solicitation had occurred. Coles admitted that she had, with her attorney's knowledge, been in contact with the NAACP and class members seeking to solicit their

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68. *See, e.g.*, Beaver Falls Thrift Corp. v. Commercial Credit Business Loans, Inc., 563 F. Supp. 68 (W.D. Pa. 1983).

69. FEDERAL JUDICIAL CENTER, pt. II § 1.41 (1981) [hereinafter cited as MANUAL].

70. For an in-depth discussion on this issue *see* Comment, *Restrictions on Communication by Class Action Parties and Attorneys*, 1980 Duke L.J. 360.

71. 508 F.2d 152 (3d Cir.) *cert. den.*, 423 U.S. 832 (1975).

72. *Id.* at 164.

73. 560 F.2d 186 (3d Cir.) *cert. den.*, 434 U.S. 985 (1977).

participation in her employment discrimination suit and she stated that she intended to continue to do so. However, the court held that these "activities were not abuses of the class action device. . . ."[74] Since there was no danger of abuse there was no power to prohibit the activities.[75] Moreover, even where there is a danger of "frustration of the policies of Rule 23, [the court] may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened . . . [and the court] giving explicit consideration to the narrowest possible relief which would protect the respective parties."[76] Though the court found that there was "at least arguably, violations of ethical norms traditionally accepted in the legal profession. . .," it pursued this issue no farther.[77]

The question of the allowable scope of orders based on section 1.41 finally reached the Supreme Court in *Gulf Oil v. Bernard*.[78] In this case the respondents, dissatisfied with the terms of a conciliation agreement between Gulf and The Equal Employment Opportunity Commission, filed a class action on behalf of all present and former black employees and rejected applicants at Gulf's Port Arthur, Texas refinery. After the action was filed, one of the plaintiffs' lawyers from the NAACP Legal Defense and Education Fund attended a meeting of some of the class members where he discussed the case and recommended that the employees not sign the releases sent under the conciliation agreement or, if they had already signed, to return the checks they had received.[79] As a result, Gulf moved for a protective order and suggested that the courts adopt the "Sample Pretrial Order" suggested by the Manual. The court issued this order but granted Gulf an exemption so it could continue its solicitation under the conciliation agreement.[80]

The Order was upheld by a panel from the Fifth Circuit, then reversed by that court sitting *en banc*. Thirteen judges held that it was an unconstitutional prior restraint on speech protected by the First Amendment. Eight concurring judges did not reach the constitutional issue because they found that the Order lacked ade-

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74. *Id.* at 189.
75. *Id.*
76. *Id.*
77. *Id.*
78. 452 U.S. 89 (1981).
79. *Id.* at 93.
80. *Id.* at 95.

quate findings to support it, thus going beyond the power granted by Rule 23(d). On appeal, the Supreme Court based its decision solely on the finding that the Order was inconsistent with the policies of Rule 23.[81] It held that such an order "should be based on a clear record and specific findings that reflect a weighing of the potential interference with the rights of the parties."[82] The Court agreed with the decision in *Coles v. Marsh* that such an order should be "carefully drawn" and limit the rights of the parties only as much as necessary under the circumstances.[83] Finally, the Court concluded that "The mere possibility of abuses does not justify the routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules."[84]

It is often said that the State has considerably greater power to regulate commercial speech. This power is frequently seen in the case of class actions brought under Rule 23(b)(3) where significant pecuniary gain may result. In these situations merely showing the potential for improper solicitation may be enough to justify court intervention.[85] This possibility is demonstrated by the decision in *Waldo v. Lakeshore Estates, Inc.*,[86] where plaintiffs filed a motion to invalidate a local rule similar to the rule invalidated in *Rodgers*. In denying this motion the court recognized that the rule limited rights "otherwise guaranteed by the First Amendment."[87] However, the court went through the same balancing process that was later required by *Gulf Oil v. Bernard* before upholding the application of the Rule as serving a "compelling" state interest and being drawn with "narrow specifity."[88]

In *Waldo* the court was especially concerned about what it saw as the "increased opportunities to 'drum up' participation in the proceeding," and that such unauthorized communication may

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81. *Id.* at 99 (footnote omitted). The Court specifically refused to consider the constitutional issue. *Id.* at 101 n.15.

82. *Id.* at 101.

83. *Id.* at 102.

84. *Id.* at 104. As a result of this decision the MANUAL has been amended to reflect these requirements. *See* MANUAL at 31-32.

85. *See In re* Primus, 436 U.S. at 434.

86. 433 F. Supp. 782 (E.D. La.) *dismissed*, 479 F.2d 642 (5th Cir. 1972).

87. *Id.* at 787.

88. *Id.* at 788.

"seem vested with official authority."[89] After considering the dangers, the court found that the benefit to the "professional and public interests" provided by the restriction "outweighed the resulting restriction of free expression."[90] *Rodgers* was distinguished because unlike the Local Rule in that case the Rule at issue in *Waldo* contained an illustrative list of abuses, and exempted certain kinds of communications which did not pose the dangers of solicitation.[91] The court therefore held that the Rule was neither overbroad nor unconstitutionally vague.[92]

Another example of a court using its power to stop solicitation that is only commercial speech is *In re W.T. Grant Co.*,[93] where a preliminary injunction was granted to stop objectants from soliciting other shareholders in an attempt to obtain proxies opposing a proposed settlement. After noting that the proposed solicitation was in violation of Bankruptcy Rules and The Securities and Exchange Act of 1934, the court moved on to consider the objectants' First Amendment claims. It noted that unlike cases such as *Button* and *Primus* the activity in question was undertaken primarily "to derive financial gain" and therefore commercial speech.[94] The court also held that the letter would breach DR2-103(A) and DR 2-104(A) of the ABA Code. "Objectants' attorneys . . . testified that they participated in drafting the solicitation, and that they are pursuing their own economic interest via the solicitation and related litigation."[95] The Court also found that the "Debentureholders would be subject to precisely the type of detrimental influence the Disciplinary Rules envision if the solicitation is not enjoined."[96] The same conclusion would probably be reached under Model Rule 7.3.

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89. *Id.* at 790-91.

90. *Id.* at 790.

91. *Id.* at 793.

92. *Id.* It should be noted that the order the Supreme Court held to be an abuse of discretion in *Gulf Oil v. Bernard* contained and the same provisions as the Local Rule upheld in *Waldo* and these were criticized by the Court. *See*, 452 U.S. at 704 n.17. Thus while a restriction on communication was proper in *Waldo* instituting it through a blanket rule rather than by issuing a case specific protective order is probably invalid. Other courts have so held. *See*, Kleiner v. First Nat'l Bank of Atlanta, 102 F.R.D. 754 (N.D. Ga. 1983).

93. 6 Bankr. 762 (S.D.N.Y. 1980).

94. *Id.* at 768.

95. *Id.* at 771 (citation omitted).

96. *Id.*

It is clear that circumstances will have a significant effect on a court's assessment of the propriety of solicitation during the time between the filing of a suit as a class action and the determination of whether or not the suit will be allowed to proceed as a class action. In cases like *Korn* and *In re Grant* where there is both evidence of harmful solicitation and the incentive of pecuniary gain for the lawyer, the solicitation can be a violation of both Rule 23 and the ABA Rules. Where the violation is less serious it seems to be a matter for the local bar association. However, in cases like *Coles v. Marsh and Gulf Oil v. Bernard* where the solicitation is not an abuse of Rule 23, the ethical question remains unclear. For example, in *Coles* the court stated that "ethical norms" may have been violated though there was no abuse of Rule 23. Taken literally this would seem to put the lawyer in the incongruous position of pursuing a course of action which is proper under Rule 23 and perhaps necessary to the success of a client's meritorious claim but is a violation of professional ethics.[97] It seems doubtful that this would be the case where "protected" speech is at issue. This conclusion is supported by the Fifth Circuit's decision in *Gulf Oil v. Bernard* where all but one of the judges who reached the constitutional question held that the solicitation was protected under *Button* and *Primus*.[98] If this is the case then Bar Association Rules would have to yield as in *Primus*. However, where the solicitation is seen as commercial speech which is not an abuse of Rule 23, but is perhaps unethical, the result remains unclear.

III. *Solicitation After Class Approval*

The main issue in this phase of class litigation is solicitation of the class members to "opt in" or "opt out" of a Rule 23(b)(3) action during the period alloted for exclusions. It should be kept in mind that although the class has been certified at this point, this determination is conditional and the class can be decertified if the court finds that it no longer meets the requirements of Rule 23.

A striking example of the problems that can be caused by solicitation of this sort is found in *Kleiner v. First Nat'l Bank of Atlanta*[99] where the defendant mounted a telephone campaign seeking to convince prospective class members to opt out of a class.

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97. *See* Waid, *supra* note 37, 1055-57.
98. 619 F.2d 459, 476 (5th Cir. 1980).
99. 102 F.R.D. 754 (N.D. Ga. 1983).

Defense counsel assisted in this plan by attending meetings and giving advice on how to carry out the campaign, preparing documents to be used in the campaign, and providing a list of the prospective class members. The campaign, which started the day before the court prepared class notice was sent out, resulted in 4,000 members out of a class of 8,000 to 9,000 being contacted and 3,000 of these electing to exclude themselves.[100] The court held that this conduct was a violation of the Model Rules.

The court held that counsel violated Model Rule 4.2 which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party he knows to be represented by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[101]

The Court pointed out that while at this point in the proceedings plaintiffs' counsel does not "fully" represent absent class members, defense counsel must treat them as represented by counsel.[102] It held that not only was the violation willful, but also, because of its "timing and one-sided nature," particularly opposed to the proper functioning of the class action device.[103]

The Court also found that the Bank's lawyer violated the provision of Model Rule 8.4 which states: "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the conduct of justice[.]"[104] This violation was a result of the lawyer knowingly participating "in a course of conduct calculated to thwart the objectives of Rule 23, Fed. R. Civ. P., namely, to give prospective class members objective information on which they may make a voluntary decision as to whether or not to participate."[105]

The court's response was twofold. First, with regard to remedial action, the court decided to "permit those who opted out based on the abusive solicitation program to void their exclusion requests after judgment, should they wish to do so."[106] Second, re-

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100. *Id.* at 767 n.17.
101. This Rule is analogous to Disciplinary Rule 7-104.
102. 102 F.R.D. at 769.
103. *Id.* at 774.
104. This Rule is analogous to Disciplinary Rule 1-102(A)(5).
105. 102 F.R.D. at 774.
106. *Id.* at 772.

garding sanctions and penalties, the court ruled that it can "*sua sponte* raise ethical problems involving attorney misconduct."[107] Pursuant to this authority, the court ordered the Bank's attorney and his firm to reimburse plaintiffs' counsel for "all expenses and attorneys' fees reasonably incurred" as a result of their misconduct.[108] This included the cost of preparing and mailing the class notice.[109] Furthermore, the two lawyers who took part in the solicitation were disqualified from making further appearances in connection with the case.[110]

A somewhat similar set of circumstances was encountered in *Impervious Paint Indus., v. Ashland Oil*[111] where, in conjunction with the explanation of the class notice, one of the defendants told class members that if they didn't take affirmative action to opt out of the class they would be subject to discovery. This went against express instructions given to defendants' lawyers by the court that such a warning should not be given.[112] Though the lawyers did not participate in the contacts "they knew [defendant] intended to do so and in derrogation of their duty as officers of the court, they did not advise against the action."[113]

The *Impervious* court also pointed out that lawyers for both the plaintiff and the defense have special duties at this stage of the action. Class counsel must:

> represent the interests of the absent class members, [but] it would appear the contact initiated by class counsel prior to the close of the opt-out period would be unethical as solicitation of clients, if the purpose or predictable effect of the contact was to discourage a decision to opt out of the class.[114]

Defense counsel must treat the absent class members as represented by counsel and act accordingly.[115] To remedy the effects of the defendant's misconduct the court ordered class members who excluded themselves from the class restored, sent a special notice

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107. *Id.* at 773.
108. *Id.* at 774.
109. *Id.* at 775.
110. *Id.*
111. 508 F. Supp. 720 (W.D. Ky. 1981).
112. *Id.* at 723.
113. *Id.*
114. *Id.* at 722.
115. *Id.* at 723.

explaining the court's decision and given a new opt out period.[116]

The other main issue at this point in the proceedings is the propriety of soliciting contributions from members of the class. According to ABA Informal Opinion 1326: "It is ethically proper for an attorney to receive funds from his own client who is the representative of the class in a class action and who solicited funds from other members of the class in order to defray the expenses of the litigation other than attorney's fees."[117] Whether a court will allow the client to solicit funds in this way depends on the circumstances.[118] The attorney may also accept funds from such a solicitation if they were solicited for the express purpose of compensating the attorney.[119] However, the attorney may not personally solicit funds for compensation from the class members.[120]

As a result of the high level of court control anticipated by Rule 23, and the more settled nature of attorney-client relationships, whether or not a proposed solicitation will be allowed at this stage is more readily determinable here than in other contexts. The court's responsibility to see that class members receive unbiased information so that they can make informed decisions regarding participation makes any unapproved solicitation a very questionable enterprise at this stage. Also, the now more fully developed nature of the attorney-client relationship puts new ethical burdens on defendants' counsel not to violate Rule 4.2. Finally, while solicitation by the plaintiff of funds or agreements to participate may be allowed by the courts in some circumstances, plaintiff's counsel must make sure that his conduct does not amount to a violation of Model Rule 7.3.[121]

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116. *Id.* at 724.

117. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1326 (1975).

118. *Compare*, Norris v. Colonial Commercial Corp. 77 F.R.D. 672 (S.D. Ohio 1972) (permitting the solicitation of funds under court imposed guidelines) *to*, Fauteck v. Montgomery Ward, 91 F.R.D. 393 (N.D. Ill. 1980) (Recognizing the *Norris* decision but finding that the problems solicitation would cause in that case outweighed the need to solicit funds).

119. Informal Op. 1326.

120. *Id.* The issues involved when the client does the soliciting are discussed by Waid, *supra*, note 37, at 1053-55.

121. The solicited nonclient probably should be advised of his right to choose his own attorney. Waid, *supra* at 1054.

Conclusion

While the Bar Association Rules concerning solicitation in general adequately address the more egregious instances of solicitation that take place in the class action context, they do not provide adequate guidance in the variety of borderline cases peculiar to class actions. The frequency with which such problems occur merits having the problem specifically addressed either by a new Rule[122] or by comments to the existing Rules where applicable. It is arguable that given the safeguards found in Rule 23, a Model Rule placing time, place and manner restrictions on solicitation connected with class actions would eliminate the dangers inherent in solicitation.[123] The approach to this problem can range from a broad allowance of solicitation to narrow prohibition of all solicitation except that which is found to be specifically protected by the constitution. But until the problem is addressed more specifically courts will lack a clear standard by which to measure such conduct and class action practitioners will remain uncertain and at jeopardy where solicitation is concerned.

Thomas Pobgee

122. *See* Waid, *supra* note 37.
123. *See* Schoor, *supra* note 28.