



“Can we talk?” The guide to communicating with class members

These handy guidelines can be valuable when you need to deal with the issue of class member discovery.

BY GREGG A. FARLEY

[With apologies to long-time comedienne Joan Rivers and her classic line, “Can we talk?”]

Has this ever happened to you? You are the plaintiff’s counsel in a class action, and you think it would be helpful to your side if you could speak with some of the class members.

This issue often comes up in wage and hour class actions under California law or in collective actions for overtime pay under the federal Fair Labor Standards Act. In such cases, you might be concerned that the employer’s lawyer is speaking with the employees in your class action and even coercing unfair declarations or releases from them. To level the playing field, you want to have equal access to the employees in the class.

The problem is that you are not sure if you are even allowed to have access to the employees. If you are not allowed access to the employees, how do you go about obtaining it?

In non-class action cases, the rules are familiar to you. You know that you generally do not need the court’s permission to interview and obtain statements from witnesses. However, you also know that class action rules are different. When it comes to communicating with class members, you are not as certain about the rules of engagement. If

this story seems familiar, this article is for you.

The most frequently asked class action questions

During the last decade, a significant body of law has developed in California and the Ninth Circuit regarding the circumstances under which it is appropriate for counsel – both plaintiff and defense – to communicate with class members informally or through court-sanctioned discovery. Some of this precedent is contradictory and the law is still evolving in this area. However, some general rules have developed from this body of law.

The purpose of this article is to answer the most commonly asked questions regarding the general rules for communicating with class members and engaging in class member discovery. This article will provide a handy reference guide when you need to deal with the issue of class member discovery. The following are some common questions:

Can I communicate with class members before the case is certified as a class action?

Yes. It is now well established that plaintiff’s counsel can communicate with potential class members prior to class certification, just as plaintiff’s counsel can communicate with any other witnesses or unrepresented parties. You do not need the court’s ap-

proval to do this. Practically the only limitations that exist on such communications are the usual prohibitions against unethically soliciting clients or making misleading statements.

Thus, in *Koo v. Rubio’s Restaurant, Inc.* (2003) 109 Cal.App.4th 719, 736, the Court of Appeal held that, “as a general rule, before class certification has taken place, all parties are entitled to ‘equal access to persons who potentially have an interest in or relevant knowledge of the subject of the action, but who are not yet parties.’” The court also noted the “importance of permitting named plaintiffs to communicate with persons for whose benefit their action was ostensibly filed.” Prior judicial approval for such pre-certification communications is not required. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 299.)

Likewise, under Federal Rule 23, the U.S. Supreme Court has recognized that parties or their counsel are generally NOT required to obtain permission of the court before communicating with class members prior to certification. (*Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 94-95.)

Can defense counsel communicate with class members before the case is certified as a class action?

The answer is, again, “yes.” Both California courts and Ninth Circuit courts stress that plaintiff’s counsel and



defense counsel have an equal right to communicate with potential class members before the court certifies the case as a class action. Before class certification, plaintiff's counsel is not considered to be in an attorney-client relationship with potential class members. As a result, ethical rules do not prohibit defense counsel from communicating directly with class members. (*Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, 873.)

Obviously, this gives defense counsel in wage and hour class actions a built-in advantage stemming from the fact that their client is the employer. To counteract this advantage, plaintiff's counsel must be especially vigilant to make sure that defense counsel is not communicating in ways that are unfair to the employees in the potential class.

Are there any limitations on pre-certification communications with class members?

Both state and federal precedents recognize that under certain circumstances, courts can control and regulate pre-certification communications by plaintiff or defense counsel, with the appropriate evidentiary showing.

For example, one court found that the defense counsel's pre-certification communications were misleading because defense counsel did not tell the potential class members that their employer's interests might be adverse to the potential class members' interests. The court held that it was appropriate to send a corrective notice to the potential class members to remedy the misleading communications. (*Mevorah v. Wells Fargo Home Mortgage, Inc.*, 2005 WL 4813532 at *5-6 (N.D.Cal. 2005).)

Likewise, in *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 579-581, the court held that pre-certification communications with potential class members were not appropriate when there was a showing of actual or threatened abuse.

Abuse occurs if defense counsel or a defendant communicates with the class

in a way that contradicts or undermines the court's own notice to the class. For example, if an employer threatens or intimidates its employees so that they will not submit claim forms for back wages or other benefits, the court may prohibit the defense from engaging in such coercive pre-certification conduct. (*See Parks*, 235 F. Supp. 2d at 1083.)

However, what happens if the defense coerces the potential class members into signing declarations or releases that are against the potential class members' individual interests? There isn't a lot of precedent addressing this scenario, but the trial court would arguably have authority to regulate these types of communications, including determining whether the declarations or releases were signed because of coercion or fraud. Thus, in *Maddock v. KB Homes, Inc.* (C.D. Cal. 2007) 248 F.R.D. 229, 237, the court recognized its own authority to strike declarations obtained by an employer from its employees as a result of "misleading or coercive communications" but declined to do so in the absence of evidence of such abusive communications.

Can defense counsel continue to communicate with class members after the case is certified as a class action?

No. Once the court has certified the case as a class action, plaintiff's counsel represents the class members who do not opt-out of the class. Therefore, it is unethical for defense counsel to continue to communicate with such class members after certification. (*Moreno v. AutoZone, Inc.*, 2007 WL 4287517 at *9-10 (N.D. Cal. 2007).)

What if I do not know how to communicate with the potential class members? Can I propound pre-certification discovery to identify their names, addresses or telephone numbers?

Yes. As long as appropriate protections are in place, plaintiffs are entitled to obtain discovery from defendants or others

to find out the names, addresses and telephone numbers of potential class members. Plaintiff's counsel can then use this information to contact the class members.

Recently, courts have been active in defining the rules for pre-certification discovery. In *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, the California Supreme Court upheld the right of a plaintiff to obtain pre-certification discovery from a defendant manufacturer that consisted of the names, addresses and telephone numbers of each customer that complained about the defendant's defective product.

The *Pioneer* court recognized that this information was protected by the customers' privacy rights so it ordered the defendant to send a letter to the customers notifying them that their names and contact information would be disclosed to the plaintiff unless they affirmatively objected. The trial court also entered a protective order ensuring that any identifying information would remain confidential. The California Supreme Court found these procedural safeguards sufficient and rejected the defendant's argument that the customers should be required to "opt in" before their identifying information is disclosed.

After *Pioneer*, the Court of Appeal approved a similar privacy notice in *Belair-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554. In *Belair-West*, the trial court ordered the plaintiff to prepare the privacy notice and ordered the defendant to mail it. The court also entered a protective order so that confidential information was protected unless the potential class members "opted out."

Must a plaintiff or defendant mail a privacy notice to class members in every case where names and contact information are requested?

The answer is currently unclear. No California or Ninth Circuit court has yet directly addressed this question in a published decision. In *Pioneer* and *Belair-*



West, the courts approved of the privacy notices that the trial courts ordered, which allowed identifying information to be disclosed unless the recipient of the notice affirmatively objected. Neither court held that such notices were required in every case to protect the privacy rights of class members. (See *Tierno v. Rite Aid Corporation*, 2008 WL 3287035 at *3 (N.D. Cal. July 31, 2008).)

In *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242 the court suggested that at least in some circumstances, sending a privacy notice before disclosing confidential information may not be necessary. In *Puerto*, the plaintiff sued the defendant for wage and hour violations. In response to form interrogatories, the defendant disclosed the names of thousands of employees that were potential witnesses. However, the defendant refused to give the contact information for these witnesses, who were all potential class members. To resolve this dispute, the trial court required a neutral administrator to mail an “opt-in” privacy notice to the witnesses that required them to affirmatively consent to the disclosure of their confidential information.

In deciding to reject an “opt-in” privacy notice, the *Puerto* court observed that an “opt-out” notice might not be appropriate if a party requests contact information for witnesses rather than potential class members. “As pursuing litigation is a voluntary activity, an opt-out letter that offered recipients the option of participating or declining to participate was appropriate. In contrast, a recipient witness’s willingness to participate in civil discovery has never been considered relevant – witnesses may be compelled to appear and testify whether they want to or not.” (*Id.* at 1251-1252.)

What happens if a privacy notice is sent and a recipient objects to disclosure of his or her identifying information?

The answer is not clear. Both the *Pioneer* and *Belaire-West* courts do not address

what happens if a privacy notice recipient affirmatively objects to the disclosure of his or her identifying information.

Can the trial court overrule the person’s objection and order that his or her identifying information be disclosed? At least one Ninth Circuit court has said yes. The *Tierno* court indicated after balancing the person’s privacy rights with the plaintiff’s need for the identifying information, that the trial court does have the power to overrule the individual’s objection. (See *Tierno*, 2008 WL 3287035 at *2-3.)

If a privacy notice must be sent, who handles the sending of the notice and who pays for it?

Generally, the defendant or a neutral third party will send the privacy notice so that the names and contact information of the class members are kept confidential. However, this is not the only way.

In *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, a neutral administrator sent the notice to the class members. However, in both the *Pioneer* and *Belaire-West* cases, the defendants sent the notices. In *Wiegele v. FedEx Ground Package System*, 2007 WL 628041 at *3-4 (S.D. Cal. Feb. 8, 2007), the district court said either side was entitled to contact the potential class members.

As of yet, no court has addressed who must pay for the cost of sending the pre-certification privacy notices. The general rule is that once a case is certified as a class action, the plaintiff pays for the cost of providing notice to the class. Sometimes the plaintiff can shift the cost of sending the certification notices to the defendant. (See *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 376-380.) If the defendant insists that a privacy notice be sent before the class is certified, the plaintiff can certainly argue that since the defendant wants the notice sent, the defendant should pay for it. In any event, this issue will be before the court in the future.

What reasons can I give for needing the names and contact information for class members prior to certification?

The strongest reason a plaintiff can give to support pre-certification discovery of the names and contact information of potential class members is that the plaintiff needs this information to successfully prosecute the case. The *Pioneer* court found that “[c]ontact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case.” (See, *Pioneer* 40 Cal.4th at 373.)

Can defense counsel find out through discovery the identities of those class members with whom I communicate?

The answer is no. In *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, the court held that the attorney-client privilege and attorney work product doctrine do not protect this type of information from disclosure. (*Id.* at 536-538.) The court held that disclosure of the information would violate the class members’ privacy rights, which outweighed the defendant’s interests in obtaining this information. (*Id.* at 541.)

What if the court denies my motion for class certification? Afterwards, can I still propound discovery to identify the names and contact information of those people who were going to be in the class if the case were certified?

The answer is yes, but only if the information is relevant to one of the claims or defenses applicable to the plaintiff individually. For example, in *Experian Information Solutions, Inc. v. Superior Court* (2006) 138 Cal.App.4th 122, the trial court denied class certification. Nevertheless, the Court of Appeal agreed with the trial court that the individual plaintiff could still contact the potential class



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members through a neutral third party to get relevant information regarding the plaintiff's punitive damage claim. (*Id.* at 132-135.) However, the *Experian* court approved of the privacy notice only if it included a provision that required these people to affirmatively give their consent before the plaintiff could get their contact information. (*Id.* at 134.)

Conclusion

As this article indicates, the relevant body of law in this area continues to ex-

pand. If you are handling class action matters, you should keep these rules in mind when you decide whether to communicate with or propound discovery on the potential class members. So, the next time you are wondering whether to contact a class member, ask yourself, "Can we talk?"



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