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A class act

Once you have the class list, organizing information becomes the challenge

By Bill Daniels

One of the reasons I enjoy class actions and complex litigation is they force you to be disciplined. Take the simple task of organizing and interviewing percipient witnesses.

In individual cases, you have a list of witnesses, you interview or depose them as seems appropriate and it's pretty much a simple process. In class actions, you need a system or things can get out of hand pretty quick.

One of my favorite parts of prosecuting a class action is getting a contact list for the potential (we call them "putative") class members and conducting the initial interviews that tell me just what it is that I have on my plate.

In the wage and hour cases I've been litigating during the past several years, I've seen both extremes. Sometimes the defense will give up the list almost upon request. Usually this means they are feeling pretty good about their prospects. Sometimes, the defense fights tooth and nail, withholding the list until ordered by the court. Usually this means they are feeling insecure and then prepare for a bloody discovery battle.

Happily, the law on getting class lists – especially in wage and hour matters where I've spent most of my time – is reasonably favorable for plaintiffs. The primary objection is usually witness privacy, but so long as there is a general protective order in place, that really shouldn't pose much of a barrier. Putative class members, after all, are percipient witnesses and there is a notion that if the defense only discloses the whereabouts of witnesses they think are going to be good for them, that's inherently unfair. Some good cases on this are: *Tierno v. Rite Aid Corp.*, 2008 WL 3287035 (N.D.Cal. July 31, 2008); *Wiegele v. Fedex Ground Package System*, 2007 WL 628041 (S.D.Cal. Feb. 8, 2007); *Crab Addison, Inc. v. Superior Court*, 169 Cal.App.4th 958 (2008); *Lee v. Dynamex, Inc.*, 166 Cal.App.4th 1325 (2008); *Puerto v. Superior Court*, 158 Cal.App.4th 1242 (2008); *Putnam v. Eli Lilly and Co.*, 508 F.Supp.2d 812 (C.D. Cal. 2007); *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 170 (1989).

Once you have the class list, though, the challenge is using it to gather information without wasting a lot of time and effort. That means, you need to have a system and you have to be disciplined in sticking with it. Truthfully, coming to grips with this fact did not come easily to me.

When I first started working on class actions as a regular deal, I was used to litigating single shot cases where I had a high degree of autonomy. So, I conducted class member interviews and gathered information in the same way I always had: cryptic notes with no real form or format. Since I had no system for gathering information in systematic fashion, I couldn't share what I knew effectively with other attorneys or paralegals on the plaintiff team. It doesn't do much good to be thinking brilliant thoughts if you aren't sharing them with the people who matter.

On one of our cases we tried to solve that problem by creating a questionnaire encouraging putative class members to fill out and return the forms. Of course the defense got wind of what we were doing and started demanding the raw questionnaires, which we successfully withheld, since under California law, there is an attorney client privilege between class counsel and putative class members. Even so, I left that experience thinking there had to be a better way.

After much trial and error, I've concluded that the best way to conduct the information gathering process is to create an interview form that can be filled in during telephone interviews. That way I can do some test interviews, fine tune the form and then share it with the other attorneys and paralegals on the plaintiff team. I like this approach because, as we learn more information in discovery, we can update the form by adding or eliminating areas of inquiry.

Once there is a standard information gathering format, the process becomes much more manageable and we spend much less time translating individual assessments and more time digesting and strategizing on our next move in prosecuting the case.

Of course, in order to get to the happy state of having to organize class interviews, you need to have the class list. In federal court, where your substantial class will often land under the Class Action Fairness Act (CAFA), there is generally a scheduling order that puts you under tight time constraints from the moment discovery is opened. Timing is controlled by Federal Rules of Civil Procedure Rule 26(d)(1) and it is generally tight. You must, as the infomercials urge, act quickly.

We generally ask for a class list as soon as discovery opens and we ask in at least three different ways: As a FRCP Rule

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33 (Civ.Proc.Code §2030.010 et seq.) special interrogatory, as a Rule 34 (CCP § 2031.010 et seq.) request for production and as a Rule 34 document request attached to a personal most knowledgeable deposition notice under Rule 30(b)(6) (CCP § 2025.230). The thinking is that this tees up a potential motion to compel in each of the three key discovery areas (interrogatory, document request and deposition), so that if a motion to compel does become necessary, there isn't unnecessary delay.


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Chances are, interviews with the putative class will lead to witness declarations in support of your motion for class certification and help you identify potential witnesses during summary judgment and trial. Good organization will help you make the most of this important resource.

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