



THE STATE BAR OF CALIFORNIA

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DATE: August 16, 2011

TO: Members of the Board's Regulation, Admissions and Discipline Oversight Committee

FROM: Randall Difuntorum, Director, Office of Professional Competence

SUBJECT: Request for Approval for Publication of Formal Advisory Ethics Opinion Interim No. 10-0002

In accordance with your Board Committee's responsibility of approving publication of formal ethics opinions of the Standing Committee on Professional Responsibility and Conduct, and the provisions of section 6(j) of the Committee's Rules of Procedure (State Bar Board Book Tab 19, Article 2), I am distributing the following formal ethics opinion for your consideration:

Proposed Formal
Opinion Interim No.

Issue

10-0002

May consent under the "no contact" rule of California Rule of Professional Conduct 2-100 be implied, or must it be provided expressly? If consent may be implied, how is implied consent determined?

Proposed Formal Opinion Interim No. 10-0002 was circulated for a 90-day comment period ending on June 28, 2011. During that period, 4 comments were received and subsequently reviewed by the Committee. At its meeting on July 15 & 16, 2011, the Committee revised the opinion in accordance with the Committee's discussion following consideration of the public comments and approved the opinion as revised for submission to the Board Committee on Regulation, Admissions and Discipline.

Pursuant to section 6(j), if you object to the publication of this formal opinion, please notify me no later than **Friday, September 16, 2011**. If you object, the issue of whether this formal opinion should be published will be placed on the next Board Committee meeting agenda. If, on Friday, September 16th there have been no objections to this opinion, it will be published in accordance with the Committee's Rules of Procedure.

Please do not hesitate to call me if I may address any of the concerns you have with this opinion or refer you to a member of the Committee on Professional Responsibility and Conduct. My direct dial telephone number is: (415) 538-2163.

MT:Imm
Enclosures

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 10-0002**

ISSUES: May consent under the “no contact” rule of California Rule of Professional Conduct 2-100 be implied, or must it be provided expressly? If consent may be implied, how is implied consent determined?

DIGEST: Consent under the “no contact” rule of California Rule of Professional Conduct 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party’s attorney.

AUTHORITIES

INTERPRETED: Rules 2-100 of the Rules of Professional Conduct of the State Bar of California.^{1/}

STATEMENT OF FACTS

Attorney A is conferring with her client (Client A) outside of court when approached by Attorney B. After exchanging pleasantries regarding the weather, the following conversation takes place among Attorney B, Attorney A and Client A:

Attorney A to Attorney B: “Do you really need to call my client’s mother to testify in court tomorrow? It really seems unnecessary and abusive under the circumstances. I would ask that you reconsider.”

Client A to Attorney B: “Yes, she’s quite elderly and it could be traumatic for her.”

Attorney B to Attorney A: “Look, I’m sorry, but unless you’re willing to be reasonable and settle, I think she’s essential to my case. She’s a key witness to what happened.”

Client A to Attorney B: “You should leave my mother alone! She wasn’t even there that day and doesn’t really know anything! Besides *your* client caused this whole mess!”

Attorney B to Client A: “Then we will see what your mother really knows tomorrow.”

Has Attorney B violated rule 2-100 by responding in the manner described above?

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

Paragraph (A) of rule 2-100 of the California Rules of Professional Conduct, entitled “Communication with a Represented Party,” provides as follows:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the *consent* of the other lawyer. (italics added)

The Discussion to rule 2-100 provides an explanation of the purpose of the rule: “Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule.” This is consistent with case law in California: “This rule [referring to a predecessor to rule 2-100] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice. It shields the opposing party not only from an attorney’s approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role.” (*Abeles v. State Bar* (1973) 9 Cal.3d 603, 609 [108 Cal.Rptr. 359] (internal quotes and citations omitted). See also *Bobele v. Superior Court* (1988) 199 Cal.App.3d 708, 712 [245 Cal.Rptr. 144] (“[Predecessor rule to rule 2-100] operates to protect a represented party from being taken advantage of by adverse counsel. . . . [T]he ultimate purpose of rule 7-103 is to preserve the confidentiality of attorney-client communications.”).)

1. Consent of the Other Lawyer

Consent of the *represented party* is not sufficient. Rule 2-100 specifies that the consent of the *other lawyer* is required in order for a member to communicate with a represented party about the subject of the representation. (See also ABA Formal Opn. No. 92-362 (offering party’s lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law).)^{2/}

A common misconception is that the rule prohibits communication outside the presence of the other lawyer. However, the *presence* of the other lawyer is not necessarily sufficient to satisfy the requirements of rule 2-100. The rule specifies that the *consent* of the other lawyer is required in order for a member to be permitted to communicate with a represented party about the subject of the representation. (Rule 2-100, paragraph (A).^{3/}) Similarly, copying the other lawyer on correspondence is not necessarily sufficient—the rule requires consent. (See, e.g., *AIU Ins. Co. v. The Robert Plan Corp.* (2007) 17 Misc. 3d 1104(A) [851 N.Y.S.2d 56] (citing *Niesig v. Team I* (1990) 76 N.Y.2d 363 [558 N.Y.S.2d 493]) (concluding that sending a letter to the directors, even with a copy sent to the company’s counsel, violated New York DR 7-104); ABA Informal Opn. No. 1348 (offering party’s lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party’s lawyer).)

2. Applicability of Implied Consent

Rule 2-100 itself does not specify whether the requisite consent must be expressly given by the other lawyer, or whether the requisite consent may be implied by the facts and circumstances surrounding the communication with

^{2/} While California has not adopted the ABA Model Rules, they may nevertheless serve as guidelines absent on-point California authority or a conflicting state public policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. Rules Prof. Conduct, rule 1-100(A) (Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered). *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].

^{3/} Nonetheless, the presence of the opposing lawyer may be a mitigating factor. See discussion below. (See also *Wright v. Group Health Hospital* (1984) 103 Wash.2d 192, 197 [691 P.2d 564] (“the presence of the party’s attorney theoretically neutralizes the contact.”).)

the represented party, and we are aware of no California case addressing this issue. We conclude, for the reasons described below, that consent under rule 2-100 need not be express, but may be implied.^{4/}

Implied consent is often recognized under the law in the State of California. See, e.g., Cal. Penal Code, § 261.6 (“Consent” is defined as “positive cooperation in act or attitude. . . .”); *People v. Jo Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 908 [56 Cal.Rptr. 261] (“In finding that the appellants did not have consent [to enter the property of another], we are mindful of the fact that consent can be implied as well as express. . . .”); *People v. Wm. D. Noland* (1948) 83 Cal.App.2d Supp. 819, 821 [189 P.2d 84] (recognizing that, in connection with a violation of the Vehicle Code, waiver of the right of way may “be inferred from circumstances indicating an intent to waive.”); *Thompson v. City of Louisville* (1960) 362 U.S. 199, 205 [80 S.Ct. 624] (recognizing implied consent as a defense to criminal loitering); *People v. Linda Fay York* (1970) 3 Cal.App.3d 648, 654 [83 Cal.Rptr. 732] (a criminal law case relating to issues regarding unlawful entry and search, “hotel employees have the *implied* permission of a guest to enter a rented room for janitorial or maid services.”) (italics added; citing *United States v. Jeffers* (1951) 342 U.S. 48 [72 S.Ct. 93]). (See also *People v. Wash Jones Williams* (1992) 4 Cal.4th 354 [14 Cal.Rptr.2d 441]; *People v. John Z.* (2003) 29 Cal.4th 756 [128 Cal.Rptr.2d 783].)^{5/}

We also note the existence of certain interpretive opinions in California which suggest consent under rule 2-100 may be implied. See Cal. State Bar Formal Opn. No. 1993-131 (citing *Milton v. State Bar* (1969) 71 Cal.2d 525, 534 [78 Cal.Rptr. 649]) (rule 2-100 anticipates that counsel who is present can correct errors in opposing counsel's communications, thus implying that conversations where clients are present can occur. See also Los Angeles County Bar Assn. Formal Opn. Nos. 472 & 490 (suggesting that when an attorney receives a communication on behalf of the client, and chooses to deliver the communication to the client, “consent to the communication may be implied,” further, where the receiving attorney can control the timing of the delivery of the message, can comment on the communication, and can suggest an appropriate response, such communication does not threaten the values or dictates of the rule). See also *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401 [58 Cal.Rptr.2d 178] (“Rule 2-100 should be given a reasonable, commonsense interpretation . . .”) (internal quotes and citations omitted)).

Authorities in other jurisdictions outside of the State of California recognize implied consent under ethical rules comparable to rule 2-100. (See, e.g., Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2009-1 [<http://www.nycbar.org/ethics/ethics-opinions-local/2009-opinions/787-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers>] (“consent may be inferred from the

^{4/} Even though we conclude that consent under rule 2-100 may be implied, we do not mean to suggest that the consent requirement of the rule be taken lightly nor that it is appropriate for attorneys to stretch improperly to find implied consent. Further, even where consent may be implied, it is good practice to expressly confirm the existence of the other attorney's consent, and to do so in writing. (See Washington State Bar Association, “Ethics and the Law: Communicating with a Represented Governmental Client,” by Barrie Althoff, WSBA Chief Disciplinary Counsel (June 2001): Rule 4.2 of Washington's Rules of Professional Conduct “does not require that consent be written, but in good practice it should be, preferably signed by the opposing lawyer, or at least by sending a writing to that lawyer confirming his or her consent. Given the purpose and strictness of the rule, it is highly perilous to engage in otherwise prohibited communication solely in reliance on an ‘implied’ consent of the opposing counsel. A lawyer doing so should immediately seek written ratification from opposing counsel, but recognize that counsel may not at all agree such consent was implied.” See also Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2009-1, <http://www.nycbar.org/ethics/ethics-opinions-local/2009-opinions/787-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers3>: “To avoid any possibility of running afoul of the no-contract rule, the prudent course is to secure express consent.”)

^{5/} See also *Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1064 [249 Cal.Rptr. 220, 220] where the Court found that the client had impliedly consented to the subsequent adverse representation by its former attorney: “[A] client or former client may consent to an attorney's acceptance of adverse employment and *such consent may be implied by conduct.*” *Health Maintenance Network v. Blue Cross of So. California*, *supra*, 202 Cal.App.3d at p. 1064 (emphasis added and citations omitted). Note, however, that this case involved neither attorney discipline nor disqualification and the Court applied case law applicable with respect to certain predecessor rules to rule 3-310 [Avoiding the Representation of Adverse Interests]. We do not mean to suggest consent under rule 3-310, which expressly requires informed written consent to certain conflicts of interest, need not be express and in writing.

conduct or acquiescence of the represented person's lawyer"); Rest. (Third) of Law Governing Lawyers § 99, cmt. j. (a lawyer "may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests."). See also Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2005-4 (although the Association was unwilling to recognize implied consent under the facts presented in this opinion, the inquiry itself suggests the lawyer could have engaged in conduct from which consent could be implied); Tex. Atty. Gen. Opn. No. JC-0572 (Nov. 5, 2002) (referencing the Texas disciplinary rule: "[c]onsent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel.")).

3. Relevant Factors

For the reasons stated above, we conclude that consent under rule 2-100 need not be express, but may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include those set below. None of the factors below individually are necessarily determinative of whether consent has in fact been implied. Rather, an examination of all facts and circumstances surrounding the communication with the represented party is necessary to determine whether consent may be inferred.

- *Whether the communication is within the presence of the other attorney.* Presence gives the other attorney the opportunity to correct errors in such communication and otherwise protect the attorney-client relationship. (See Cal. State Bar Formal Opn. No. 1993-131.) Presence also gives the other attorney the opportunity to expressly object to such communication, thereby negating an implication of consent.
- *Prior course of conduct.* Prior conduct between the attorneys, whether in connection with the pending matter or other matters, may be indicative of implied consent.
- *The nature of the matters.*^{6/} Tacit consent to communications with a represented party may be found more often in transactional matters as compared with adversarial matters. Under certain circumstances, for example, transactional matters may be more collaborative or neutral than litigation matters. As a result, based on the totality of the facts and circumstances, the nature of the matter may be a relevant factor.
- *How the communication is initiated and by whom.* Consent may be implied by the fact that the attorney invited the communication with his or her client or otherwise facilitated such communication. In addition to the factual scenario of this opinion as set forth above, common contexts where consent may possibly be implied include email correspondence from an attorney to an opposing attorney which includes the attorney's client as a copied recipient, thereby facilitating a communication by the opposing attorney by use of the "Reply to All" email function. (See Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2009-1, *supra* ("We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented.")).
- *The formality of the communication.* The more formal the communication, the less likely it is that consent may be implied. For example, whereas under the proper circumstances, a "Reply to All" email communication might be acceptable, copying the represented party in a demand letter to the other attorney would be difficult to justify.
- *The extent to which the communication might interfere with the attorney-client relationship.* Among factors weighing against implied consent are the likelihood that the represented party may: (a) make

^{6/} Rule 2-100 is not limited to a litigation context. See Discussion to rule 2-100: "As used in paragraph (A), 'the subject of the representation,' 'matter,' and 'party' are not limited to a litigation context."

an admission or reveal confidential or privileged information; (b) be persuaded by the communication, reach certain conclusions or form certain opinions as a result of the communication; or (c) question the advice or ability of his or her attorney.

- *Whether there exists a common interest or joint defense privilege between the parties.* The existence of a common interest or joint defense privilege between the parties may be indicative of an implicit understanding that the attorneys be permitted to communicate with both parties.
- *Whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication.* Where, for example, the communication is unilateral, coming from the other attorney to the represented party, and if such party's attorney has the opportunity to promptly dispel misinformation and otherwise counsel the client, there may be little impact on the attorney-client relationship and administration of justice.
- *The instructions of the represented party's attorney.* Certainly consent should not be inferred where the attorney expressly withholds such consent and/or instructs the other attorney not to communicate with his or her client.

APPLICATION TO THE FACTS

Applying these principles to our factual scenario, we conclude that Attorney A provided implied consent, and therefore the communications described therein do not violate rule 2-100.

We conclude that consent may be implied by the fact that Attorney A initiated the substantive conversation regarding the litigation between Client A and Client B, by asking Attorney B (in the presence of Client A) about the need to call a witness in the case. By doing so, Attorney A invited the communication. In further support of our conclusion, we note that Attorney B's communication is in direct response to Attorney A's inquiry and that Attorney A did not intercede and stop the communication.

CONCLUSION

We conclude that consent under rule 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on August 16, 2011. A copy of these resources are on file with the State Bar's Office of Professional Competence.]