

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 490: May 1, 1997

SUMMARY

EX PARTE COMMUNICATIONS TO PARTY DIRECTED IN CARE OF ATTORNEY; EX PARTE COMMUNICATION WITH ADVERSE WITNESSES:

An attorney representing a client may send a written communication to a represented party provided delivery is made through the attorney representing that party.

An attorney may communicate with non-party adverse witnesses without notification or consent of the other party's lawyer unless the communication concerns attorney-client privileged information.

AUTHORITIES CITED

California Rule of Professional Conduct 2-100
Abeles v. State Bar (1973) 9 C.3d 603; 108 Cal. Rptr. 359; 510 P.2d 719
Bobele v. Superior Court (1988) 199 Cal.App.3d 708
Jorgensen v. Taco Bell Corp. (1996) 50 Cal.App.4th 1398
Los Angeles County Bar Association Formal Opinion 472

FACTS AND ISSUES

Plaintiff is alleged to have been injured in a work related accident. Defense attorney lawfully obtained a physical examination of Plaintiff. Defense retained examiner wrote a report which opined that Plaintiff's condition did not warrant surgical intervention. Without Plaintiff attorney's consent, the defense attorney sent a copy of the report, with defense interpretation of its contents, to Plaintiff care of and to Plaintiff's attorney. Defense attorney also sent a copy of the same report, with defense interpretation, to Plaintiff's treating physician. The issues are whether, in either instance, there has been a violation of California Rule of Professional Conduct 2-100. ¹

DISCUSSION

First Issue: Sending a written communication addressed to client but delivered to attorney

This Committee's Formal Opinion 472 states that an attorney involved on behalf of a client, in a matter with a business organization, may direct a written communication to the officers or board of directors of the represented organization provided the written communication is addressed care of the corporation's attorney at counsel's business address. The same opinion points out that Rule 2-100 is not designed to prevent or

hinder communications between opposing parties. Thus when the written communication is directed to the represented party, but sent to the attorney, the communication is wholly within the attorney's control. The receiving attorney can control the timing of delivery of the message, can comment on the communication, and can suggest an appropriate response, (LACBA Formal Opinion 472), subject to California Rule of Professional Conduct 3-500² and California Business and Professions Code section 6068 (m)³. This proposed form of communication does not threaten the values or dictates of Rule 2-100. (LACBA Formal Opinion 472)⁴. The scope of Rule 2-100 is not selective as to the type of client, organizational or individual, whom the attorney represents. Therefore, the written communication to the client but directed through the attorney does not violate the rule.

Second Issue: Communicating, *ex parte*, with a non-party adverse witness. A witness is not a party within the meaning of Rule 2-100. "Absent a privilege (such as attorney-client or attorney work product), 'counsel for all parties have a right to interview an adverse party's witness (the witness willing) in private, without the presence or consent of opposing counsel.'" (*Bobele v. Superior Court* (1988) 199 Cal.App.3d 708, 713, citation omitted). Instances of work product or attorney-client privileged information where an attorney is precluded from communicating with a witness do not involve Rule 2-100 which concerns communications with the represented client. An appellate court has recently stated that "Rule 2-100 should be given a reasonable, common sense interpretation, and should not be given a 'broad or liberal interpretation' which would stretch the rule so as to cover situations which were not contemplated by the rule." (*Jorgensen v. Taco Bell Corp.* 50 Cal App. 4th 1398, 1401.). Plaintiff's treating physician, although a witness, is not a party and therefore Rule 2-100 does not apply.⁵

CONCLUSION

It is not a violation of California Rule of Professional Conduct 2-100 for an attorney to direct a communication to a represented party provided delivery of the communication is made through the other party's attorney.

It is not a violation of California Rule of Professional Conduct 2-100 for an attorney to communicate, without notification or consent of other party's lawyer, *ex parte*, with any non-party witness provided the communication does not concern attorney-client privileged information.

This Opinion is advisory only. The Committee acts on specific Inquiries submitted *ex parte*. The Committee's Opinions are based only on such facts as are set forth in the Inquiries submitted.

¹ California Rule of Professional Conduct 2-100 subsection (A) states: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member known to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." The remaining subsections (B) and (C) do not apply to this opinion.

² California Rule of Professional Conduct 3-500 states: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information."

³ Business and Professions Code section 6068 (m) states that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

⁴. The purpose of the prohibition against ex parte unconsented communications is to preserve the integrity of the attorney-client relationship. (Abeles v. State Bar of California (1973) 9 Cal. 3d 603, 609; 108 Cal. Rptr. 359; 510 P.2d 719.)

⁵. Attorneys are cautioned not to intentionally try to use a communication with an adverse witness as a subterfuge to contact the represented party under circumstances where the attorney could not personally make the ex parte contact. (Rule 2-100 (A)).