L.A. COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 472

INQUIRY NO.: 1992-4
DATE OF INQUIRY: MAY 5, 1992
FINAL DRAFT APPROVED: JANUARY 25, 1993
PREPARED BY: GEORGE B. NEWHOUSE, JR.

SUMMARY

CONTACT WITH REPRESENTED PERSONS. An attorney involved on behalf of a client in a matter with a business organization may communicate with the president, managing partner, or board of directors of such organization, provided that he does so in writing, with delivery made through the attorney representing the organization in the matter.

AUTHORITIES CITED:

Abeles v. State Bar of California, 9 Cal.3d 603, 510 P.2d 719, 108 Cal.Rptr. 359 (1973);

Lysick v. Walcom, 258 Cal.App.2d 136, 151-52 (1968);

United States v. Lopez, 765 F.Supp. 1433 (N.D.Cal. 1991);

United States v. Jamil, 546 F.Supp. 646 (E.D.N.Y. 1982);

California Rules of Professional Conduct, Rules 2-100, 5-310;

Rules of Professional Conduct of the State Bar, Rule 12 (Cal. Business & Professions Code § 6076 (West 1962);

ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1);

Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion Nos. 350 (1975) & 375 (1978);


FACTS AND ISSUES PRESENTED

The following hypothetical facts are presented: While representing a client, an attorney wishes to communicate with the opposing corporation’s board of directors, or its president, on a matter relevant to the representation. The attorney wishes to do so by writing directly to the board of directors, but addressing the board in care of the corporation’s attorney at counsel’s business address. The corporation’s attorney has not consented to the manner of communication.\footnote{The inquirer does not specify whether the matter of the representation is litigation, prospective litigation or a business transaction. Nor does the inquirer indicate the motive for opposing counsel’s desire to transmit a message directly to the opposing party. Frequently this may occur when opposing counsel has reason to believe that settlement offers are not being faithfully communicated to the opposing party. This opinion makes no assumption with respect to these factors, except to note that under this hypothetical, whether the communication from opposing counsel actually reaches the represented party is dependent upon its attorney’s ultimate decision to deliver the message. We express no opinion whether the communication may be sent directly to the board of directors, with only notice of the letter to the corporation’s attorney, except to note that such practice would be a probable violation of Rule 2-100. See Los Angeles County Bar Association Opinion No. 350 (1975)(disapproving transmission of letter from plaintiff’s counsel to defendant insured).}

The inquirer requests our opinion whether such a communication to a represented person violates the Rules of Professional Conduct.
DISCUSSION

The Rules of Professional Conduct provide 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.

California Rules of Professional Conduct, Rule 2-100(A). A "party" is defined by Rule 2-100(B)(1) as including "[a]n officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership."

Two issues are presented. First, is the communication contemplated by counsel here made with a "party" in light of the proposal to write directly to the board of directors of the corporation? Second, assuming that the corporation's board of directors is a "party" within the scope of Rule 2-100, is the attorney's letter, addressed to the board of directors in care of its attorney, a "communication" proscribed by the rule against ex parte communications with a represented party?

A. A Communication Addressed to a Party's Board of Directors Is Tantamount to a Communication With a Party.

The inquirer argues that the adversary's "full board of directors" falls outside Rule 2-100(B)’s definition of "party" in light of the rule’s failure to include the board of directors as a board, within the specification of "party." This rationale is unpersuasive because a board of directors can only act through its participants, the individual directors. A communication or meeting with the board is obviously a communication with its individual members, and as a result, falls within the scope of the rule. See e.g., Opinion of the Alaska Bar Association,
Opinion No. 90-1, *Natl. Rptr. on Legal Ethics*, n.4 1990 (ex parte meeting between attorney for derivative action plaintiffs and board of directors of defendant corporation violated DR 7-104(A)(1)); Formal Opinion No. 1991-125, State Bar Committee on Professional Responsibility and Conduct (ex parte contact with dissident director of corporation represented by independent counsel deemed a violation of Rule 2-100).

B. **A Communication In Writing Addressed to the Board of Directors Made Through the Corporation's Counsel Is Not a Prohibited Ex Parte Communication With a Represented Person.**

Rule 2-100 is not designed to prevent or hinder communications between opposing parties. The purpose of the rule, as the Commentary to Rule 2-100 makes clear, is "to control communications between a member and persons the members knows to be represented by counsel unless a statutory scheme or case law will override the rule." See Discussion to Rule 2-100. For example, nothing in Rule 2-100 constrains the ability of the parties to meet and discuss the subject matter of the representation. Id. ²

The underlying objective of the rule is simply to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior skill and knowledge of the opposing lawyer. See e.g., *United States v. Lopez*, 765 F.Supp. 1433, 1448-49 (N.D.Cal. 1991); *United States v. Jamil*, 546 F.Supp. 646, 652 (E.D.N.Y. 1982). Thus, the rule "shields the opposing party not only from an attorney's approaches which are well intended but misguided." *Abeles v. State Bar of California*, 9 Cal.3d 603, 510 P.2d 719,

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² As we indicated in Opinion No. 375, the client may communicate directly with the opposing party without the consent of that party’s counsel, and may do so even with the knowledge of his own counsel. See Los Angeles County Bar Association Opinion No. 375 (1978).
108 Cal.Rptr. 359 (Cal. 1973); see also, State Bar Committee Formal Opinion No. 1979-49 at IIA-128.

In this case, the proposed communication is sent to the corporation's attorney, who will naturally review the communication before taking further action. This is a critical factor under Rule 2-100. As the corporation's attorney may perceive a duty to deliver the letter to the board of directors, she may not formally "consent" to the communication, yet it is still communication wholly within her control. Moreover, the communication here is unilateral rather than bilateral, and the corporation's attorney can control the timing of the message, as well as coordinate any appropriate response by the party.

We conclude, therefore, that the proposed form of communication does not threaten the values the rule is designed to foster, and is consistent with the dictates of Rule 2-100.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based on such facts as set forth in the queries submitted to it.

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3 We assume that although addressed formally to the "board of directors," the letter is still within the control of the attorney, who may open and review the contents of the letter, and exercise her discretion whether to deliver physically the letter to the board. If the attorney physically delivers the written communication to the board of directors, her consent to the communication may be implied. Although there may be circumstances where the attorney has an ethical duty to convey, in one form or another, the text of the letter to her client, this Committee expresses no opinion with respect to an attorney's ethical duty to deliver a written communication from opposing counsel to his client, as the extent of that obligation will turn on the circumstances of the situation and the nature of the communication. (See Rule 3-510, imposing on attorney a duty to "promptly communicate to the member's client . . . [a]ll amounts, terms and conditions of any written offer made to the client." Lysick v. Walcom, 258 Cal.App.2d 136, 151-52 (1968)(lawyer breached duty by failing to communicate policy limit demand to client).)