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 to Attorney A's inquiry in the presence of Client A?

[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).)

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).[2/]) 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 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.[3/]

[2/] 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.").)

[3/] 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); http://www.wsba.org/media/publications/barnews/archives/2001/jun-01-ethics.htm: 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

Implied consent is often recognized under the law in the State of California.[4/] More to the point, case law in California recognizes the validity of implied consent under at least one of the other California Rules of Professional Conduct (e.g., consent under rule 3-310 to conflicts of interest may be implied in certain circumstances). In *Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1064 [249 Cal.Rptr. 220, 220], the Court, in determining whether to disqualify an attorney, addressed whether a former client had consented to a subsequent adverse representation by its attorney.[5/] Even though consent to such conflicts requires written consent, the Court found that such consent could be provided implicitly: "There are exceptions to the general rule that an attorney may not do anything which will injure his former client in any matter in which he formally represented him and may not at any time use against his former client knowledge or information acquired by virtue of the previous relationship. An exception may exist, where the new employment is not inconsistent with the former employment or where the client expressly or *impliedly consents* to the adverse representation. . . . [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).)

We find it significant that California courts have held (under certain circumstances) that consent may be implied under rule 3-310 despite the rule's requirement that consent be in writing, whereas rule 2-100 has no such requirement. We also note that, because rule 2-100 requires consent of an attorney rather than that of a client, the rule may be given a more flexible interpretation. "Rule 2-100 should be given a reasonable, commonsense 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.* (1996) 50 Cal.App.4th 1398, 1401 [58 Cal.Rptr.2d 178] (internal quotes and citations omitted).)[6/]

We 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

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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.abcny.org/Publications/reports/show_html.php?rid=853: "To avoid any possibility of running afoul of the no-contract rule, the prudent course is to secure express consent.")

[4/] 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/] Although the Court was evaluating the requirements of predecessor rules to rule 3-310, such rules (similar to rule 3-310) required written consent: Former rules 4-101 ("A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client . . . .") and 5-102(B) ("A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.").

[6/] But see *Graham v. United States* (9th Cir. 1996) 96 F.3d 446, 449 (citing Cal. State Bar Formal Opn. No. 1993-131, that the "rule and its predecessors have a history of being strictly enforced in California.").

on the communication, and can suggest an appropriate response, such communication does not threaten the values or dictates of the rule).)

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.abcny.org/Publications/reports/show_html.php?rid=853] ("consent may be inferred from the 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, but are not limited to, the following:

- *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.*[7/] Tacit consent to communications with a represented party may be found more often in more neutral transactional matters as compared with adversarial matters.

- *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

[7/] 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.

None of the above factors 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.

APPLICATION TO THE FACTS

Applying these principles to our factual scenario, we conclude that Attorney A provided implied consent, and therefore the communication by Attorney B in response to Attorney A's inquiry (despite being within the presence of Client A) does 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.