

PROFESSIONAL LIABILITY UPDATE

June 1, 2004

Issue No. 185

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DISQUALIFICATION

California Law

By Jennifer A. Becker

The Fourth District refuses to disqualify an attorney for ex-parte contacts with an opposing party's mid-level employees. California's Rule of Professional Conduct precluding contact with a represented party is to be read narrowly to protect the competing policies of preservation of the attorney-client relationship and zealous representation by attorneys. An organization's attorney should take proactive steps to avoid employee contact with opposing counsel.

Snider v. Superior Court (Quantum Productions, Inc.) (2003) 113 Cal.App.4th 1187

Quantum sued former employee David Snider for unfair competition and misappropriation of confidential information. His attorney Dale Larabee contacted Quantum employees to discuss the case. Quantum filed a motion to disqualify Larabee based on improper contacts with a represented party in violation of California Rule of Professional Responsibility 2-100.

The trial court granted Quantum's motion to disqualify Larabee concluding that he compromised Quantum's attorney-client privilege by contacting management level employees. The Court of Appeal granted Snider's petition for a writ of mandate directing the trial court to reverse its order.

The court reviewed the historical development of Rule 2-100. Former Rule 7-103 had been interpreted to allow contacts with non-management employees of an adverse party. The test

was whether the employees were part of the "control group" of officers and agents responsible for directing the organization's actions in response to legal advice.

After the United States Supreme Court decided that the corporate attorney-client privilege extended to middle and low-level corporate employees, interpretation of the Rule expanded to preclude any contact with current employees of an organization.

In 1988, Rule 7-103 was repealed and the current Rule 2-100 was adopted. Paragraph (B)(1) encompasses officers, directors or managing agents. Paragraph (B)(2) encompasses "[a]n association member or employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for

purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.”

The Court found that because paragraph (B)(2) focuses on the subject matter of the communication it arguably applies to employees outside of an organization's control group. The ban applies if the subject matter of the conversation is the employee's act or failure to act in connection with the matter at issue, *and* that act or failure to act could bind the organization, be imputed to it, *or* if the employee's statement could constitute an admission against the organization. Conversely opposing counsel can initiate *ex-parte* contacts with current unrepresented employees about matters that do not involve the employee's conduct in a way that could bind the organization, be imputed to it, or constitute an admission of the organization.

Under California law admissions can be imputed to the employer only if the employee has authority to speak on the employer's behalf, such as high-ranking executives and spokespersons. This is known as the “managing-speaking agent” test.

This test balances the competing policies of protecting the organizational client from overreaching by opposing counsel and counsel's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery. It does not protect an organization from the revelation of prejudicial facts.

Quantum argued the contact was precluded under paragraph (B)(1) because both employees were

“managing agents.” The Court disagreed and defined “managing agent” in the same way the term is used for purposes of punitive damages liability. A managing agent is an employee who exercises substantial discretion over significant aspects of a corporation's business and is more than a mere supervisory employee. Neither employee fit into this definition.

Nor did the employees fall within the terms of paragraph (B)(2). There was no evidence that the subject matter of the contacts concerned any act or omission of the employee in connection with the matter. Neither employees' statements would constitute an admission because this category only applies to high-ranking executives and spokespersons.

The court rejected Quantum's broad interpretation of Rule 2-100 to preclude contact with all employees to protect the attorney-client privilege. The fact that a lower level employee, who is not shielded from contact under Rule 2-100, may be in possession of substantial privileged information does not enable corporate counsel to automatically assert the privilege as to all employees and enjoin opposing counsel from contact with them. Organizations are protected in the event of inadvertent disclosures because the organizational party can disqualify counsel and suppress evidence. The drafters of 2-100 opted for a combination of the “control group” and “managing-speaking agent” tests as the best balance between the competing policies of protecting confidential communications and allowing discovery of factual matters concerning the litigation.

There was no evidence that Larabee's actions had exposed attorney-client

communications. The court did criticize Larabee's questioning of one employee about why Quantum had sued Snider because this question could have revealed a confidential communication.

Furthermore, Quantum did not demonstrate that Larabee had actual knowledge that the employees were represented parties, which is required for sanctions pursuant to Rule 2-100.

The Court offered organizations some practical advice to protect themselves from improper disclosures of attorney-client communications. An organization can instruct its employees to contact management before speaking to opposing counsel. Alternatively, the organization's counsel can send the opposing party a warning that the employees are represented and may not be interviewed.

In turn, an attorney contacting an employee of a represented organization should inquire about the employee's status and whether the employee is represented by counsel or has spoken to the organization's counsel. If there is doubt about the propriety of the contact, the communication should be terminated.

Comment: From a practical standpoint the onus is clearly on an organization's counsel to communicate that as a matter of company policy employees should avoid contact with an opponent's attorney, or to warn opposing counsel that all employees are represented. Courts will not assume a violation of Rule 2-100 and the ability to protect the organizational client's interests is sacrificed if counsel fails to address the issue early in the dispute.