

PROFESSIONAL LIABILITY UPDATE

ETHICS

By Jennifer A. Becker

***San Francisco Unified School Dist. ex rel Contreras v. First School, Inc.* 2013 WL 628318**

The First District holds Rule of Professional Conduct 2-100 could not preclude party contacts with an opposing party's employees.

William Padilla and Manuel Contreras, former Laidlaw employees, and the Environmental Law Foundation (“ELF”), filed a complaint against Laidlaw’s parent corporation, First School, Inc. (“FSI”) alleging violations of the False Claims Act. According to the operative Complaint, Laidlaw contracted to provide bus services to SFUSD and was required to run school buses meeting certain environmental and safety standards. The Complaint alleged that FSI was in breach of its obligations, yet knowingly presented false claims for payment.

FSI filed two motions seeking injunctive relief after the individual Plaintiffs and their counsel had contact with bus mechanics who were current Laidlaw employees. The circumstances of the contacts were sharply disputed between the parties.

Eventually the trial court issued an order prohibiting ELF, Contreras, and Padilla from discussing the case with current Laidlaw employees. They were prohibited from contacting Laidlaw employees, although they were permitted to refer employees who voluntarily contacted them to Plaintiffs’ counsel.

On appeal Plaintiffs argued no evidence

supported a finding either Plaintiffs or their counsel violated Rule of Professional Conduct 2–100; the order violates the policies underlying the False Claims Act; and the order infringes the free speech rights of the individual Plaintiffs.

Rule 2–100 precludes an attorney from direct communication with a represented party about the subject of the representation without the consent of the party’s counsel. A party includes officers, directors, managing agents, partners, or employees whose acts could bind the entity, or whose statement could constitute an admission. The rule excludes communications with a public officer, board, committee, or body; communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or communications otherwise authorized by law.

The rule protects the attorney-client relationship. It is designed to permit an attorney to function adequately and to prevent the opposing party from interfering in the attorney’s role.

A bright line test is essential because an attorney must be able to determine whether conduct is permissible or risk disqualification. The Rule must be narrowly interpreted because the threat

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of disqualification and possible disciplinary action may blunt an attorney's zealous advocacy. Punishment for violations of the Rules of Professional Conduct is a matter for State Bar discipline. A trial court is limited to an appropriate remedy to ameliorate the effect the attorney's misconduct on the case.

The witnesses contacted did not qualify as a "party" or a high ranking officer who could bind their employer. There is no authority analyzing the provision that construes "party" to include employees whose acts or omissions could be binding upon or imputed to the organization for purposes of civil or criminal liability. The court relied on tort law to hold that the Rule precludes contact with employees whose acts or omissions are within the scope employment, and might be imputed to the corporation. As bus mechanics in a lawsuit about bus maintenance, both employees qualified as parties under the Rule.

The trial court did not resolve a dispute about whether the attorney's contact included discussion of the employee's conduct as a mechanic. Thus, there was neither unambiguous evidence nor a judicial finding of a Rule violation by Plaintiffs' counsel to support an order against the individual Plaintiffs.

Counsel using a client to indirectly communicate with an opposing party is a violation of rule 2-100. However, as set forth in the discussion of the Rule, attorneys are afforded considerable latitude in advising their clients regarding communications with opposing parties. Attorneys may actively advise their clients regarding such communications as long as the attorney does not overreach in light of the purposes underlying the rule.

The Court examined ethics opinions from different jurisdictions. One concluded an attorney may use information obtained from a client's direct communications with an opponent where there has been no prohibited direct or indirect communication under rule 2-100. By contrast, when the communication

originates with or is directed by the attorney, the communication is prohibited. Thus, an attorney is prohibited from drafting written materials to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client, and appear to be from the client rather than the attorney. An attorney is also prohibited from scripting questions to be asked or statements to be made in the communications, or otherwise using the client as a conduit for conveying words or thoughts originating with the attorney.

Another ethics opinion takes a more liberal view, allowing attorneys to actively counsel their clients about planned communications with represented parties and to draft some documents for use in the communications.

Other jurisdictions preclude an attorney from preparing binding legal documents that the client plans to ask the opposing party to sign. These decisions are consistent with the general principle that attorneys should not advise their clients regarding party communications in a manner that violates the underlying purpose of the rule. Preparation of legally binding documents for an opposing party to sign takes advantage of the fact that the party is being contacted without knowledge, consent or presence of a legal representative.

There was no evidence that plaintiffs were acting on their counsel's request, or that plaintiffs' counsel coached them. Thus the individual plaintiffs' communications with Laidlaw employees did not violate rule 2-100 because there was no evidence the communications were improperly directed by counsel.

Rule 2-100 is not intended to override a statutory scheme or case law. The False Claims Acts prohibits employers from imposing rules to inhibit employees from acting in furtherance of a false claims action. FSI could not directly interfere with its employees' ability to communicate with plaintiffs' counsel and could

not indirectly do so by advising its attorney to withhold consent for interviews with willing employees.

The trial court's order also impinged on Plaintiffs' First Amendment rights. Absent a protected competing interest on a level equivalent to the constitutional guarantee of free speech, orders limiting speech are not appropriate sanctions. Rule 2-100 cannot be construed to unduly interfere with the right of parties to communicate with one another absent compelling evidence of abuse.

The court dismissed FSI's witness tampering concerns. There was no legal authority to justify the order to prevent witness tampering, nor was there any evidence presented suggesting the plaintiffs attempted to coerce or intimidate potential witnesses. Employees' disquiet or discomfort, particularly in the context of a False Claims Act lawsuit, could not justify the order.

Comment: This case is an interesting exploration of the intersection between ethical rules on the one hand, and statutory schemes enacted to address corruption as well as constitutional rights on the other.