MCLE Article:
The No Contact Rule Actually DOES Apply to Transactional Lawyers

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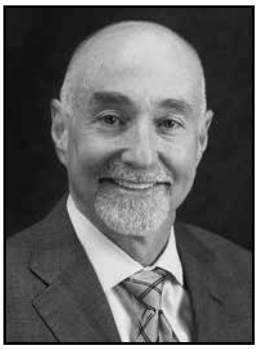

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This article is part of a series by the authors that focuses on ethical issues of particular interest to transactional attorneys in California.

You are sitting at your desk when your assistant announces that your most active client is on the phone. You take the call, looking forward to hearing about her next big M&A deal. After some pleasantries, the client announces that she also has on the line the counterparty with whom she is negotiating a term sheet. The client informs you that the counterparty is also represented by counsel, but your client explains that they are trying to hammer out some of the key business terms before they incur substantial legal costs. The client then proceeds to ask for your input on how to best structure the deal.

Sounds familiar, right? Who among us also hears the sound of alarm bells ringing? This all-too-common occurrence may result in a violation of the California Rules of Professional Conduct (or the CRPC)–specifically CRPC Rule 2-100 (the so-called No Contact Rule), which prohibits communication between an attorney and a represented party without the consent of the party's attorney. The rule relating to such communications does not appear to many transactional attorneys to be applicable in their practice, as it would be to our litigation colleagues. However, the rule prohibiting such communication does indeed apply to transactional attorneys, and violations of the rule can carry consequences including disqualification and discipline.

The rule aims to preserve the attorney-client relationship between a represented party and his or her legal counsel, and to protect a represented party from possible overreaching by an attorney who may take advantage of the opportunity to gain a better deal for his or her client. It is not difficult to anticipate other potential mishaps, such as inadvertent disclosure of confidential or privileged information and admissions against interest. In the above example, however, many transactional attorneys would not hear alarm bells, and even for those who do, they may feel that terminating the discussion to prevent a violation would be awkward at best and may demonstrate a lack of cooperativeness to the client and other parties to a transaction.

Few cases and interpretive opinions apply the No Contact Rule to transactional representations. One may therefore conclude that there is little risk to the transactional attorney for violating the rule, but the fact remains that the rule still applies, and, especially where a violation creates an unfair advantage for one party, discipline or disqualification is a real possibility. This

article discusses the prohibition on such communications, paying particular attention to issues commonly faced by transactional attorneys.

The basic rule

The rules regulating attorney conduct in the State of California are set forth in the CRPC, which were promulgated by the State Bar of California and approved by the California Supreme Court and are binding on all members of the State Bar of California.[1] The CRPC are disciplinary rules, not statutory laws, but courts may use the CRPC to determine whether attorneys or law firms should be disqualified from a particular representation.

An attorney's obligations with respect to communications with represented parties are governed by Paragraph (A) of Rule 2-100 of the CRPC:

> "While representing a client, a member [of the State Bar of California] 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*."[2]

The No Contact Rule is not limited to the litigation context, and the rule expressly applies to transactional matters as well.[3] However, terminating the telephone call in the example above, or ceasing a friendly conversation with someone seated across a conference table simply because the person's attorney steps out for a bathroom break, may not be second nature to many transactional attorneys. Therefore, it is important to note that the rule applies not just to communications "which are intentionally improper, but, in addition, [communications] which are well intentioned but misguided."[4]

What types of communications are covered?

Generally, any form of communication is covered by the No Contact Rule. The most common forms of communication include in-person meetings, traditional or electronic correspondence, and telephonic communication.[5] For most transactional attorneys, the telephone call described above presents a real-life scenario. For purposes of the No Contact Rule, it is not relevant that the client initiated the call or that the advice given is impartial–the attorney's participation in the discussion itself may be a violation of the rule. Similarly, when an attorney dials into a conference call and it becomes evident that some parties are participating with their counsel while others are not, the ethical attorney should either drop off the call or request that all represented parties get their counsel on the line. While parties are assembling and engaging in small talk, it may also be advisable to email or call opposing counsel to either invite them to the call or obtain their consent to such communication.

The foregoing hypothetical conference call raises an interesting question: is it a permissible alternative for the attorney to stay on the call and just listen without speaking–would that constitute prohibited communication? There is no clear answer to this question. Although the attorney's conduct might not technically qualify as "communication with a party," it does put the attorney in the position of possibly obtaining confidential information from the represented party or otherwise gaining an unfair advantage.

Another awkward situation involves discussions between an attorney and a party where the party is a client of the attorney in one matter, but separate counsel represents the party with respect to the matter that is the subject of the discussion. Of course, both parties to that matter would need to consent to the conflict of interest,[6] but even with such consent, the attorney must additionally secure the consent of the separate counsel to discuss that matter with the party. Without such consent, any such discussion (even though the party is a client) would be a communication subject to the No Contact Rule.

"Directly or indirectly"

The No Contact Rule expressly extends to both direct and indirect communications. Clearly, the use by an attorney of an intermediary or agent to communicate with a represented party could be a prohibited form of indirect communication. Interestingly, the prohibition might even extend to the use of the client as an intermediary of the attorney. In such a situation, there is a tension between improper indirect communications with a represented party, on the one hand, and encouraging principal-to-principal communications, on the other hand. In most business transactions, having the principals get together to discuss and agree upon material business terms is necessary, beneficial, and cost effective. However, if

the content of a communication between principals originates with or is directed by the attorney (who either scripts the principal's questions or conveys his or her own thoughts or positions through the principal), then the communication may be improper.[7] The attorney may confer with and advise a client with respect to a principal-to-principal communication, but the attorney may not direct the conversation. There is no bright line test, but generally reviewing, commenting on, or proofing letters and emails at the request of a client is probably acceptable, although ghostwriting them is probably not.

The prohibition on indirect communication may also extend to providing a represented party with copies of correspondence sent to the party's attorney.[8] For example, separately sending a represented party copies of correspondence you sent to his or her counsel (e.g., to incite the party to "light-a-fire" under counsel) would be an example of behavior subject to the rule. Likewise, sending a represented party a "courtesy copy" of email correspondence without consent may also be prohibited.

"Subject of the representation"

There is little guidance regarding this specific element of the No Contact Rule, probably because its meaning should be self-evident. A literal reading provides that only communications about the subject of a particular representation between an attorney and a represented person (individual or entity) are prohibited. Clearly, an attorney and a represented party can discuss the weather, politics, sports, or anything else unrelated to the representation. The exact scope of what constitutes the subject matter of the representation, however, may be somewhat elusive in certain matters. Consider a situation where an attorney represents the issuer in a private placement, where the lead investor is represented by counsel. Absent consent by such counsel, the attorney must direct all communications with respect to the private placement through counsel. Suppose sometime after closing of the investment, the issuer needs shareholder consent for a proposed corporate action. Is the subject matter sufficiently different that the issuer's attorney can now communicate directly with the investor without going through counsel? On the one hand, a corporate governance action is a different matter than an investment in the issuer. On the other hand, the representation may be in connection with all matters relating to the investor's interests in the issuer, not just the initial investment. The attorney must use common sense and his or her reasonable judgment to make the determination. Often the prudent course of action is to inquire, either of the party or (if known) counsel, whether the party is represented by counsel with respect to the particular matter proposed to be discussed.

Who is the party?

Attorneys are not barred from communicating with any person simply because that person happens to be represented by counsel. The No Contact Rule only applies to a represented party in a matter.[9] Communications with a represented person are permissible if such person is represented in an *unrelated* matter and not a party to the matter which is the subject of the communication.

Where an entity is a party, that "party" for purposes of the No Contact Rule includes any *current* officer, director, or managing agent[10] of the entity and any employee of the entity where the subject of the communication is an act or omission by that person that may be binding on the entity in connection with the matter in dispute or the employee is one whose statement may constitute an admission on the part of the organization.[11] When dealing with officers or directors, it is irrelevant whether the contacted person is, in reality, a member of the control group or has power to speak on behalf of the corporation.[12] Even in situations where a director or officer is in a dispute with the entity, an attorney cannot communicate with a dissenting director or officer of the entity without the consent of the entity's counsel.[13] However, if such dissident officer or director is represented by separate counsel, direct contact may be permitted if separate counsel consents.[14]

Even where an entity is the party, and such entity is represented by outside counsel, it may be permissible to communicate with the entity's in-house counsel without securing the consent of the outside counsel.[15] A rationale under such circumstances is that the in-house counsel is not likely to inadvertently make harmful disclosures. However, if the in-house counsel (i) was a party in a dispute and represented by the entity's outside counsel, (ii) otherwise participated in giving business advice, or (iii) was involved in the decision-making which gave rise to the dispute, then the prohibition on communication could still apply.[16]

Note that the No Contact Rule does not prohibit an attorney from communicating with a represented party if the attorney is acting on his or her own behalf. Just because the party in a particular matter happens to be an attorney does not mean that the party has given up his or her right to communicate directly with the party on the other side of a transaction.[17] The same should be true for an in-house attorney acting on behalf of an entity, as long as the in-house attorney is acting as principal, and not as legal counsel, for the entity.

"Knows to be represented" . . . "in the matter"

A violation of the No Contact Rule requires that the attorney know that the contacted party is represented in the particular matter which is the subject of the communication. Although the authorities appear to be split as to whether constructive knowledge is sufficient,[18] knowledge can be established using an objective standard, based on circumstantial evidence, to determine if the attorney had reason to believe that a party was represented but failed to obtain counsel's consent prior to initiating contact.[19] In such cases, an attorney ought to inquire about the existence and nature of a representation to confirm his or her understanding. If the attorney has no reason to know a party is represented, the attorney is not obligated to inquire.[20] If the attorney is unsure, it is prudent to ask the party whether or not the party is represented before initiating any communication regarding the matter. Even if the party denies that counsel has been engaged, or claims that his or her counsel has not been engaged with respect to the matter being discussed, but a reasonable attorney would know that such denials or statements were untrue, then the attorney should curb any communication with the party without the consent of counsel.[21]

The fact that an attorney knows a party will likely retain counsel for a particular matter, but has not yet done so, does not mean that the attorney is barred from communicating with the party.[22] It follows, for example, that an attorney would be free to meet with his or her client and other unrepresented parties at the early stages of a transaction to help analyze the practicality of a potential transaction. Conversely, a representation is not perpetual, "forever excluding other attorneys from contacting [a] former [party]."[23] Once a representation has concluded, and an attorney does not have any reason to believe there is a continuing representation, communication is permitted. It is not always clear, however, when a transactional representation has ended. As a practical matter, in many instances a transactional representation has ended once the deal has closed, your fees have been paid, the closing dinner has occurred, and the closing sets have been distributed. However, where there are post-closing obligations and survival provisions, and especially where the notice provisions in the principal transactional document call for copies to be sent to counsel, the attorney should assume that the relationship continues for post-closing disputes. In such a case, the attorney should not communicate with a party without at least inquiring as to the current status of the representation.

Where an entity is a party, the fact that the entity has in-house counsel may well suggest that the entity is represented in all matters, especially if the entity has a general counsel. In such instances, an attorney may not communicate with current officers, directors, managing agents, and other covered employees without the consent of such in-house counsel. However, the mere presence of an in-house specialist (e.g., regulatory or IP counsel) does not necessarily put the attorney on notice that the entity is represented in any particular matter outside such specialty.

"Consent of the other lawyer"

Consent is the cornerstone of compliance with the No Contact Rule. However, consent of the represented party is not sufficient.[24] Consent must be obtained from opposing counsel before the attorney may communicate with the represented party. Where an entity is the party, consent of in-house counsel may be sufficient (depending on the function and role of such counsel).

A common misconception is that the No Contact Rule prohibits communication outside the presence of opposing counsel. But the presence of opposing counsel is not necessarily sufficient to satisfy the requirements of the No Contact Rule. The rule mandates that consent of opposing counsel is required. However, consent need not be express, but may be implied by the facts and circumstances surrounding the communication with the represented party.[25] Such facts and circumstances may include whether the communication is within the presence of opposing counsel. Other relevant factors include prior course of conduct, the nature of the matter,

how the communication is initiated and by whom, the formality of the communication, and the extent to which the communication might interfere with the attorney-client relationship.[26]

Even though the required consent under the No Contact Rule need not be in writing or expressly provided, it is good practice as an evidentiary matter to confirm an undocumented consent in an email or other writing.

Exceptions

The No Contact Rule recognizes three exceptions where communications with a represented party are permissible without the consent of counsel: (i) contact with a public officer, board, committee, or body, (ii) communications initiated by a represented party seeking advice or representation from an independent attorney (not opposing counsel), and (iii) communications otherwise authorized by law.[27]

For example, an attorney may discuss a matter pending before a city tribunal with a city official without the city attorney's consent.[28] Similarly, attorneys are permitted to communicate directly with government regulators at the Securities and Exchange Commission or the Federal Trade Commission in connection with investigative or compliance matters without consent. On a deal where a principal is dissatisfied with his or her current counsel, it is also permissible for an attorney not yet involved in that matter to provide independent advice to the principal or substitute into the representation as long as the attorney did not initiate the contact.[29] Certain statutes may also override the No Contact Rule to protect other established rights, such as the right of employees to organize and to engage in collective bargaining.[30]

Consequences of failure to comply

Improper communications with a represented party can lead to consequences even for transactional lawyers. The State Bar of California may discipline an attorney for a violation of Rule 2-100. While we have found no instance in the transactional context, a prosecuted violation in a litigation context sometimes results in a temporary suspension of the attorney's license to practice law.[31] Whether an attorney can be disqualified from representing the client rests with a trial court (if applicable).[32] Normally, a technical violation alone may not warrant disqualification unless it "led to the disclosure of confidential communications protected by the attorney-client privilege . . . or created an unfair advantage, or impacted . . . the integrity of the judicial system."[33] In determining whether disqualification of counsel is appropriate, the court will consider whether the violation will likely have a "continuing effect" on the matter.[34] Disqualification due to a willful or reckless violation of the rule may also result in malpractice liability or fee disallowance or disgorgement where the client's interests are jeopardized or prejudiced by the termination of the representation. It may be, however, that disqualification is most relevant where the transactional matter also involves or results in litigation (i.e., because absent litigation, there is no tribunal to impose disqualification).

Conclusion

The limitation on communications with represented parties imposed by the No Contact Rule applies to all attorneys, including transactional attorneys. Unlike litigators, who routinely perceive such non-consensual communications as an abusive violation, many transactional attorneys inadvertently violate the rule and run the risk of discipline or disqualification. However, attorneys can prevent such outcomes by simply being mindful of the issues addressed in this article. Here's a good start: make a mental note of all parties present at a meeting or on a call and ensure that an attorney for each party is also present. Pay attention as individuals drop off a call or leave the room, and you may prevent a violation of the No Contact Rule and simultaneously preserve a party's right to effective counsel–even if the party is not your client.

Endnotes

* The views expressed herein are the views of Mr. Wertlieb and Ms. Avedissian individually, and not attributable to their employers or other affiliated organizations.

1 CAL. BUS. & PROF. CODE §§ 6076-77.

2 CAL. RULES OF PROF. CONDUCT [hereinafter CRPC] R. 2-100(A) (2008) (emphasis added).

3 *See Graham v. U.S.*, 96 F.3d 446, 449 (9th Cir. 1996). *See also* CRPC R. 2-100 Discussion (2008).

4 *Abeles v. State Bar*, 9 Cal. 3d 603, 609 (1973).

5 Social media communications (e.g., through Facebook) are also considered communications for this purpose. *See* San Diego County Bar Legal Ethics Comm., Op. 2011-2 (2011).

6 *See* Neil J Wertlieb & Nancy T. Avedissian, *Addressing Conflicts of Interest in a Transactional Practice*, 4 BUS. L. NEWS 7 (2008).

7 Cal. Bar Form. Op. 1993-131 (1993). *See San Francisco Unified Sch. Dist. ex rel. Contreras v. First Student, Inc.*, 213 Cal. App. 4th 1212 (2013). *But see* ABA Form. Op. 11-461 (2011).

8 *See Crane v. State Bar*, 30 Cal. 3d 117, 121 (1981).

9 *Matter of Dale (Rev. Dept. 2005)*, 4 Cal. State Bar Ct. Rptr. 798, 804-07.

10 A "managing agent" is an employee who exercises "substantial discretionary authority over decisions that determine organizational policy." *Snider v. Super. Ct. (Quantum Productions, Inc.)*, 113 Cal. 4th 1187, 1209 (2003).

11 CRPC R. 2-100(B)(1)-(2). *See San Francisco Unified Sch. Dist.*, 213 Cal. App. 4th 1212.

12 *Id*.

13 *See Mills Land & Water Co. v. Golden West Ref. Co.*, 186 Cal. 3d 116, 128 (1986).

14 *La Jolla Cove Motel & Hotel Apts., Inc. v. Super. Ct. (Jackman)*, 121 Cal. 4th 773, 789-90 (2004). Despite the fact that corporate or in-house counsel's consent in such a situation is not required, it may be "advisable and prudent" for the dissent's separate counsel to consult with corporate counsel prior to granting a consent to communicate because it is possible for confidential or privileged information to be accidentally disclosed. *Id*. at 788.

15 ABA Form. Op. 06-443 (2006).

16 *Id.*

17 CRPC R. 2-100 Discussion.

18 See *Snider*, 113 Cal. 4th at 1209; Cal. Bar Form. Op. 1996-145 (1996).

19 *Snider*, 113 Cal. 4th at 1215-16.

20 Cal. Bar Form. Op. 1996-145. *See McMillan v. Shadow Ridge at Oak Park Homeowner's Ass'n.*, 165 Cal. App. 4th 960, 965 (2008).

21 *See Abeles*, 9 Cal. 3d at 609-10; *Engstrom v. Goodman*, 166 Wash. App. 905 (2012).

22 *Jorgenson v. Taco Bell Corp.*, 50 Cal. 4th 1398, 1402 (1996). *See also Hernandez v. Vitamin Shoppe Indus. Inc.*, 174 Cal. App. 4th 1441, 1459 (2009).

23 *Jackson v. Ingersoll-Rand Co.*, 42 Cal. 4th 1163, 1168 (1996).

24 Cal. Bar Form. Op. 2011-181 (2011).

25 *Id.*

26 *Id.*

27 CRPC R. 2-100(C)(1)-(3).

28 Cal. Bar Form. Op. 1977-43 (1977).

29 However, attorneys must be mindful not to persuade a represented party to discontinue representation by existing counsel so as not to trigger potential tort liability for alleged interference with a contractual relationship. *See Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell*, 70 Cal. 3d 331, 337-339 (1977).

30 *See* CRPC R. 2-100(C)(3) Discussion.

31 *See, e.g., Levin v. State Bar*, 47 Cal. 3d 1140, 1150 (1989). *See also Conservatorship of Estate of Becerra v. Becerra*, 175 Cal. App. 4th 1474 (2009).

32 *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal 3d 597, 607-608 (1980).

33 *Cont'l Ins. Co. v. Sup. Ct. (Commercial Bldg. Maint. Co.)*, 32 Cal. App. 4th 94, 111 n.5 (1995).

34 *Chronometrics*, 110 Cal. 3d at 607-08.