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A WORD ON CLIENT "SCRIPTING"

In a recent, interactive seminar, University of San Diego Professor David McGowan posed an interesting hypothetical which was tricky. Law school professors are funny that way. Since a large majority of participants came to what likely was the wrong conclusion, the issue is one deserving a brief walk down memory lane.

The hypothetical went something like this: Plaintiff Corp's CEO wants to write a settlement proposal directly to her counterpart at Defendant Corp., offering to settle a litigated dispute, in order "to keep the lawyers at bay," and stem the flow of expenses. Both parties are represented by counsel. The CEO asks Plaintiff Corp.'s counsel to "ghost" a letter conveying that sentiment, who obediently complied. The CEO reviewed it, signed as is, and passed it along directly to Defendant Corp.'s CEO. Did counsel act ethically?

At issue, perhaps surprisingly, is California Rule of Professional Conduct (CRPC) 2-100, which states in pertinent part: "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." Direct communication seems obvious enough, but what is indirect communication?

California's Committee on Professional Responsibility and Conduct (COPRAC) spoke to an analogous circumstance in its Formal Opinion No. 1993-131. There, an attorney was representing the husband in a pending dissolution action, where wife

was separately represented by counsel. The husband desired to communicate directly with his wife, without either attorney being present, regarding the merits of the dissolution and in an attempt to resolve various disputed issues. He asked for guidance from his attorney regarding the content of and strategy to be pursued in that communication. COPRAC determined that CRPC 2-100 would prohibit a conversation "scripted," or communication "ghosted" by the attorney for his or her client's use in proceeding, as being an indirect communication with a represented party.

According to COPRAC, the threshold question is who the communication "originates with or is directed by." Certainly, and

not the attorney, "an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general nature of the communication the client intends to initiate with the opposing party..." In determining the propriety of one's actions, COPRAC concluded that "counsel should be guided by the overriding purpose of rule 2-100, which is to prohibit one side to a dispute from obtaining an unfair advantage over the other side as a result of having ex-parte access to a represented party."

Returning to Prof. McGowan's clever twist, does Formal Opinion No. 1993-131 present a fair analogy; between the drama and idiosyncrasies of family law and...well...the drama and idiosyncrasies of business litigation? The answer is "yes," for certainly there is no such distinction made in CRPC 2-100. Although the idea of initiating communication between the

ETHICS IN BRIEF

A column from the SDCBA's Legal Ethics Committee

perhaps thankfully, parties to litigation generally have the right to communicate with each other without their counsel present. However, to the extent one party's communication with a represented, opposing party "originates with or is directed by" counsel, that attorney has violated CRPC 2-100. "An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications, or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney."

Conversely, moving from one shade of gray to the other, where the communication "originates with or is directed by" the client and

parties came from Plaintiff Corp.'s CEO, to the extent its counsel originated or directed the communication as instructed, he or she would be subject to discipline, as having indirectly communicated with a represented party without the consent of opposing counsel.

...At least, unless I'm missing something. Law school professors are funny that way.

The information in this column is intended to be informational only and does not constitute legal advice. Shepardize all codes and case law before using.

This month's EIB was submitted by Ross G. Simmons, principal of The Simmons Firm, ALC. The views expressed are his own.