

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CIV S-09-2445 JAM EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants.

ORDER

_____ /
This matter was before the court on September 22, 2010, for hearing on Sierra Pacific Industries' (hereafter "SPI") August 27, 2010 motion for discovery and the United States' August 25, 2010 motion for a protective order. Assistant U.S. Attorneys Kelli Taylor and Todd Pickles appeared on behalf of the plaintiff, the United States. Attorneys William Warne, Mike Thomas, Annie Amaral, and Meghan Baker appeared on behalf of defendant SPI. Attorney Richard Linkert appeared on behalf of the Walker defendants and related trusts.

I. SPI's Motion for Discovery Partially Granted

For the reasons stated on the record, the motion for discovery was partially granted and partially denied. The court granted SPI two days and four hours to depose Joshua White and the same amount of time to depose Dave Reynolds. The court granted SPI an additional ten

////

1 depositions beyond the number of depositions the parties had already agreed upon,¹ as discussed
2 at the hearing. That bench ruling is confirmed by this written order.

3 **II. United States' Motion for Protective Order is Granted**

4 Following extended oral argument, the court submitted for further consideration the
5 United States' motion for a protective order. That motion is now granted.

6 The United States argues that an attorney for SPI, Michael Schaps, questioned Forest
7 Service employees regarding matters SPI considers relevant to this litigation, and that this
8 contact violated the rules of professional responsibility barring contact with represented parties.
9 It is undisputed that Schaps did communicate with Forest Service employees, and that the
10 communication occurred without notice to or consent from the attorneys representing the United
11 States and without resort to the Federal Rules of Civil Procedure as they pertain to discovery. It
12 is also undisputed that Schaps did not inform those employees that he was an attorney
13 representing SPI in this pending litigation. However, SPI asserts that the communications were
14 protected by the First Amendment and thus did not violate professional responsibility rules.

15 The United States seeks an order requiring counsel for SPI to produce a list of all of
16 plaintiff's employees who have been contacted by SPI's counsel or persons acting at the
17 direction of counsel, together with the dates of the contacts, and a description of what
18 representations were made by counsel or counsel's agent(s) before the employees were
19 questioned. The United States also requests that counsel for SPI be ordered to produce to the
20 plaintiff the originals and all copies of all notes or other documents that concern or relate to the
21 communications by plaintiff's employees and SPI's counsel and/or agents. The motion also
22 seeks an order requiring SPI's counsel (including those acting on behalf of counsel) to inform
23 any federal employee they contact in the course of this litigation that they are attorneys (or
24

25 ¹ The United States had already agreed to 15 federal depositions, in addition to the 23
26 depositions that were scheduled or had been taken in state court, and three additional depositions
that were to be taken as expert depositions.

1 representatives of attorneys) working on behalf of SPI in litigation brought by plaintiff against
2 SPI involving the Moonlight Fire. Finally, the motion seeks an order precluding SPI from using
3 information obtained by the ex parte communications with the Forest Service employees.

4 **A. The Parties' Arguments**

5 The parties have described in the Joint Statement filed September 15, 2010 their
6 respective versions of what occurred. Dckt No. 78 ("Jt. Stmt."). While their characterizations of
7 the contacts in question are sharply at odds, certain key facts regarding the communications with
8 the government's employees are not seriously disputed.

9 The parties agree that Schaps attended a Forest Service sponsored field trip to a fuel
10 reduction project site on the Plumas National Forest. *Id.* at 2, 24. It is undisputed that the
11 excursion was open to the public. The United States complains, however, that while on the field
12 trip Schaps specifically questioned Forest Service employees about fuel breaks, fire severity, and
13 what contract provisions the Forest Service requires for fire prevention in timber sale projects,
14 and that he did so without disclosing that he was seeking information regarding pending
15 litigation and that he was an attorney representing a party opposed to the government in that
16 litigation. *Id.* at 4 (citing Tompkins, Garcia, Wood and Suihkonen Declarations). Had he made
17 those disclosures, the government argues, the Forest Service employees could have sought legal
18 counsel before engaging in the communications with and responding to questions by the
19 government's opposing counsel. According to the government's employees, Schaps, again
20 without disclosing his status as opposing counsel, also asked their opinions as to several
21 hypothetical questions concerning these topics. The United States further contends that when the
22 District Ranger specifically asked him if he was representing anyone, Schaps failed to disclose
23 the fact that he was representing SPI in this litigation, and further failed to inform the employees

24 ///

25 ///

26 ///

1 that he considered the issues he was inquiring about relevant to the pending litigation.² *Id.* at 4.

2 The United States also asserts that Schaps used his iPhone to record parts of his discussions with
3 the Forest Service employees. *Id.* at 4-5.

4 SPI argues that the Forest Service chose to organize the event and to invite the public,
5 including a local news reporter. *Id.* at 24. SPI notes that the Forest Service identified the topics
6 to be addressed and invited the public's input. *Id.* SPI contends that its attorney's participation
7 in the event, including his conversations with Forest Service employees, was constitutionally
8 protected activity under the First Amendment. SPI also asserts that its attorney was not required
9 to reveal his status as counsel for SPI and that he was "unconstitutionally interrogated" when
10 Forest Service employees asked him whether he represented anyone. *Id.* at 24-25.

11 **B. Applicable Legal Authority**

12 Local Rule 180(e) states that attorneys before this court must comply with the Rules of
13 Professional Conduct of the State Bar of California (hereafter "California Rules"). Local Rule
14 180(e) further provides that in the absence of an applicable California standard, the Model code
15 of Professional Responsibility of the American Bar Association may be considered as guidance.

16 Rule 2-100 of the California rules states: "[w]hile representing a client, a member shall
17 not communicate directly or indirectly about the subject of the representation with a party the
18 member knows to be represented by another lawyer in the matter, unless the member has the
19 consent of the other lawyer."³

21 ² The government alleges that Schaps made several false representations to Forest
22 Service employees as to his status and whether he was representing anyone during the course of
23 his discussions with and questioning of those employees. *Id.* at 3-4. The government argues that
24 these false statements violated the standards of professional conduct required by Local Rule
25 180(e), Cal. Bus. & Prof. Code § 6068(d) and ABA Model Rules 4.1(a) and 8.4(c). Because the
26 court grants the instant motion on grounds that the communications violated the no contact rule,
the court does not address this issue.

³ This prohibition includes contacts with employees of a represented party where the
communication concerns material acts or omissions of the employee or may elicit statements that
constitute an admission of the part of the organization. Rule 2-110(B)(2). As discussed below,

1 Rule 2-100(C)(1) contains a “public officer” exception to the no contact rule. According
2 to a proposed, but not formally adopted, opinion by the state bar, the public officer exception
3 allows for contact with a represented party or employee if the communication is with:

4 a person whom a communication would be constitutionally protected by the First
5 Amendment right to petition the government. Such a person would be one who,
6 for example, has the authority to address, clarify or alter governmental policy; to
correct a particular grievance; or to address or grant an exemption from
regulation.

7 Proposed Formal Opinion Interim No. 98-0002. As the proposed opinion notes, the purpose for
8 the exception is to recognize rights which already exist under the First Amendment.⁴

9 As noted above, the ABA Model Rules may be considered by this court as guidance in
10 the absence of an applicable California standard. ABA Model Rule 4.2 is similar to California’s
11 no contact rule, as it also prohibits contact with represented parties (including government
12 agencies and employees) except where the communication is protected under the First
13 Amendment.⁵

14 The California and ABA rules, while very similar, do vary in their approach to
15 determining whether a given communication with an unrepresented party is protected by the
16 First Amendment right to petition government for a redress of grievances. The ABA rule
17 focuses on the purpose for the communication as well as the level of authority of the government

18 _____
19 this appears to be precisely the point of the contacts with the Forest Service personnel that
occurred here.

20 ⁴ There is also an “otherwise authorized by law” exception to the no contact rule under 2-
21 100(C)(3). This exception simply recognizes that communications protected by the First
22 Amendment are not prohibited by the no contact rule. Paradoxically, SPI does not argue that the
23 “authorized by law” exception applies. *Jt. Stmt.* at 37 n.15 (“Finally, the government’s
24 arguments regarding the applicability of Rule 2-100(C)(3)’s “otherwise authorized by law”
exception are directed at a straw man. *Sierra Pacific* does not rely on this exception because
Rule 2-100(C)(1)’s exceptions so clearly apply.”) The court will not separately address the
“authorized by law” exception, but notes that in this case, as First Amendment protection is at
issue, the analysis would be similar to that of the “public officer” exception.

25 ⁵ The ABA rule protects a represented government entity from unconsented contacts by
26 opposing counsel, but provides an exception to ensure the “right of access to government
decision makers.” ABA Formal Ethics Opinion 97-408.

1 official being contacted:

2 Rule 4.2 permits a lawyer representing a private party in a controversy with the
3 government to communicate about the matter with government *officials having*
4 *authority* to take or to recommend action in the matter, provided that the *sole*
purpose of the communication is to address a policy issue, including settling the
controversy.

5 ABA Formal Ethics Opinion 97-408 (emphasis added). Even then, the ABA rule requires
6 reasonable advance notice to the government’s counsel. ABA Model Rule 4.2. Finally, the
7 ABA rule is clear that “[i]n situations where the right to petition has no apparent applicability,
8 either because of the position and authority of the officials sought to be contacted or because of
9 the purpose of the proposed communication, Rule 4.2 prohibits communication without prior
10 consent of government counsel.”

11 California’s rule, at least as explained by the state bar’s currently unadopted but proposed
12 formal opinion No. 98-0002, discounts the importance of the purpose of the communication.
13 Instead, the California rule focuses primarily on the level of the public official’s authority. The
14 analysis set out in the unadopted opinion would bar such questioning of a government employee
15 where the employee lacked the authority to decide the matter or policy question addressed in the
16 communication. The public officials at issue in the unadopted opinion were line police officers,
17 and they were determined not to be of the requisite level of authority to be covered by the
18 “public officer” exception of Cal. Rule 2-100(C).⁶

19
20 ⁶ Ignoring the purpose of the communication entirely is problematic. A focus solely on a
21 public official's level of authority without regard to the purpose of the communication offers
22 little assistance in determining the ultimate question of whether the communication is protected
23 by the First Amendment. However, contrary to the suggestion in unadopted Opinion No. 98-
24 0002, the emphasis that the California rule places on the public official’s level of authority does
25 not necessarily represent a different approach than the ABA rule. Where the level of authority
26 falls below that necessary to address the policy issue presented, it may be possible to determine,
as in the case of the line police officers, that the communication could not have implicated a First
Amendment right to seek governmental redress. Otherwise stated, the fact that the purpose for
the communication has nothing to do with the exercise of First Amendment rights can be
inferred by the lack of authority of the official who was contacted.

Obviously, as both the ABA and California rules require, the government official must be
one possessing the power to grant the remedy being sought by the contact. But it is the First

1 There are several policy reasons behind these rules. *Mitton v. State Bar of Cal.* held that
2 before any direct communication is made with the opposing party, consent of the opposing
3 attorney is required because “[i]f a party’s counsel is present when an opposing attorney
4 communicates with a party, counsel can easily correct any element of error in the communication
5 or correct the effect of the communication by calling attention to counteracting elements which
6 may exist.” 455 P.2d 753, 758 (1969). Citing *Mitton*, the California Court of Appeals
7 recognized that “one of the reasons for the ethical rule barring ex parte communication is to
8 prevent injurious disclosures.” *Continental Ins. Co. v. Superior Court*, 32 Cal. App. 4th 94, 112
9 (1994). The court explained:

10 [A]n important reason why the ethical rules bar ex parte communication is
11 because statements made by the uncounseled party to an opposing attorney might
12 be offered against that party as admissions in court, thereby seriously damaging
13 [the] case.... “[T]he lawyer may be required to supervise the manner in which
14 information is elicited to prevent his client from making statements which,
15 through ambiguous use of language, may not accurately or fairly reflect the
16 client's position.” Presence of the attorney at the interview allows counsel to
17 perform properly her duty to ensure that her client’s case is presented in the best
18 possible light.

19 Although these types of improvident disclosures may injure a corporation just as
20 they may injure an individual, courts and commentators disagree as to the scope
21 of the prohibition on ex parte contact with corporate employees justified by such
22 dangers.

23 *Id.* at 112-13 (quoting Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New*
24 *Approach*, *supra*, 66 N.Y.U. L.Rev. 1456, 1471-1472; fns. omitted).

25 ////

26 _____
Amendment purpose of the communication that is protected. Where the communication does not
address matters implicating a request for governmental redress, the “redress” clause of the First
Amendment is simply not implicated. Thus, it is counterintuitive to suggest that
communications for purposes having nothing to do with seeking governmental redress are
nonetheless covered by the First Amendment’s petition-for-redress clause merely because the
public official happens to be a policy-making official. However, as discussed below, this
difference in approach between the ABA Formal Ethics Opinion 97-408 and Cal. Bar Committee
of Professional Responsibility, Proposed Formal Opinion Interim No. 98-0002 is of no
consequence here.

1 The Ninth Circuit has also recognized this policy purpose:

2 Rule 2-100's prohibition against communicating with represented parties without
3 the consent of their counsel is both widely accepted and of venerable heritage.
4 The California rule tracks the language of Rule 4.2 of the American Bar
5 Association's Model Rules of Professional Conduct, which in turn is nearly
6 identical to its predecessor in the Model Code of Professional Responsibility,
7 Disciplinary Rule 7-104(A)(1). A similar prohibition appears under Canon 9 of
8 the ABA's Canons of Professional Ethics, which were promulgated in 1908. Not
9 simply an American invention, the prohibition has roots which can be traced back
10 to English common law. *See, e.g., In Re Oliver*, 2 Adm. & Eccl. 620, 622, 111
11 Eng.Rep. 239, 240 (1835) ("When it appeared that Mrs. Oliver had an attorney, to
12 whom she referred, it was improper to obtain her signature, with no attorney
13 present on her part. If this were permitted, a very impure, and often a fraudulent,
14 practice would prevail.") (Lord Denman, C.J.). Today some version of the rule is
15 in effect in all fifty American states.

16 The rule against communicating with a represented party without the consent of
17 that party's counsel shields a party's substantive interests against encroachment
18 by opposing counsel and safeguards the relationship between the party and her
19 attorney. . . . the trust necessary for a successful attorney-client relationship is
20 eviscerated when the client is lured into clandestine meetings with the lawyer for
21 the opposition. As a result, uncurbed communications with represented parties
22 could have deleterious effects well beyond the context of the individual case, for
23 our adversary system is premised upon functional lawyer-client relationships.

24 *United States v. Lopez*, 4 F.3d 1455, 1458-59 (9th Cir. 1993).

25 C. Analysis

26 It is undisputed that SPI's counsel, Schaps, communicated directly with employees of the
Forest Service, that he knew that the Forest Service was represented by counsel in this litigation,
and that he did not have the consent of counsel for the United States to engage in the
communications.

Moreover, while it is not clear how the communications with the Forest Service
employees related to the "subject of the representation," there is little doubt that Schaps' purpose
in questioning the Forest Service employees was to obtain information and evidence to use in
this litigation against the government.⁷ SPI did not offer any other explanation for Schaps'

⁷ Rather than dispute whether the communications related to the "subject of the
representation," SPI argued at length in the context of this motion and its motion to take more
and longer depositions than provided by Fed. R. Civ. P. 30(a)(2) and (d)(1) that the topics are

1 questioning the employees, either in their briefs or at oral argument, and his declaration is silent
2 on the subject. It appears that the effort to gather relevant evidence was unsuccessful, as SPI's
3 counsel has represented in a letter that "Schaps did not gather any evidence we intend to use."
4 Dckt. No. 79, Ex. O to Warne Declaration (letter dated August 27, 2010 at 3). Nonetheless,
5 counsel's letter clearly shows that Schaps was actively seeking information to use in the
6 litigation. *See* discussion below. Moreover, SPI's counsel asserted at oral argument that the
7 information it obtained by those communications is protected from disclosure to the government
8 by the attorney work product privilege, thus implying that the information that Schaps gathered
9 on the tour was for the purpose of litigation.

10 Thus, California Rule 2-100 was violated here unless the "public officer" exception of
11 subsection (C)(1) applies. SPI strenuously argues that the exception applies because its attorney
12 merely attended a tour that was open to the public. SPI discounts the fact that Schaps also
13 questioned Forest Service employees about matters that at least SPI's counsel believes touch on
14 issues in dispute in the pending litigation. Thus, Schaps states in his declaration that "I believed
15 it was my right to attend the tour, which was open to the public, without providing information
16 regarding my employment or clients." There can be little doubt that he had that right. The
17 United States concedes as much. *Jt. Stmt.* at 11. But this statement stops short of addressing the
18 more pressing issue raised by his contact with the plaintiff's employees. Those employees
19 describe contacts that went well beyond attending a public information tour of a project site.
20 One employee, Garcia, attests that Schaps "asked many questions of the Forest Service
21 employees" on topics "includ[ing] fuel breaks and their potential effects on fire severity, and
22 what types of contract provisions regarding fire precautions the Forest Service requires with
23 respect to timber operators working in National Forests." Garcia Decl. ¶ 6. In questioning
24 employee Garcia, Schaps continued his line of questions regarding "fuel breaks and fire severity,
25 _____
26 relevant to the litigation and that its attorneys have a right to unfettered contact with the
government's employees in question on these matters.

1 including asking [Garcia's] opinions about hypothetical situations involving fires and fuel
2 breaks.” *Id.* ¶ 7. Another employee, Tompkins, states in his declaration that he also was
3 questioned by Schaps about fuel breaks and their potential effects on fire severity, and what
4 contract provisions for fire precautions the Forest Service requires of timber operators working
5 in National Forests. Tompkins Decl. ¶ 7. Tompkins also was asked for his opinions as to
6 hypothetical questions involving fires and fuel breaks. *Id.* at ¶ 9. He also observed Schaps using
7 his iPhone and believes some of the conversations were recorded on it. *Id.* at ¶ 8. Like Garcia,
8 Tompkins was never informed that Schaps represented SPI in this pending litigation. *Id.* at ¶ 10.

9 As discussed above, it is clear that evidence gathering, not seeking governmental redress,
10 was the point of Schaps’ contacts. This point is underscored by the statement in SPI’s counsel’s
11 letter that “. . . we have every intention of preserving all evidence gathered through our
12 investigation of the Moonlight Fire, including any gathered as a result of contacts with
13 government employees.” Dckt. No. 79, Ex. O. The letter criticizes the government’s objections
14 to Schaps’ ex parte communication with its employees, arguing that the objections amount to an
15 improper interference with the discovery process. SPI’s letter scolds the government for its
16 objections as “searching for ways to limit discovery by the named defendants in order to increase
17 your chances of prevailing” *Id.* at 4; Jt. Stmt. at 33. The letter clearly shows that Schaps’
18 actions were not an exercise of a First Amendment right to seek redress of a particular grievance,
19 but were rather an attempt to obtain evidence from these employees. This is consistent with
20 SPI’s argument that its counsel has a right to unfettered access to these employees.

21 There is little to support the characterization of Schaps’ communications with the
22 employees as an exercise of the right to petition a policy level government official for a change
23 in policy or to redress a grievance. Rather, the facts show and the court finds that he was
24 attempting to obtain information for use in the litigation that should have been pursued through
25 counsel and through the Federal Rules of Civil Procedure governing discovery. SPI surely has
26 the right to conduct discovery. But interviewing Forest Service employees, without notice to

1 government's counsel, on matters SPI considers part of its litigation with the government--even
2 if not successful in obtaining relevant evidence--strikes at and, indeed questions the very policy
3 purpose for the no contact rule.

4 To suggest that the "public official" exception to the rule permits unfettered access to the
5 employees in question here, regardless of the purpose, carries the exception too far. SPI's
6 counsel argues for an exception so broad that it eviscerates the rule by the mere presence of the
7 government in the litigation. Absent an appropriate exercise of the First Amendment right to
8 seek governmental redress of a grievance(s) or to decide or address a particular issue before the
9 official being contacted, these exceptions have no application here. There is nothing in Schaps'
10 declaration, or the declarations of the government employees he contacted that supports a
11 conclusion that he was communicating with them as part of a request for governmental redress.
12 Nor do they support a conclusion that he was communicating with a policy-making official or
13 persons with authority to change a policy or grant some specific request for redress that Schaps
14 was presenting. Therefore, the exception of Rule 2-100(C)(1) can have no application here.
15 Rather, the evidence together with SPI's own arguments demonstrate that, apart from simply
16 attending the tour, Schaps also questioned certain Forest Service personnel, and while doing so
17 was engaged in an attempt to discover and gather evidence and statements from those employees
18 for use in this litigation. He did so without the consent of the government's counsel and without
19 disclosing either the litigation or his status as opposing counsel in that litigation.⁸

20 Although ABA Rule 4.2 is not necessarily controlling here, that rule was violated as well.
21 Unconsented questioning of an opposing party's employees on matters that counsel has reason to
22 believe are at issue in the pending litigation is barred under ABA Rule 4.2 unless the sole
23 purpose of the communication is to exercise a constitutional right of access to officials having
24

25 ⁸ The court accepts the explanation in Schaps' declaration that he believed he had a First
26 Amendment right to attend the tour. But his declaration fails to address or even dispute the
government employees' accounts of the key communications and questioning by Schaps.

1 the authority to act upon or decide the policy matter being presented. In addition, advance notice
2 to the government's counsel is required.

3 Thus, under either Cal. Rule 2-100, or the rule that its language tracks,⁹ Rule 4.2, the
4 communications with the employees here were prohibited.

5 **D. Conclusion**

6 SPI's counsel's communication with the Forest Service employees violated California
7 Rule 2-100. Accordingly, the court grants the United States' motion and orders as follows.

8 Within seven days from the date of this order, SPI must identify all federal employees
9 contacted without the knowledge of counsel for the United States in this matter to date, as well
10 as the dates and circumstances of each contact, and produce originals and copies of all
11 recordings or documents relating to such communications. Recordings and documents
12 containing such information that are stored on Schaps' iPhone or other electronic devices must
13 be accurately copied and produced to the government in electronic format. Upon confirmation
14 from the government that it has received the duplicate copies in a useable electronic format those
15 files shall be deleted from the iPhone or other devices and SPI and its counsel shall not retain
16 copies. SPI shall submit a sworn declaration attesting that all such electronic recordings and
17 documents have been produced and then deleted.

18 The court accepts SPI's specific representation in the August 27, 2010 Warne letter
19 (appended to the Warne Declaration, Dckt. No. 79, Ex. O at 3) that SPI does not intend to use
20 "any evidence" gathered by Schaps from these disputed contacts. Consistent with that
21 representation, SPI shall be barred from using information obtained through such contacts in this
22 litigation. Likewise, the court accepts SPI counsel's representation that counsel will "identify
23 [their] relationship to Sierra Pacific and involvement in this litigation before seeking out and
24 interviewing particular government employees about issue related to the Moonlight Fire. [And]

25
26 ⁹ See *United States v. Lopez*, 4 F.3d at 1458.

1 . . . to notice the deposition of control group federal employees if and when [counsel] wish to ask
2 them questions.” Jt. Stmt. at 33, 42 (quoting August 27, 2010 Warne letter). Counsel must hold
3 themselves to that representation and must not engage in such contact in the future.

4 SO ORDERED.

5 DATED: November 15, 2010.

6 
7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26