

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-100

Lead Drafter: Tuft
Co-Drafters: Cardona, Chou, Martinez, Peters, Zipser
Meeting Date: June 26, 2015

I. CURRENT CALIFORNIA RULE

Rule 2-100 Communication With a Represented Party

(A) 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.

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an 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.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or

(3) Communications otherwise authorized by law.

Discussion

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any

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possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE(S) (CLEAN)

Rule 4.2: Communication With a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this rule, a represented person includes:
 - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other private or governmental represented organization; or
 - (2) **[ALTERNATIVE 1]** A current employee, member, agent, or other constituent of a corporation, partnership, association, or other private or governmental

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represented organization, if:

- (i) 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
 - (ii) the person's statement may constitute an admission on the part of the organization.
- (2) **[ALTERNATIVE 2]** A current employee, member, agent, or other constituent of a corporation, partnership, association, or other private or governmental represented organization, 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.
- (c) Exceptions
- (1) Notwithstanding the protection afforded constituents with decision-making authority under paragraph (b)(1), this Rule shall not prohibit communications with a public official, board, committee, or body; or
 - (2) This Rule shall not prohibit communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person permitted by this rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication with a represented person permitted by this rule, a lawyer shall not provide legal advice to the represented person or seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) For purposes of this Rule:
- (1) "Managing agent" means an employee, member, agent, or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization.
 - (2) "Public official" means a public officer of the United States government, or of a state, county, city, township, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities

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as the non-public organizational constituents described in paragraph (b)(1).

Comment:

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who is represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule does not prevent represented persons from communicating directly with one another with respect to the subject of the representation. The Rule does not prohibit a lawyer from advising a client that such communication can be made or discussing the risks and benefits of communicating directly with an adverse party. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person in that matter.

[3] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3A] **[PLACEHOLDER]** This rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances.

[4] This Rule does not prohibit communications with a represented person, or a current employee, member, or other constituent of a represented organization, concerning matters outside the representation.

[5] A lawyer who knows that a person is being provided with limited scope representation is not prohibited from communicating with that person with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 [Limited Scope Representation].)

[6] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[7] A lawyer is not required to obtain the consent of a represented organization’s lawyer for communication with a former constituent but the lawyer is bound by Rule 4.3 if the former constituent is unrepresented.

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[8] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this rule.

[9] **[PLACEHOLDER for a clarifying comment if paragraph (b), ALTERNATIVE 1, is approved]** Paragraph (b)(2)(ii) applies to a statement by a person who is authorized to speak on behalf of the represented organization by virtue of that person's position or by implicit or explicit conferred authority. (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1209 [7 Cal.Rptr.3d 119].) A constituent's official title or rank within an organization is not necessarily determinative of his or her authority. (*Id.* at 1210.)

[10] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (f)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule if the communication with that constituent falls within paragraph (b)(2).

[11] Paragraph (c) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person who would otherwise be subject to this rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) Accordingly, the Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.

[12] A lawyer who is uncertain whether a communication with a represented person is permissible may be able to seek a court order. A lawyer also may be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[13] This Rule does not prohibit communications initiated by a represented person seeking advice or representation from an independent lawyer of the party's choice.

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IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 2-100)

Rule ~~2-100~~4.2: Communication With a Represented ~~Party~~Person

(A)~~a~~a ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person the ~~member~~lawyer knows to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.

(B)~~b~~b For purposes of this rule, a ~~“party”~~represented person includes:

(1) ~~An~~A current officer, director, partner, or managing agent of a corporation ~~or a~~partnership, association, ~~and a partner or other private or governmental represented organization;~~ ~~or managing agent of a partnership;~~ ~~or~~

(2) [ALTERNATIVE 1] ~~An association member or an~~ A current employee ~~of an association,~~ member, agent, or other constituent of a corporation, ~~or partnership,~~ association, or other private or governmental represented organization, if:

(i) 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~~

(ii) ~~whose the person’s~~ statement may constitute an admission on the part of the organization.

(2) [ALTERNATIVE 2] ~~An association member or an~~ A current employee ~~of an association,~~ member, agent, or other constituent of a corporation, ~~or partnership,~~ association, or other private or governmental represented organization, 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.

~~(C)~~(c) ~~This rule shall not prohibit:~~Exceptions.

(1) Notwithstanding the protection afforded constituents with decision-making authority under paragraph (b)(1), this Rule shall not prohibit ~~Communications~~ communications with a public ~~officer~~official, board, committee, or body; or

(2) ~~Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or~~

~~(3)~~ This Rule shall not prohibit ~~Communications~~ communications otherwise

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authorized by law or a court order.

- (d) In any communication with a represented person permitted by this rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication with a represented person permitted by this rule, a lawyer shall not provide legal advice to the represented person or seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) For purposes of this Rule:
- (1) "Managing agent" means an employee, member, agent, or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization.
 - (2) "Public official" means a public officer of the United States government, or of a state, county, city, township, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

Discussion Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation.

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer party, and (2) not to accept or engage in communications with the lawyer party.~~[2] This Rule does not prevent represented persons from communicating directly with one another with respect to the subject of the representation. The Rule does not prohibit a lawyer from advising a client that such communication can be made or discussing the risks and benefits of communicating directly with an adverse party. A lawyer may also advise a client not to accept or engage in such

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communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person in that matter.

~~Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.~~

~~As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.~~^[3] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

~~Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)~~

^[3A] [PLACEHOLDER] This rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances.

^[4] This Rule does not prohibit communications with a represented person, or a current employee, member, or other constituent of a represented organization, concerning matters outside the representation.

^[5] A lawyer who knows that a person is being provided with limited scope representation is not prohibited from communicating with that person with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 [Limited Scope Representation].)

^[6] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

^[7] A lawyer is not required to obtain the consent of a represented organization's lawyer for communication with a former constituent but the lawyer is bound by Rule 4.3 if the former constituent is unrepresented.

^[8] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this rule.

^[9] [PLACEHOLDER for a clarifying comment if paragraph (b), ALTERNATIVE 1, is approved] Paragraph (b)(2)(ii) applies to a statement by a person who is authorized to speak on behalf of the represented organization by virtue of that person's position or by implicit or

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explicit conferred authority. (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1209 [7 Cal.Rptr.3d 119].) A constituent's official title or rank within an organization is not necessarily determinative of his or her authority. (*Id.* at 1210.)

[10] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (f)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule if the communication with that constituent falls within paragraph (b)(2).

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~[11] Paragraph (c) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person who would otherwise be subject to this rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) Accordingly, the Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.

[12] A lawyer who is uncertain whether a communication with a represented person is permissible may be able to seek a court order. A lawyer also may be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct.~~[13] This Rule does not prohibit

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communications initiated by a ~~party~~-[represented person](#), seeking advice or representation from an independent lawyer of the party's choice.

V. PUBLIC COMMENTS SUMMARY

Hon. Mark A. Juhas, California Commission On Access To Justice (June 8, 2015)

Rule 2-100, subdivision (A), prohibits a member from communicating directly or indirectly about the subject of a 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.

Subdivision (C) of the rule explains that it does not cover “[c]ommunications with a public officer, board, committee, or body”

We believe subdivision (C) of the Rule should be preserved to ensure that lawyers representing parties in litigation against public entities may speak about the subject of the representation with public officials associated with those entities, such as city council members, county supervisors, and their staffs. Preserving subdivision (C) would facilitate settlement and would avoid any conflict with First Amendment principles.

Glenn Alex (May 25, 2015)

The Rules should clarify which public employees may be contacted by an outside attorney without permission of agency counsel. Existing Rule 2-100 provides in subdivision (A) that a member may 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”

Subdivision (C)(1) provides an exception for “Communication with a public officer, board, committee or body[.]” Perhaps the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

The existing rule does not define “public officer.” Which public employees or officials may be contacted without permission of the public agency’s lawyer? And if the agency has staff attorneys who are routinely involved in agency legal matters, at what point is the agency represented or not represented by a lawyer in the matter?

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VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 6/4/2015:**

1. In *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, the Review Department found that the language of rule 2-100, unlike Model Rule 4.2, does not broadly prohibit ex parte communication with one represented by counsel in a related matter without regard to the circumstances of that representation.¹ The rule only prohibits ex parte communication with a party who is represented by counsel in the same matter. However, the Review Department recognized “that a strict construction of the rule, limiting its applicability only to represented parties to litigation or a transaction could, as in this case, defeat important public policy underlying the rule ...” (Id. at p. 806.)

The question becomes: Is it necessary and appropriate to expand rule 2-100 to prohibit direct communication with persons represented by counsel in any related matter?

Expansion of the rule may be appropriate and consistent with the important purposes of the rule.² However, broad expansion could cause unintended consequences, such as providing counsel for a non-party witness the ability to prohibit communications between a party’s attorney and the non-party witness. This could inhibit attorneys from contacting witnesses relevant to their cases. This would be true for criminal and civil proceedings. As an alternative to a broad expansion of the rule, the Commission should consider requiring attorneys to provide notice to counsel representing the non-party witness in a related matter and an opportunity for that counsel to discuss the matter with his or her client before the non-party witness is contacted.

Any overreaching by the attorney during his or her contact with the non-party, such as that discussed in the Dale opinion, can be remedied through discipline under Business and

¹ Model Rule 4.2 states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.”

² See *United States v Lopez* (9th Cir. 1993) 4 Fed.3d 1455, 1458-1459 [The rule against communicating with a represented party without the consent of that party’s counsel shields a party’s substantive interests against encroachment by opposing counsel . . . the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into a clandestine meeting with a lawyer for the opposition]. See also *Mitton v. State Bar* (1969) 71 Cal.2d 525, 534 [“This rule is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice and was designed to prevent acts such as those engaged in here by petitioner. It shields the opposing party not only from an attorney’s approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party’s counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist. Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required.”].

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Professions Code sections 6068(a) and 6106.

2. There should be no change to the current exception that permits an attorney to contact a represented public officer, board, committee, or body without first obtaining the permission of the attorney representing the public officer or body. While one could conceive of situations where a limitation might be appropriate, the Rules of Professional Conduct should not infringe on the right of citizens to petition the government.

3. The rule need not clarify which person in a corporation or other organizational setting is entitled to the protection afforded by the rule. A bright-line rule is likely to be too narrow or overly broad. The appropriate balance will depend on the facts of each case and the specific structure of each organization. Instead of attempting to define the persons in every corporation or organization covered by the rule, it should be left to the courts to develop the defining principles on this issue on a case-by-case basis.

4. A revision to rule 2-100 governing contact with one who is not represented by counsel is unnecessary. Again, overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. In *Dale*, the Review Department failed to find an attorney culpable of violating current rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the Dale type of situation. Even the court in *Dale* appeared to encourage that. While the rule now states person and not party so that the Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a comment should be added to clarify that the *Dale* type of situation is covered by this rule.

2. There are way too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

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- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC's recommends adding to the discussion section of the rule to clarify the rule's application and scope.

Revise the discussion section as follows:

* * *

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. Rule 2-100 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation. It applies even though

the represented party initiates or consents to the communication.

There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal opportunity. Other applicable law also includes the right of the client to exercise a constitutional or other legal right to communicate with the government and the authority of government prosecutors and investigators to conduct criminal investigations – a lawyer representing a government entity to conduct investigative activities, directly or through investigative agents, in the course of criminal, civil, or administrative matters, as limited by the relevant decisional law. However, when communicating with the accused in a filed matter, a government lawyer must comply with rule 2-100 in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Rule 2-100 is not intended to prevent parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her behalf with a represented party. Such a member has independent rights as a party which

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should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice.

Rule 2-100 does not prohibit communication with a represented person, or an employee or agent of such person, concerning matters outside the representation, for example of the existence of a controversy between a government agency and a private party, or between two organizations. Nor does it prohibit a lawyer for either side from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does it prohibit a client who is represented by counsel from filing a complaint with a government agency and communicating with officials of that agency regarding the client's complaint.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization, who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil, criminal, or administrative liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own lawyer, the consent of that lawyer to a communication will be sufficient for purpose of rule 2-100. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

OCTC believes the rule as written is sufficient. However, we do recommend some changes to the discussion section of the rule. OCTC recommends that the discussion section clarify that rule 2-100 applies not just in the litigation context, but in all contexts where a lawyer represents a client. The discussion should also clarify that the rule applies when the other party initiates the communication. Lawyers, not clients, are obligated to know the rules and clients should not waive important rights without consulting their own lawyers.

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OCTC recommends that the discussion section inform members that clients still have the right to communicate with the government. We also recommend that the language regarding criminal investigations by government attorneys and their investigators be expanded to apply to other non-criminal matters, including licensing regulation. The government has the right to conduct investigations involving civil and administrative enforcement as well as criminal prosecutions. These recommendations do not change existing law, but provide a more accurate and complete description of the law. We also want the government attorney to understand that while he or she may conduct or head an investigation, once a matter is filed there is an obligation on the part of the attorney to comply with rule 2-100.

OCTC also adds language to make it clear that this rule only applies when the communication covers the same subject matter. It should also be clear that the rule and its exceptions apply to organizations as well as individuals, but does not prohibit communications by a government agency investigating, or handling a complaint by the represented client.

Perhaps the most difficult aspect of this rule concerns an attorney communicating with employees and other individuals involved with a represented organization or entity. OCTC recommends adopting the ABA's proposed comments on this issue so that the members understand the rule. (See Model Rule 4.2) This does not change existing law, but would clarify it.

- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Massachusetts Rule 4.2** is identical to Model Rule 4.2:

Massachusetts Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

- **Utah Rule 4.2** has a rule that diverges from Model Rule 4.2 and more closely approximates the California Rule by identifying exceptions and providing specific definitions in the black letter. Utah Rule 4.2 provides:

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Utah Rule 4.2. Communication with Persons Represented by Counsel.

(a) General Rule. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

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(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(i) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.³

³ Utah Rule 4.2 also has 23 comments. See: https://www.utcourts.gov/resources/rules/ucja/ch13/4_2.htm

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The ABA State Adoption Chart for the ABA Model Rule 4.2, which is the counterpart to current rule 2-100, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.authcheckdam.pdf
- 46 states have adopted “person” (AL, AR, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MD, MN, MO, MI, MT, NE, NV, NH, ND, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY). Four jurisdictions besides California have retained “party” in their rule (AZ, CT, MI, MS). All four jurisdictions: (i) have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) include a comment providing the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added).
- 40 jurisdictions have adopted a rule that includes “or a court order” (AK, CO, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, MA, ME, MD, MN, MO, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); and 11 jurisdictions do not have “or a court order” (AL, AR, AZ, CA, CT, FL, MI, MS, NY, TX, VA).
- Seven jurisdictions include “organizations” and a definition of what is considered an “organization” (CA, DC, LA, MD, NJ, TX, UT); and 1 state includes “organization” but refers to rule 1.13 for the definition (NM).
- Two jurisdictions expressly prohibit indirect as well as direct violations of the rule.⁴
- Eight jurisdictions have a black letter provision similar to proposed comment [5], which addresses the application of the rule in the context of a limited scope representation.⁵

⁴ The two jurisdictions are New York and Texas. See, e.g., New York Rule 4.2(a), which provides:

(a) In representing a client, a lawyer shall not communicate *or cause another to communicate* about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Emphasis added.)

⁵ The jurisdictions are: Alabama, Alaska, Connecticut, Florida, Maine, Montana, New Hampshire, and Utah. For example, Maine Rule 4.2(b) provides:

(b) An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation attorney provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation attorney.

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Drafting Team consensus to substitute “person” for “party” in the Rule.
 - Pros: This change accords with federal and state law interpreting existing Rule 2-100 as applying outside the litigation context to “persons” represented in connection with a particular matter, even if the “persons” are not “parties” in the matter. This change also accords with ABA MR 4.2 and every other jurisdiction. Only four jurisdictions have retained “party” in their rule (Arizona, Connecticut, Michigan, and Mississippi), and: (i) all have a title that states “Communication With A Person Represented By Counsel” (Emphasis added), and (ii) all include a comment providing the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added). Finally, changing “party” to “person” will also resolve the limitations inherent in “party” that were recognized in *In the Matter of Dale* (Rev.Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule’s objectives as stated in comment [1] to protect any “person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation,” there is no reason to limit the protection of the rule to those persons who are parties.
 - Cons: Public comment received by the first Commission demonstrated that many lawyers, both government and private, believe that the substitution of “person” will inhibit their ability to investigate. However, see discussion re addition of the phrase “or a court order” in paragraph (c)(3) and of Comments [11] and [12], below.
2. In proposed paragraph (a), substitute “In” for “While”. Drafting Team consensus.
 - Pros: Although not a substantive change, it clarifies precisely which communications are governed by the rule and removes unnecessary differences between California and every jurisdiction except one (Georgia).⁶
 - Cons: None identified.
3. In proposed paragraph (a), retain the phrase “directly or indirectly”. Drafting Team consensus.
 - Pros: Prevents circumvention of the rule by a lawyer directing an agent, e.g., private investigator, to communicate with the represented person.
 - Cons: None identified.

⁶ Georgia Rule 4.2 provides in relevant part: “(a) A lawyer who is representing a client in a matter shall not communicate”

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4. General: Retain concept in current rule 2-100(B), which defines which constituents in an organization should be considered “represented” and therefore protected by the Rule.
 - Pros: Proposed paragraph (b) is necessary to clarify the complicated and recurring issue of which constituents of an opponent entity are protected under the rule from ex parte communications by a lawyer representing an opposing party. With clarifying comments that reflect case law, (see comments [4], [7], [8] and [9]), paragraph (b) provides important guidance that will foster compliance with the Rule.
 - Cons: Attempting to clarify this point risks being too narrow or overly broad. (See 6/4/2015 OCTC Memo, #3.)

5. In introductory clause to proposed paragraph (b), substitute the defined term “represented person” for “party”. Drafting Team consensus.
 - Pros: Although including “represented” as a modifier of “person” is arguably redundant since “person” is identified as the object of protection, i.e., “communications with a represented person,” use of the term “represented person” avoids possible confusion in certain provisions of the rule, e.g., under subparagraph (b)(2) where certain constituents who are not members of an organization’s control group (and thus presumptively represented) may nevertheless qualify as “represented persons.”
 - Cons: Possible redundancy.

6. In proposed paragraph (b)(1), insert “current” to modify managerial employees of an organization. Drafting Team consensus.
 - Pros: Clarifies that the rule applies only to currently-employed constituents. RRC1 included the same clarification s do a number of other jurisdictions. Current rule states same limitation in Discussion ¶. 6. This limitation on the rule’s scope should be in the black letter.
 - Cons: None identified.

7. In proposed paragraphs (b)(1) and (b)(2) add the phrase “or other private or governmental represented organization” after “corporation, partnership, association”. Drafting Team consensus.
 - Pros: Recognizes that there may be other organizations that practice law besides those listed. The use of “represented” as a modifier of “organization” emphasizes that the paragraphs apply only when a lawyer knows the organization is represented by a lawyer.
 - Cons: “Other represented organization” is sufficiently clear particularly in light of Comment [10]. Making this change requires grammatically awkward changes to the longstanding structure of paragraph (c) that are otherwise unnecessary and could lead to uncertainty and confusion. There are other rules that apply to governmental organizations and that do not require the degree of repetition that is being proposed here. See, e.g., Model Rule 1.13 and RRC-1 Proposed Rule 1.13 (“Organization as a Client”) which includes a comment that

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the rule applies to private and governmental organizations. There is no need to change the black letter rule here either. See further comments in opposition to paragraph (c) in VIII.A.10. below.

Note re Paragraph (b)(2). Paragraph (b)(2) addresses when constituents of an organization, including non-control group employees, are deemed represented for purposes of the rule because of their acts, omissions or statements, and thus are protected. The Drafting Team has provided two alternatives, **ALTERNATIVE 1** and **ALTERNATIVE 2**. The former largely retains the entire substance of current rule 2-100(B)(2) but divides in two subparagraphs (i) and (ii) the two situations under which the identified constituents would be deemed represented. ALTERNATIVE 2, on the other hand, deletes the second situation, i.e., when the person's statement may constitute an admission on the part of the organization.

ALTERNATIVE 1.

8. In proposed paragraph (b)(2), retain the substance of current rule 2-100(B)(2), but substitute "current," "person" and the phrase "corporation, partnership, association or other represented private or governmental organization" as previously discussed.
- o Pros: See VIII.A.1, 4, 6 and 7, above.
 - o Cons: See VIII.A.1, 4, 6 and 7, above.

ALTERNATIVE 2.

9. In proposed paragraph (b)(2), retain the first situation addressed in current rule 2-100(B)(2) (when act or omission "may be binding upon or imputed to the organization"), but delete the second ("the person's statement may constitute an admission on the part of the organization.")
- o Pros: (1) this provision was dropped from the Model Rule and is not the law in most states that have adopted rule 4.2, (2) the provision is ambiguous and applies even if the statement "may" constitute an admission against interest; (3) the provision requires a lawyer at his or her peril to analyze the rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity.
 - o Cons: "Statements" are different from acts and omissions. Constituents of an organization whose statements can result in liability being imposed on the organization should therefore be protected by the rule.
10. Retain as proposed paragraph (c)(1) current rule 2-100(C)(1), which excepts from the rule communications with government officers and boards, etc., but substitute "public official" (defined in (f)(2)) for "public officer". Drafting Team consensus.
- o Pros: The shift from "public officer" to "public official" raises a critical policy issue concerning the scope of the right to petition the government versus preserving the government counsel's attorney-client relationship with the

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governmental agency and its constituents. The term more precisely describes those constituents of a governmental organization for whom the right to petition would apply. The initial clause in (c)(1) ["Notwithstanding the protection afforded ..."] has been added because paragraph (b) now expressly includes "governmental organizations."

- Cons: There is no justification for changing the structure of paragraph (c) other than the addition of the phrase "private or governmental represented organization" in paragraphs (b)(1), (b)(2) and Alts 1 and 2. See VIII.A.7. Stylistically, the syntax is awkward and changes the longstanding structure of the rule in a way that could lead to greater confusion between paragraphs (b) and (c). Deviating from an existing rule that has proven not to be a problem is not consistent with the Commission's Charter. Moreover, it is inaccurate to state that paragraph (b) affords "protections" for managerial constituents. It is well settled that the purpose of the rule is to protect the represented organization and the organization's lawyer, not the constituents. See, e.g. Comment [6].

The Rules of Professional Conduct should not infringe on the right of citizens to petition the government. (See 6/4/2015 OCTC Memo, #3.)

11. Delete current rule 2-100(C)(2) (represented party seeking second opinion from independent lawyer) but include it as a clarifying comment. Drafting Team consensus. Committee consensus.

- Pros: Current (C)(2) is superfluous because an independent lawyer could not be covered by this rule, which applies only to communications *by a lawyer in the course of representing a client*, which would make the lawyer making those communications not independent. However, the (C)(2) concept is included as a clarifying comment. (See Comment [13].)
- Cons: None identified.

12. Retain concept in current rule 2-100(C)(3) (exception for communications otherwise authorized by law) and include a further exception for those authorized by a court order. Drafting Team consensus.

- Pros: Adding the phrase "or a court order" accords with ABA Model Rule and the rule in 40 jurisdictions. (See Section VII.) Together with proposed comments [11] and [12], the addition of the phrase, "or a court order," is intended to address concerns over the substitution of "person" that were expressed by representatives of law enforcement agencies that the substitution would interfere with their ability to conduct investigations. In 2002, the ABA encountered similar opposition to its proposed amendments to Model Rule 4.2 and responded:

Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to

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alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4] (renumbered Comment [6]).

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.⁷

The Drafting Team believes the ABA responded appropriately to the concerns of law enforcement by amending Model Rule 4.2 to include a reference to “a court order.” (See also Comments [11] and [12], below.)

- Cons: None identified.

13. Include proposed paragraph (d), based on Model Rule 4.3, to apply when a lawyer communicates with a represented person as expressly permitted under paragraph (c) or impliedly permitted under paragraph (b). Drafting Team consensus.

- Pros: This provision aligns with the objectives of rule 4.2 (see comment [1]) and clarifies that even if you are permitted to communicate with a *represented* person under one of the 4.2 exceptions, you still must not engage in conduct prohibited under paragraph (d). Including this language, which is also employed in proposed rule 4.3, is less confusing than simply referring to proposed rule 4.3, which applies only to *unrepresented* persons.
- Cons: Inserting (d) [and (e)] is an unnecessary complication. The same result can be obtained by adopting the following single paragraph in place of proposed paragraphs (d) and (e):

(d) In any communication with a represented person not prohibited by this rule, a lawyer shall comply with the requirements of Rule 4.3.

The phrase in paragraphs (d) and (e), “communications permitted by this rule,” is not accurate. The “anti-contact” rule prohibits rather than permits communications with a represented person. The alternative provision that replaces these two paragraphs eliminates unnecessary repetition and is clear in stating that the lawyer must comply “with the requirements” of Rule 4.3.

⁷ See Reporter's Explanation of Changes, Rule 4.2, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule4_2rem.html [Last visited on June 6, 2015]

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14. Include proposed paragraph (e), which is similar in content to proposed rule 4.3(b), to apply when a lawyer communicates with a represented person as permitted under the rule. Drafting Team consensus.
 - Pros: See VIII.A.13.
 - Cons: See VIII.A.13.
15. In proposed paragraph (f)(1), include definition of “Managing Agent”. Drafting Team consensus.
 - Pros: Defining managing agent provides an important clarification of when the rule applies in organizational settings.
 - Cons: None identified.
16. In proposed paragraph (f)(2), include definition of “Public Official”. Drafting Team consensus.
 - Pros: See VIII.A.10. The term “comparable decision-making authority” is included to clarify that the right of petition applies when the government constituent has decision-making authority. (See also Comment [10].)
 - Cons: See VIII.A.10.

COMMENTS

Note on Comments To Proposed Rule 4.2: Although Principle 5 of the Commission’s Charter provides that comments “should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves,” proposed Rule 4.2 has been the focus of substantial case law that has clarified how it should be applied. The comments the Drafting Team recommends are an attempt to capture that case law and other authority to clarify how the rule is applied, do not conflict with Principle 5, and are in line with Principle 4 by facilitating “compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”

17. As proposed comment [1], insert Model Rule 4.2, cmt. [1]. Drafting Team consensus.
 - Pros: The comment sets forth the policies that underlie the rule, including the prevention of an opposing lawyer’s interference with the lawyer-client relationship. Including this comment’s statement of the underlying policies provides important insight into the rule’s application.
 - Cons: None identified.
18. As proposed comment [2], retain the substance of current rule 2-100, Discussion ¶1.2. Drafting Team consensus.
 - Pros: Current Discussion ¶1.2 identifies kinds of communications that do not violate the policies underlying the rule and therefore are permitted. The Drafting Team has shortened the comment.
 - Cons: None identified.

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19. As proposed comment [3], retain the substance of current rule 2-100, Discussion ¶.4. Drafting Team consensus.
 - Pros: The comment importantly clarifies that “matter,” etc., is not limited to litigation contexts. The Drafting Team has added a second sentence that further clarifies the point.
 - Cons: If the word “person” is substituted for “party,” there is no longer a need for a clarifying comment re the scope of “matter,” etc.
20. Include proposed comment [3A] as placeholder. Drafting Team consensus.
 - Pros: Unless the Commission adopts a definition of “know” in a general terminology rule/section, the comment would be necessary to clarify that the knowledge required under the rule is actual knowledge. (See, e.g., *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403 [58 Cal.Rptr.2d 178].)
 - Cons: None identified.
21. Include proposed comments [4], [5], [6], [7] and [8], which clarify how the rule should be applied. Drafting Team consensus.
 - Pros: These comments provide guidance on the rule’s application, thus fostering compliance, regarding communications unrelated to the subject matter of the representation ([4]), in limited scope representation situations ([5]), when the represented person initiates the communication ([6]), a former organization constituent ([7]), and when an organization constituent is represented by independent counsel ([8]).
 - Cons: None identified.
22. Include proposed comment [9] to explain paragraph (b)(2)(ii) if the Commission agrees to retain all of current rule 2-100(B)(2).
 - Pros: See VIII.A.8.
 - Cons: See VIII.A.8.
23. Include proposed comment [10] re the scope of the “public official” exception. Drafting Team consensus.
 - Pros: See VIII.A.10.
 - Cons: See VIII.A.10.
24. Include proposed comments [11] and [12] re the scope of the paragraph (c)(2) exception for communications authorized by law or a court order. Drafting Team consensus.
 - Pros: See VIII.A.12.
 - Cons: See VIII.A.12.

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B. Concepts Rejected (Pros and Cons):

1. Add a provision that would prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization unless such representation is true.
 - o Pros: Adding the provision would clarify that an organization's lawyer could not inhibit pre-litigation investigations by opposing lawyers by simply claiming to represent all constituents in the organization. (Cf. *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].)
 - o Cons: Such misrepresentations are already prohibited under provisions of the State Bar Act.
2. Retain current 2-100(C)(2) in the black letter of the rule.
 - o Pros: See VIII.A.11.
 - o Cons: See VIII.A.11.
3. Carve out an express exception for government lawyers conducting criminal or civil action investigations.
 - o Pros: See VIII.A.12 & 24.
 - o Cons: See VIII.A.12 & 24.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Substitution of "person" for "party". (See VIII.A.1.) Although rule 2-100, Discussion ¶. 1⁸ and case law⁹ suggests substituting "person" for "party" might be a non-substantive change, the better view is that person is a substantive change in light of *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, which held that the rule's protections were limited to "parties" in a matter.
2. Substitution of "public official" for "public officer". (See VIII.A.10.) Although the change is intended as a non-substantive clarification of which government employees are excepted from the protections of the rule under paragraph (c)(1), the first Commission's received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, concerning the exception for communications with a "public official." Consequently, this change is listed under substantive changes.

⁸ Discussion ¶.1 provides: "Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Emphasis added.)

⁹ See *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1167 (although rule 2-100 applies to a person represented by counsel, the lawyer had not violated the rule because even assuming the person was represented by counsel, the lawyer had no knowledge of the representation.)

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-100

Lead Drafter: Tuft

Co-Drafters: Cardona, Chou, Martinez, Peters, Zipser

Meeting Date: June 26, 2015

3. Addition of “or a court order” in proposed paragraph (c)(2) [former rule 2-100(C)(3)]. See VIII.A.12.
4. Addition of paragraph (d). See VIII.A.13.
5. Addition of paragraph (e). See VIII.A.14.
6. Addition of a definition of “managing agent,” although intended as a clarification of a term already existing in the rule, is a substantive change to the extent the definition delimits the scope of the term. See VIII.A.15.
7. Addition of a definition of “public official,” although intended as a clarification of a term already existing in the rule, is a substantive change to the extent the definition delimits the scope of the term. See VIII.A.16.

D. Non-Substantive Changes to the Current Rule:

1. In paragraph (a), substitution of “in” for “while”. See VIII.A.2.
2. In paragraph (b)(1), addition of “current” to modify managerial employees of organization. See VIII.A.6.
3. In paragraphs (b)(1) and (b)(2), add phrase, “or other private or governmental represented organization.” See VIII.A.7.
4. None of the comments are intended as substantive changes to the current rule that would have an effect on a lawyer’s duties. They are included to clarify the application of the proposed rule and enhance compliance with it.

E. Alternatives Considered:

None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) Whether to recommend to the Board the adoption of **ALTERNATIVE 1** or **ALTERNATIVE 2** of paragraph (b)(1). See VIII.A.8 & 9, above.

(2) See the attached email messages exchanged between George Cardona and Mark Tuft on June 9, 2015. In an effort to garner team consensus, the messages offer possible changes to the drafting team’s proposed rule that the team did not have time to consider prior to the assignment deadline.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-100

Lead Drafter: Tuft
Co-Drafters: Cardona, Chou, Martinez, Peters, Zipser
Meeting Date: June 26, 2015

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Cardona

- [June 9, 2015]: (See attached emails.)

Chou

- [Date]: Email Comment
- [Date]: Email Comment

Martinez

- [Date]: Email Comment
- [Date]: Email Comment

Peters

- [Date]: Email Comment
- [Date]: Email Comment

Tuft

- [June 9, 2015]: (See attached emails.)

Zipser

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 4.2 [2-100] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4.2 [2-100] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-100

Lead Drafter: Tuft
Co-Drafters: Cardona, Chou, Martinez, Peters, Zipser
Meeting Date: June 26, 2015

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

ATTACHMENT

EMAIL MESSAGES EXCHANGED ON JUNE 9, 2015 BETWEEN GEORGE CARDONA AND MARK TUFT

From: Cardona, George S. (USACAC) [<mailto:George.S.Cardona@usdoj.gov>]
Sent: Tuesday, June 09, 2015 8:43 AM
To: Mark Tuft; Kevin Mohr; Martinez, Raul <Raul.Martinez@lewisbrisbois.com> (Raul.Martinez@lewisbrisbois.com); Danny Chou (danny.chou@cco.sccgov.org); 'Winston Peters (WPeters@pubdef.lacounty.gov)' (WPeters@pubdef.lacounty.gov)
Cc: Dean J. Zipser (DZipser@umbergzipser.com); Difuntorum, Randall; Tuft, Andrew
Subject: RE: Proposed Rule 4.2 [Current rule 2-100]

I will try one more approach that leaves (a) alone as you wish, but switches over to language drawn from Comment 7 to the ABA Model Rule as a substitute lead in for (b). For me, this is less good but would still work and, I think, resolves the various differences from the emails while also shortening the rule:

Rule 4.2: Communication With a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) In the case of a represented corporation, partnership, association, or other organization, this rule prohibits communication with:
- (1) A current officer, director, partner, or managing agent of the organization; or
 - (2) [ALTERNATIVE 1] A current employee, member, agent, or other constituent of the organization, if:
 - (i) 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
 - (ii) the person's statement may constitute an admission on the part of the organization.
 - (2) [ALTERNATIVE 2] A current employee, member, agent, or other constituent of a corporation, partnership, association, or other private or governmental represented organization, 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.
- (c) This rule shall not prohibit:
- (1) communications with a public official, board, committee, or body; or
 - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person permitted by this rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

- (e) In any communication with a represented person permitted by this rule, a lawyer shall not provide legal advice to the represented person or seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) For purposes of this Rule:
 - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization.
 - (2) “Public official” means a public officer of the United States government, or of a state, county, city, township, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

From: Mark Tuft [<mailto:MTuft@cwclaw.com>]
Sent: Tuesday, June 09, 2015 8:32 AM
To: Cardona, George S. (USACAC); Kevin Mohr; Martinez, Raul <Raul.Martinez@lewisbrisbois.com> (Raul.Martinez@lewisbrisbois.com); Danny Chou (danny.chou@cco.sccgov.org); 'Winston Peters (WPeters@pubdef.lacounty.gov)' (WPeters@pubdef.lacounty.gov)
Cc: Dean J. Zipser (DZipser@umbergzipser.com); 'Difuntorum, Randall'; Tuft, Andrew
Subject: RE: Proposed Rule 4.2 [Current rule 2-100]

George, I give you high marks (along with Kevin) for attempting to find a solution to what I don't believe is a significant problem. I don't think we want to do major surgery to paragraph (a) which is the baseline of the rule and has been universally accepted—even in California. We should stick with draft 1.5 in regard to paragraphs (b) and (c).

Mark L. Tuft
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 17th Floor
 San Francisco, CA 94111
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 (415) 765-6215 (Direct Line)
 (415) 433-5530 (Fax)
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Certified Legal Malpractice Specialist
 California State Bar Board of Legal Specialization

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This communication (including any attachments) contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive messages for the addressee), you may not use, copy or disclose to anyone the message or any information contained in the communication. If you have received the communication in error, please advise the sender by reply e-mail and delete the communication. Nothing in this communication should be interpreted as a digital or electronic signature that can be used to authenticate a contract or other legal document.

From: Cardona, George S. (USACAC) [<mailto:George.S.Cardona@usdoj.gov>]
Sent: Tuesday, June 09, 2015 6:53 AM
To: Mark Tuft; Kevin Mohr; Martinez, Raul <Raul.Martinez@lewisbrisbois.com> (Raul.Martinez@lewisbrisbois.com); Danny Chou (danny.chou@cco.sccgov.org); 'Winston Peters (WPeters@pubdef.lacounty.gov)' (WPeters@pubdef.lacounty.gov)
Cc: Dean J. Zipser (DZipser@umbergzipser.com); 'Difuntorum, Randall'; Tuft, Andrew
Subject: RE: Proposed Rule 4.2 [Current rule 2-100]

Sorry for the delay, but I am hoping there is still time to make some changes, since I think it would be better if we could at least reach agreement on the bulk of proposed Rule 4.2. With that goal, I offer the following as an alternative that allows us to remove “private or governmental represented organization” from (b)(1) and (b)(2) and return to the basic language of paragraph (c). It does this by slightly modifying paragraph (a) to make clear the knowledge required when the person at issue is a constituent of an organization. With this addition, I believe we can simply return to person and organization in paragraphs (b)(1) and (b)(2). Because we simply return to “organization,” which is broad enough to encompass all types of organizations (including both private and governmental, we can then rely on comment 10 (which does not need to change) to make clear that this broad term encompasses both private and governmental organizations. And, because we return to “organization,” we need not worry about (c)(1) taking away what (b)(1) specifically gave – rather, (c)(1) is taking away what (b)(1) gives only for a specified subset of the organizations and individuals covered by the broader (b)(1), and we rely on comment 10 to make this clear. In short, I think this works to address the concerns that have been raised by Mark, Raul, Danny, and Kevin, and has the benefit of moving us back closer to the language of the current rule. Here is the proposal (clean language of the rule only, with the proposed additional language in paragraph (a) in bold):

Rule 4.2: Communication With a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person **if the lawyer knows *the person, or if the person is specified in (b) below the organization of which the person is a constituent***, to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this rule, a person includes:
- (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other organization; or
- (2) [ALTERNATIVE 1] A current employee, member, agent, or other constituent of a corporation, partnership, association, or other organization, if:
- (i) 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
- (ii) the person’s statement may constitute an admission on the part of the organization.
- (2) [ALTERNATIVE 2] A current employee, member, agent, or other constituent of a corporation, partnership, association, or other private or governmental represented organization, 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.
- (c) This rule shall not prohibit:
- (1) communications with a public official, board, committee, or body; or

- (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person permitted by this rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication with a represented person permitted by this rule, a lawyer shall not provide legal advice to the represented person or seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) For purposes of this Rule:
 - (1) "Managing agent" means an employee, member, agent, or other constituent of an organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization.
 - (2) "Public official" means a public officer of the United States government, or of a state, county, city, township, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

CURRENT CALIFORNIA RULE 2-100
“Communication With a Represented Party”

I. Text of Current Rule:

- (A) 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.
- (B) For purposes of this rule, a “party” includes:
 - (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
 - (2) An association member or an 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.
- (C) This rule shall not prohibit:
 - (1) Communications with a public officer, board, committee, or body; or
 - (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
 - (3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be

made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

II. Background/Purpose:

Rule 2-100 has its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 12 provided:

A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board committee or body.

In 1975, Rule 12 was revised and renumbered 7-103. The rule that was adopted differed from the version that appeared in the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. In that report, the special committee had recommended retaining Rule 12's language, "communicate with a party represented by counsel," but the language actually adopted was derived from ABA Code of Professional Responsibility, DR 7-104, which provided "communicate directly or indirectly with a party whom he knows to be represented by counsel."

In 1989, Rule 7-103 was renumbered as 2-100 and was further revised. The rule continued the general prohibition found in rule 7-103 on communication with a

represented party but was amended to prohibit communications with a represented party only when the member is already representing a client in the matter. A new paragraph (B) was added to clarify the complicated issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. The State Bar's memorandum to the Supreme Court explained the addition of paragraph (B):

Paragraph (B) is new and is intended to clarify the troubling issue of which employees of an entity may be approached without consent of the attorney for the entity when the entity is the opponent.

The issue has sometimes been analogized to the issue of whether communications between a party's counsel and that party's employees are protected by the attorney work product rule and the attorney-client privilege. Some courts have applied the so called "control group test" in this situation. The test restricts the availability of the privilege to a control group—those employees who play a substantial role in deciding and directing the employee's legal response. In *Upjohn Co. v. United States* (1981) 449 U.S. 391, 392, the Supreme Court rejected that test, noting that it frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation, that such advice will frequently be more significant to noncontrol group members than those who officially sanction the advice, and that the test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

The Los Angeles County Bar Association Ethics Committee, in Formal Opinion 410 (march 24, 1983) opined that the reasoning of *Upjohn* could be logically extended to *ex parte* contacts with a corporate party's employee by opposing counsel because: (1) the corporate employee may be prejudiced either directly or indirectly by the *ex parte* contact; (2) the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel; (3) due to the difficulty of ascertaining whether an employee is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation; and (4) due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party who he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper. (See also San Diego County Bar Association Ethics Opinion 1984-5.) Both opinions found, after discussion of *Upjohn* and *Chadbourne*, that it is ethically improper for opposing counsel to contact,

ex parte, any employee of a corporation or other entity that is a party to a suit, knowing that the information sought from the employee relates to the subject of the controversy.

However, the large number of comments received on this rule as presented in the Red Book, which proposed prohibiting members from communicating directly with the employee of a corporate opponent, stressed the hardship that such a prohibition would create on certain litigants. The employment discrimination bar, both public and private, pointed out that such a prohibition would make it virtually impossible to investigate claims prior to filing a suit, thus requiring more lawsuits to be filed and costly depositions taken. In addition, certain administrative proceedings have no mechanisms for formal discovery at all, thus making it possible that some potential witnesses would never be interviewed at all. As a result of these comments and many others, it is proposed that paragraph (B) utilize the “control group test.”

(See page 24 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

The State Bar’s memorandum also explained that addition of new subparagraphs (C)(2) and (C)(3):

Subparagraph (C)(2) is new and is intended to expressly permit a member to communicate with an individual seeking to hire new counsel or to obtain a “second opinion.” Current rule 7-103 has sometimes been interpreted to prohibit an attorney from responding to such inquiries.

Subparagraph (C)(3) is new and is intended to make clear that where a statutory scheme or case law exists regarding communication with a represented party with respect to the subject matter of the representation, the statute or case overrides the rule.

(*Id.*) In 1988, in response to an inquiry from the Supreme Court concerning subparagraph (B)(2), the State Bar responded:

As to the Court’s comment regarding the “binding” standard in rule 2-100(B)(2) being ambiguous, the language of the proposed rule was not intended to be substantively different from the “liability” test in the Comment to ABA Model Rule 4.2. Indeed, the “liability” test appears to be a clearer formulation of the concept underlying 2-100(B)(2). In order to clarify the rule, it is recommended that the “liability” test from ABA Model Rule 4.2 be added to 2-100(B)(2) as follows:

An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person ~~which may be binding on such entity or which~~

~~may be the basis of a claim or defense involving that entity 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, which may be binding on such entity or which may be the basis of a claim or defense involving that entity.~~

In 1992, rule 2-100 was further revised. The fifth paragraph of the Discussion section added case authority in support of the stated proposition that communications with former employees of an organization are exempt from the rule. The sixth paragraph of the Discussion section was revised to conform it to the language used in the rule and the rest of the Discussion section as follows:

Subparagraph (C)(2) is intended to permit a member to communicate with ~~an individual~~ a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such ~~an individual~~ a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)

The 1992 amendments were the last revisions of rule 2-100.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2001 Comment. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 2-100:

OCTC's recommends adding to the discussion section of the rule to clarify the rule's application and scope.

Revise the discussion section as follows:

* * *

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. *Rule 2-100 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation. It applies even though the represented party initiates or consents to the communication.*

There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective

bargaining, employee health and safety, or equal opportunity. Other applicable law also includes the right of the client to exercise a constitutional or other legal right to communicate with the government and the authority of government prosecutors and investigators to conduct criminal investigations—a lawyer representing a government entity to conduct investigative activities, directly or through investigative agents, in the course of criminal, civil, or administrative matters, as limited by the relevant decisional law. However, when communicating with the accused in a filed matter, a government lawyer must comply with rule 2-100 in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Rule 2-100 is not intended to prevent parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice.

Rule 2-100 does not prohibit communication with a represented person, or an employee or agent of such person, concerning matters outside the representation, for example of the existence of a controversy between a government agency and a private party, or between two organizations. Nor does it prohibit a lawyer for either side from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does it prohibit a client who is represented by counsel from filing a complaint with a government agency and communicating with officials of that agency regarding the client's complaint.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization, who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil, criminal, or administrative liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own lawyer, the consent of that lawyer to a communication will be sufficient for purpose of rule 2-100. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

OCTC believes the rule as written is sufficient. However, we do recommend some changes to the discussion section of the rule. OCTC recommends that the discussion section clarify that rule 2-100 applies not just in the litigation context, but in all contexts where a lawyer represents a client. The discussion should also clarify that the rule applies when the other party initiates the communication. Lawyers, not clients, are obligated to know the rules and clients should not waive important rights without consulting their own lawyers.

OCTC recommends that the discussion section inform members that clients still have the right to communicate with the government. We also recommend that the language regarding criminal investigations by government attorneys and their investigators be expanded to apply to other non-criminal matters, including licensing regulation. The government has the right to conduct investigations involving civil and administrative enforcement as well as criminal prosecutions. These recommendations do not change existing law, but provide a more accurate and complete description of the law. We also want the government attorney to understand that while he or she may conduct or head an investigation, once a matter is filed there is an obligation on the part of the attorney to comply with rule 2-100.

OCTC also adds language to make it clear that this rule only applies when the communication covers the same subject matter. It should also be clear that the rule and its exceptions apply to organizations as well as individuals, but does not prohibit communications by a government agency investigating, or handling a complaint by the represented client.

Perhaps the most difficult aspect of this rule concerns an attorney communicating with employees and other individuals involved with a

represented organization or entity. OCTC recommends adopting the ABA's proposed comments on this issue so that the members understand the rule. (See Model Rule 4.2) This does not change existing law, but would clarify it.

B. 2015 Comments. In a May ____, 2015 memorandum from OCTC, OCTC provided the following comment on rule 2-100:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

IV. **Potential Deficiencies in the Current Rule:**

A. See above 2001 input from OCTC. Although OCTC stated its belief that the current rule is "sufficient," OCTC proposed several revisions to rule 2-100's Discussion, including the following, "to clarify the rule's application and scope":

1. The rule Discussion should clarify that the rule applies to any "person" involved in a matter.¹
2. The rule Discussion should clarify that the rule applies even when the communication is initiated by the opposing party.
3. The rule Discussion should clarify that the rule applies to government lawyers who seek to communicate with an accused "in a filed matter" and that a communication is not permitted just because it does not violate a state or federal constitutional right.
4. The rule Discussion should clarify that the rule does not prohibit communications with represented persons or agents of such persons "concerning matters outside the representation."
5. Concerning a represented organization, the rule Discussion should clarify that consent of the organization's lawyer is not necessary to communicate with a former client and that, when an organizational constituent is represented by independent counsel, the consent of the constituent's counsel to communications is sufficient.

B. The exception in rule 2-100(C)(1) for communications with a "public officer, board, commission, or body" should be clarified, in part by substituting the term "public official" and defining that term.

C. Related to 2001 OCTC point #3, the rule 2-100(C)(3) exception for communications "authorized by law" might be too limited and should be

¹ Compare OCTC's suggestion with the approach taken in the jurisdictions that have retained "party" in their version of Model Rule 4.2. (See text accompanying footnote 7.)

supplemented by an exception for communications “authorized by a court order” as is present in nearly every other jurisdiction.

D. The current rule does not prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization even when the interests of the constituents diverge from those of the organization.

E. The current rule does not prohibit a lawyer from seeking to obtain privileged or other confidential information from a person with whom communications are permitted under the rule, for example, under current rule 2-100(B) or (C).

F. The current rule does not explain how the rule should be interpreted and applied in situations where the opposing party is represented on a limited scope basis. (See Cal. Rules of Court, Rules 3.37 – 3.39; 5.70 – 5.71.)

G. The current rule does not prohibit a lawyer from misleading a person with whom the lawyer is permitted to communicate pursuant to 2-100(B) and (C) into believing the lawyer is disinterested. This raises two issues for consideration: (i) whether to adopt a rule similar to **Model Rule 4.3** (Dealing With Unrepresented Persons);² (ii) whether to add a provision to current rule 2-100 that would mirror the prohibition in a rule based on Model Rule 4.3.

H. The express exception in rule 2-100(C)(2) for communications with a person seeking advice (i.e., a second opinion) or representation from an *independent* lawyer is superfluous as rule 2-100 by its terms only applies only to a lawyer “while representing a client.” The rule does not apply to an “independent lawyer.”

V. **California Context:**

A. California law related to current rule 2-100.

See research resources in Section IX., below.

² Model Rule 4.3 provides:

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

C. California law related to concepts in Model Rule 4.3.

1. A provision analogous to the first sentence of Model Rule 4.3 is found in the second sentence of current rule 3-600(D), which provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Model Rule 4.3 applies the prohibition in 3-600(D) more generally, so that it is not limited to contexts involving a constituent of an organization.³

2. The second sentence of Model Rule 4.3, which requires a lawyer to take reasonable steps to correct a misunderstanding when the unrepresented person incorrectly believes the lawyer is disinterested, has an analogous provision in the first sentence of current rule 3-600(D), above. Again, Model Rule 4.3 applies the prohibition more generally.

3. The concept in the third sentence of Model Rule 4.3, which prohibits the lawyer from giving the unrepresented person legal advice – except the advice to seek independent counsel – also has a predicate in case law. (See *In re Marriage of Bonds* (2000) 24 Cal.4th 1 [99 Cal.Rptr.2d 252]. But compare *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].)

VI. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 4.2 Variations. All jurisdictions except California have adopted some version of ABA Model Rule 4.2. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 4.2: Communication With Person Represented By Counsel,” revised May 6, 2015, is available at:

³ Conduct analogous to that prohibited in Model Rule 4.3 appeared in a Court of Appeal decision, *Furia v. Helm* (2003) 111 Cal.App.4th 945, 955 (In dispute between contractor and homeowners, homeowner’s lawyer, who had agreed to mediate the dispute, breached the duty to exercise reasonable care the lawyer assumed towards contractor when the lawyer did not fully and fairly disclose to contractor that he did not intend to be entirely impartial as a mediator.)

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.authcheckdam.pdf [Last visited 5/19/15]

Twenty-seven jurisdictions have adopted Model Rule 4.2 verbatim, including the adoption of “person” in place of “party.”⁴ Nineteen jurisdictions have adopted something substantially similar to Model Rule 4.2.⁵ Four states have retained a version of the model rule that uses “party” instead of “person.”⁶

Of the four jurisdictions that have retained “party” in their rule,⁷ (i) all have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) all include a comment that expressly provides that the rule applies to a represented *person*: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added).

California, which also retains “party,” is the only jurisdiction that has a “no-contact” rule not based on Model Rule 4.2.

B. Model Rule 4.3. All jurisdictions except California have adopted some version of ABA Model Rule 4.3. See ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 4.3: Dealing With Unrepresented Person,” revised May 6, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf [Last visited 5/19/15]

Twenty-eight jurisdictions have adopted Model Rule 4.3 verbatim.⁸ Twenty jurisdictions have adopted a rule substantially similar to Model Rule 4.3.⁹ Three jurisdictions have adopted a substantially different version of the model rule.¹⁰

⁴ The twenty-seven jurisdictions are: Alabama, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming.

⁵ The nineteen jurisdictions are: Arkansas, Arizona, District of Columbia, Florida, Georgia, Louisiana, Maine, Maryland, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Texas, Utah, Vermont, and Virginia.

⁶ The four jurisdictions are: Arizona, Connecticut, Michigan, and Mississippi.

⁷ Arizona, Connecticut, Michigan, and Mississippi.

⁸ The twenty-eight jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts (effective 7/1/15), Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.

⁹ The twenty jurisdictions are: Alabama, Connecticut, Florida, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, and Wisconsin.

VII. Public Comment Received by the First Commission:

A. The clean text of proposed new Rules 4.2 and 4.3 drafted by the first Commission and adopted by the Board to replace rule 2-100 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 2-100, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 2-100 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the protection against *ex parte* contact provided by the rule should continue to extend merely to a "party" represented by counsel or be expanded to any "person" represented by counsel (put another way, if a witness in a criminal proceeding has retained counsel in connection with the witness' participation in the criminal proceeding, then must the prosecutor and public defender obtain the permission of the witness's counsel before engaging in any communications with

¹⁰ The three jurisdictions are: California, District of Columbia, and Georgia.

the witness?). (See *In the Matter of Dale* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 and compare MR 4.2.)

(2) Whether to retain from current rule 2-100 the express prohibition against both direct and indirect communications with a represented person. (See rule 2-100(A).)

(3) Whether there should be any change to the current exception that permits a lawyer to contact a represented public officer, board, committee or body without first obtaining the permission of the lawyer representing the public officer or body. (See rule 2-100(C)(1).) For example, should the term “public official” be substituted for “public officer”? Should which term is used be defined in the rule?

(4) Whether the rule should clarify which person(s) in a corporation or other organizational setting are entitled to the protection afforded by the rule (e.g., how far does this extend beyond the control group? (See rule 2-100(B).) How should former officers or employees be treated under the rule? (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].) Should the rule clarify that a lawyer is permitted to communicate with an organizational constituent so long as the constituent’s independent counsel has given consent to the communication? (See *La Jolla Cove Hotel & Motel Apartments v. Superior Court* (2004) 121 Cal.App.4th 773 [17 Cal.Rptr.3d 467].)

(5) Whether to retain the express exception in rule 2-100(C)(2) for communications with a person seeking advice or representation from an independent lawyer.

(6) Whether to retain the express exception in current rule 2-100(C)(3) for communications “authorized by law” and to amend the provision to add an exception for communications “authorized by a court order.”

(7) Whether to add a provision that would prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization unless such representation is true. (Cf. *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].)

(8) Whether a related new rule governing contact with a party/person who is not represented by counsel should be recommended for adoption by the Board (compare ABA Model Rule 4.3).

(9) Whether a provision corresponding to Model Rule 4.3 should also be added to rule 2-100 that would prohibit a lawyer from misleading a person, with whom the lawyer is permitted to communicate by the rule, into believing that the lawyer is disinterested, and requires the lawyer to make reasonable efforts to correct the misunderstanding.

(10) Whether to add a provision that would prohibit a lawyer from seeking to obtain privileged or other confidential information from a person with whom

communications are permitted under the rule, for example, under current rule 2-100(B) or (C).

(11) Whether a rule provision or comment should be added to clarify how the rule should be applied in situations where the opposing party is represented on a limited scope basis. (See *McMillan v. Shadow Ridge At Oak Park Homeowner's Ass'n* (2008) 165 Cal.App.4th 960 [81 Cal.Rptr.3d 550].)

IX. Research Resources:

- [Abeles v. State Bar](#) (1973) 9 Cal.3d 603, 609 [108 Cal.Rptr. 359, 510 P.2d 719]
- [Chronometrics, Inc. v. Sysgen, Inc.](#) (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party)
- [Jorgensen v. Taco Bell Corp.](#) (1996) 50 Cal.App.4th 1398, 1403 [58 Cal.Rptr.2d 178]
- [Koo v. Rubio's Restaurants, Inc.](#) (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].
- [La Jolla Cove Hotel & Motel Apartments v. Superior Court](#) (2004) 121 Cal.App.4th 773 [17 Cal.Rptr.3d 467]
- [McMillan v. Shadow Ridge At Oak Park Homeowner's Ass'n](#) (2008) 165 Cal.App.4th 960 [81 Cal.Rptr.3d 550].
- [Triple A Machine Shop, Inc. v. State of California](#) (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493]
- [Truitt v. Superior Court](#) (1997) 59 Cal.App.4th 1183, 1190 [69 Cal.Rptr.2d 558, 563]
- [In the Matter of Dale](#) (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798
- [CAL 2011-181](#) (Communications with Opposing Counsel's Implied Consent Under the "No Contact" Rule)
- [CAL 1993-131](#) (Communication with represented party)
- [CAL 1996-145](#) (Communication with represented party or unrepresented party)
- [California Rules of Court, Appendix C, proposed guideline 11](#) (communication with represented litigants)