RRC2 – Rule 2-100 [4.2][4.3]
E-mails, etc. – Revised (June 22, 2015)
Drafting Team: Tuft (Lead), Cardona, Chou, Martinez, Peters, Zipser

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POST JUNE 26, 2015 AGENDA MAILING:

June 12, 2015 Langford Email re 4.2 to Drafting Team, cc Difuntorum & Mohr:

I have reviewed your Rule 2-100 draft. I overall like the change from "party to person" if nothing else because the Bar judges want (and need) that change as can be seen in the case In the Matter of Dale. However, you have a host of comments at the end that are absolutely unnecessary and go against the Supreme Court's encouragement to - and I paraphrase - "limit all the comments already."

You may be thinking "But they would not mind comments that reflect the correct and current state of the law, right?" I think they would, as my guess is that they would like simple, short Rules where we can do it and where case law already exists on an issue.

For example, look at Comment one. Needed? No. Comment three - it is not needed as the Rule says "In representing a client.." Comment Placeholder 3A - is not needed as case law already discusses actual knowledge. Simple Rules, which are enlightened and applied by the courts is what we want, I think. Comment 4 - clearly not needed as the Rule says "about the subject of the representation".

I am not going to go through every comment as you get my point. Please go through all the comments and really check if they are needed. This is important, as we absolutely do not want to annoy the Supreme Court once again.

June 14, 2015 Kehr Email re 4.3 to Drafting Team, cc Difuntorum, McCurdy & Lee:

I have the following thoughts and suggestions on this proposed Rule (my references are to the red-lined version on p. 2 of 9) ---

1) Proposed Comment [1] is not consistent with the Rule. While it seems plain, as this Comment would say, that one of the purposes of the Rule is to prevent unrepresented persons from being misled in the circumstances the Rule addresses, the third sentence of proposed paragraph (a) would apply even when the unrepresented person is not misled. The third sentence is a blanket prohibition on providing legal advice to the unrepresented person if that person and the client are or could be in conflict. One can imagine situations in which: (i) the unrepresented person understands the lawyer is not disinterested; (ii) it is in the client's interest that the lawyer provide legal information to the unrepresented person; and (iii) that information is not misleading. Why should that be prohibited? Two possibilities occur to me for dealing with this. First, that sentence could be limited to a prohibition on giving misleading advice, not all advice and not all discussion regarding legal matters that might in retrospect be labelled as having been advice. Second, the third sentence could be removed.

> a. Of the two alternatives I've suggested, I prefer the latter. Keeping the third sentence in a more limited form strikes me as being aspirational. Because of the difficulty of knowing what is misleading, and of knowing from what perspective that standard would be measured, the third sentence would be unpredictable as a disciplinary standard but irrefutable as an aspirational goal. If limited to misleading advice, the lawyer also would be in jeopardy for saying anything of a legal nature that turned out not to be correct.

This could create a standard of competence higher in communications with non-clients than the standard for a lawyer's representation of a client under 3-110/1.1

b. The third sentence of (a) is defended by the second sentence of proposed Comment [2]. It argues that the prohibition on giving any legal advice to the unrepresented person is needed b/c "the possibility that the lawyer will compromise the unrepresented person's interests is so great". That notion has as an unstated premise that the typical unrepresented person is so weak minded as to be easily mislead or confused. I don't agree with this. One can think of countless situations in which a lawyer will communicate with unrepresented persons in the course of representing a client. This could occur, for example, in estate planning, in probate and conservatorship proceedings, in trust administration, in business and real estate transactions, in litigation in conversation with an unrepresented co-party, and in litigation with a pro per adversary. I will restrict myself to two examples and then three general comments:

i. Lawyer is hired by X, Y, Z, LLC. to serve as counsel for the LLC but not to represent any of the three eponymous investors, and is asked to prepare an Operating Agreement for the LLC. Investor X asks Lawyer whether the investors would be bound by fiduciary duties and if so, in what respects. Would Lawyer violate the third sentence of proposed paragraph (a) by answering the question? By suggesting alternative provisions? Is it reasonably foreseeable that the LLC later would seek to enforce fiduciary duties against X? Communications of this sort should be permitted, even encouraged in order to minimize the number of lawyers and of legal expense. In some situations, considerations of time or cost might make it impossible for Investor X to obtain independent legal advice, so Lawyer's failure to answer X's questions could be a deal killer or lead to a deal that is less protective of Investor X than otherwise might have been the case.

ii. Lawyer represents client as a potential tenant in negotiating a commercial lease. The potential Landlord owns many properties, has negotiated many commercial leases, and is highly sophisticated in this particular area. Lawyer and Landlord discuss the legality of a provision in the lease offered by Landlord, the two of them exchange views on the contested provision and how it might be modified in conformity with applicable legal authority. Would Lawyer be subject to professional discipline? (Cf. the final sentence of proposed Comment [2] - Lawyer is not merely stating the client's position.)

iii. More generally, I disagree with the condescending presumption that unrepresented persons generally are unable to participate in legal communications with lawyers. A lawyer who communicates dishonestly with an unrepresented person already is subject to discipline under Bus. & Prof. C. § 6106, and perhaps later will be subject to discipline under a version of MR 8.4(c).

iv. The removal of the third sentence of (a) also would avoid the problem of whether a person is deemed to be unrepresented when represented for some purposes but not others. There are some state variations that wrestle with this difficulty.

2) If the Commission were to decide to retain the third sentence of proposed paragraph (a), it should be edited b/c the use of "may" at line 8 is incorrect. That word means "is permitted to". See Guidelines for Drafting and Editing Court Rules, § 4.2.A. Paragraph (a) is not intended to say "... the unrepresented person [is permitted to] become in conflict with the interests of the

client ...." Substituting "might" or "could" in the third sentence of (a), as often works when wishing to say "could happen" rather than "is permitted to happen", would not be adequate here. The MR language at that point is "reasonable possibility of being in conflict", and that interjects a standard of likelihood or foreseeability. If we were to change "may" to "might", the result would be a sentence that would mean: "If the lawyers knows or reasonably should know that there is any possibility that the interests of the unrepresented person are or could become in conflict with the interest of the client, ..." Even the MR's aspirational perspective doesn't go that far. If retained, I would suggest revising and reordering that sentence in one of the following ways: "If the lawyer knows or reasonably should know that there is a reasonable possibility that the interests of the unrepresented person are or might become in conflict with the interests of the client, ..." Here is an alternative: "The lawyer shall not give legal advice to the unrepresented person if it is reasonably foreseeable that the interests of the unrepresented person are or might become in conflict with the interests of the client, except that ...." I prefer the latter as being more direct and declarative and avoiding the close use of "reasonable" and "reasonably".

a. The first Commission attempted to deal with the foreseeability issue by removing from the third sentence the entire phrase "or have a reasonable possibility of being", thus limiting the third sentence to a current difference in interests. I think that would improve the MR language, but that change would not address the concerns I discussed in paragraph 1) of this message.

3) I believe the use of "may" in paragraph (b) also is not correct. I would substitute "can". The point is that it is not possible for the unrepresented person to disclose the information without violating a duty owed to someone else.

4) The use of "apparent" in the first line of proposed Comment [2] contradicts any version of the third sentence of the Rule. The meaning of "reasonable possibility" or "reasonably foreseeable" are not the same as "apparent".

5) To the extent the Commission decides to retain Comments [1] and [2], the word "rule" should be capitalized in both of them.

6) I support the first two sentences of paragraph (a) of the proposed Rule. However, because our directions are to be guided by the current California Rules, and b/c this Rule might be seen as inconsistent with that charge (there being no such current rule), I would minimize any suggestion that proposed Rule 4.3 is inconsistent with California law. For example, the idea that a lawyer can have an obligation to communicate with non-clients is the basis for the line of published court opinions and advisory ethics opinions that begin with Butler v. State Bar, 42 Cal.3d 323, 329 (1986). I see Rule 4.3 an important aspect of that duty to communicate.

June 18, 2015 Ham Email re 4.2 to Drafting Team, cc Chair, Difuntorum & Mohr:

I will not be at the June meeting, but wanted to supply you with comments on Rule 2-100.

1. What does it mean that “knowledge may be inferred from the circumstances” in comment [3A]? The law in California has previously required actual knowledge. I do not necessarily agree that it is appropriate or necessary to discipline a lawyer for making a reasonable mistake, even if a Monday morning quarterback can later ***argue*** that the lawyer ***should*** have known because the knowledge can supposedly be “inferred from the circumstances.” For example, corporate litigators like to take the position that they represent

every employee. These lawyers can be expected to file State Bar complaints asserting that their adversary *should* have known the employees were represented based on the *circumstance* that a lawsuit existed and corporate counsel was representing the corporation and perhaps some individually named corporate defendants.

2. Comment [12] seems unusual and I don't know whether it belongs in a disciplinary rule. I've never seen this on the civil side. Is this something that criminal prosecutors do?

June 18, 2015 Tuft Email re 4.2 to Ham, cc Drafting Team, Chair, Difuntorum & Mohr:

The definition of "knowingly" "known" and "knows" in Model Rule 1.0(f) is actual knowledge and is distinct from "reasonably should know" which is defined in Model Rule 1.0(j). A finding that a lawyer has actual knowledge of the fact in question based on the circumstances is a matter of proof that applies in all adjudications whether civil, criminal or disciplinary, and does not change the mens rea requirement.

June 18, 2015 Ham Email re 4.2 to Tuft, cc Drafting Team, Chair, Difuntorum & Mohr:

Actual knowledge is easy. I have no problem with that aspect. My concern is with the phrase "*knowledge may be inferred from the circumstances*." That is not defined in the M.R. and I am concerned that it would generate a great deal of satellite litigation and State Bar complaints that really don't warrant the investigative resources. Egregious cases call for discipline. I don't think we want the disciplinary system to get bogged down in litigation backlog over whether an attorney's knowledge "could have been inferred" from the circumstances.

Also, how does the "inferred from the circumstances" language square with long controlling case law concerning the burden of proof in State Bar proceedings. Under established State Bar precedent, where equally reasonable inferences can be drawn from a set of facts, inferences must be drawn in favor of the lawyer, not adversely. "The charges against an attorney must be supported by convincing proof and to a reasonable certainty; inferences leading to a conclusion of innocence must be drawn if equally reasonable but conflicting inferences may be drawn from the evidence. *Skelly v. State Bar (1973) 9 Cal. 3d 502, 508-509." Sternlieb v. State Bar (1990) 52 Cal.3d 317, 324.* "[I]f equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." *Vaughn v. State Bar (1972) 6 Cal.3d 847, 852.* Many authorities are in accord. *See, e.g., Young v. State Bar (1990) 50 Cal.3d 1204, 1216; Kapelus v. State Bar (1987) 44 Cal.3d 179, 183; Himmel v. State Bar (1981) 29 Cal.3d 339, 343.*

June 18, 2015 Martinez Email re 4.2 to Ham, cc Drafting Team, Chair, Difuntorum & Mohr:

The intent, in my view, is not to impose a negligence standard, but a "must have known" standard. California law is consistent in that regard. See Chaney v. Superior Court (1995) 39 Cal.App.4th 152, 157 [Only where the circumstances are such that the defendant "must have known" and not "should have known" will an inference of actual knowledge be permitted.]

June 18, 2015 Tuft Email re 4.2 to Ham, cc Drafting Team, Chair, Difuntorum & Mohr:

I don't believe the definition changes the burden of proof in a disciplinary proceeding or the law on permissible inferences.

June 18, 2015 Ham Email re 4.2 to Martinez, cc Drafting Team, Chair, Difuntorum & Mohr:

Perhaps "must have known" is better.

June 18, 2015 Chou Email re 4.2 to Ham, cc Drafting Team, Chair, Difuntorum & Mohr:

I believe the comment addresses the evidence that may be used to establish knowledge – and not the quantum of knowledge that is required. It merely states black letter law that actual knowledge need not be proven directly and may be proven through circumstantial evidence. (See e.g., Landers v. Flood (1976) 17 Cal.3d 399, 415, fn. 13 ["The knowledge a person may have . . . is a fact to be proven as any other fact. . . . It may be evidenced by . . . circumstantial evidence and the inferences which the trier of fact may draw therefrom"]; Gomes v. Byrne (1959) 51 Cal.2d 418, 421 ["actual knowledge of risk may be inferred from the circumstances"].)

June 18, 2015 Ham Email re 4.2 to Chou, cc Drafting Team, Chair, Difuntorum & Mohr:

Thank you. I appreciate your point about these authorities.

However, this rule has always required actual knowledge. I oppose lowering the standard because I believe it will lead to unnecessary and wasteful prosecutions, wasting and diverting State Bar prosecutorial resources from more serious situations, and will be on balance detrimental to the public interest and public protection.

June 18, 2015 Ham Email #2 re 4.2 to Chou, cc Drafting Team, Chair, Difuntorum & Mohr:

To clarify my last email, I oppose a comment that invites or appears to suggest that something less than actual knowledge is required.

I don't see why we need a comment on the quantum of evidence here any more than we need to discuss that issue in any other rule. I remain concerned that this comment will lead to mischief.

June 19, 2015 Mohr Email re 4.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

I've attached three comments we have received that relate to rule 2-100:

1. Alex [2015-016e];
2. Cal. Comm'n on Access to Justice [CCAJ] [2015-020b] (previously distributed and cited in the Report); and
3. Cal. Pub. Defenders Ass'n [CPDA] [2015-038a]

I am providing the foregoing so that you may consider any issues they raise during the telephone conference at 2:00 p.m. on Wednesday, 6/24/15. Thanks,

Attached:
RRC2 - PubCom - 2015-016e Glenn Alex [2-100].pdf
RRC2 - PubCom - 2015-020b CCAJ [2-100].pdf
RRC2 - PubCom - 2015-038a California Public Defenders Association [2-100].pdf

June 19, 2015 Peters Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

With respect to CPDA's comment on Cal Rule 2-100, I agree that the change of the word "party" to "person" is very problematic for the reasons stated. I suggest that we put this issue back on the agenda for our next discussion.

June 19, 2015 McCurdy Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Rule 2-100 Drafting Team Members,

A conference call to discuss this rule has been set as follows:

Date: Wednesday, 6/24/2015
Time: 2:00 pm
Dial-In #: 855-520-7605
Conference Code: 524-668-2961

Please contact me if you have questions or concerns about any technical issues associated with this call.

Please contact the drafting team leader, Mark Tuft, if you have questions about the anticipated substantive discussion.

June 19, 2015 Mohr Email re 4.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

Additional comment received concerning 2-100, from:

L.A. County Public Defender (Brown) [2015-045a]

Attached:
RRC2 - PubCom - 2015-046a LA County Public Defender [2-100]-r.pdf

June 20, 2015 Cardona Email re 4.2 to Drafting Team, cc Difuntorum, Mohr, A. Tuft & McCurdy:

For possible discussion during our conference call on Wednesday, attached below are clean and redline versions of revisions to the current report and recommendation draft that I would propose to address both (1) some discussion among drafting team members prior to the public release of the current report and recommendation to address issues relating to the "private or governmental" language in paragraph (b) and resulting modifications to paragraph (c); and (2) some of the comments that have come in from both commission members and the public (including in particular public defenders) since the current report and recommendation was released. The redline shows the changes from the current report and recommendation draft.

In addition to the changes in the redline, I think we should also discuss and consider as a possible alternative to the shift from "party" to "person," OCTC's proposal (in the comment from Jayne Kim submitted June 4, 2015) that with respect to non-party witnesses the rule should not permit attorneys to preclude access to those witnesses, but instead require "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." I discuss this further in item 8 below.

With respect to the changes reflected in the redline:

1. The changes to paragraphs (b) and (c) I explained in two June 9 emails in the hopes of addressing concerns with the current report and recommendation draft expressed by Mark, Raul, Danny, and Kevin. In short, the changes incorporate as a lead in to paragraph (b) language drawn from Comment 7 to the ABA Model Rule. This allows us to remove "private or governmental represented organization" from (b)(1) and (b)(2) and return to the basic language of paragraph (c) (thus lessening the changes from current California Rule 2-100). language). Because we simply return in (b)(1) and (b)(2) to the general term "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. 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. I believe that with these changes, with the continuing inclusion of (c)(1), and with our definition of "public official" in (f), we have addressed the issues raised in the comments of the California Commission on Access to Justice and Mr. Alex.
2. The change in paragraphs (d) and (e) from "permitted" to "not prohibited" reflect that paragraphs (a), (b), and (c) (consistent with the current language of California Rule 2-100) all speak in terms of communications "prohibited" and "not prohibited," as opposed to communications "permitted." I think paragraphs (d) and (e) should take the same tack.
3. The changes in paragraphs (f)(1) and (f)(2) are simply clean-up to be consistent with the proposed changes in paragraphs (b) and (c).
4. The elimination of Comment 1 is to address Carol Langford's comment that we should seek to minimize the number of comments. I agree that this comment is unnecessary.
5. The change to placeholder comment 2A (placeholder comment 3A in the current report and recommendation) is made to address James Ham's comments and make clear that the knowledge required, however established, is "actual knowledge" of the representation.
6. The change to comment 3 (comment 4 in the current report and recommendation) is to shorten the comment by removing language I believe is no longer necessary in light of the proposed changes to paragraphs (b) and (c) of the rule.
7. The change to comment 9 (comment 10 in the current report and recommendation) is for the same reasons discussed in item (2) above, that is, to use the term "prohibited" consistent with the language in paragraphs (a) and (b) of the rule.
8. The change to comment 10 (comment 11 in the current report and recommendation) is to address comments from the California Public Defenders Association and the Los Angeles County Public Defender by adding a sentence to make clear that, to the extent communications with represented persons in the course of legitimate investigative activities by defense lawyers representing criminals charged with or being investigated for crimes are authorized by law, they would fall within the exception in (c)(2). This makes clear that the rule places the prosecution and defense on the same footing. With respect to the comments' broader objection to the change from "party" to "person," and the reliance on

Matter of Dale (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, as indicating that this will work a radical change, I note: (a) though distinguished by Dale as dicta, Jackson v. Ingersoll-Rand Co. (1996) 42 Cal. App. 4th 1163, 1167 contains language suggesting that "party" should be interpreted more broadly to include "persons"; and (b) the court in Dale appears to have held as it did only because it felt compelled to do so, while noting that its strict interpretation of Rule 2-100 might defeat the important public policy concerns underlying the Rule 2-100:

> We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction could, as in this case, defeat the important public policy underlying the rule, which was described in United States v. Lopez, supra, 4 F.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.... [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." Our Supreme Court echoed this same assessment in Mitton v. State Bar, supra, 71 Cal.2d 524, 534: "[The no contact rule] 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."
>
> The instant case illustrates how the concern about interference with the attorney-client relationship as expressed by the Ninth Circuit Court of Appeals and the Supreme Court is equally relevant when the represented individual is not a party to the proceedings. But we defer to the Board of Governors and the Supreme Court for any curative efforts should they determine that the purpose of rule 2-100 is ill-served by its present language.

(footnote omitted). All this said, as I indicate above, I believe we should discuss and consider as a possible alternative OCTC's proposal (in the comment from Jayne Kim submitted June 4, 2015) that with respect to non-party witnesses the rule should not permit attorneys to preclude access to those witnesses, but instead require "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." This would be a significant change from the current draft, but might address the concerns raised by the California Public Defenders Association and the Los Angeles County Public Defenders, while still serving the public policy concerns underlying Rule 2-100. I note that such a notice requirement would still need to be subject to exceptions for communications "authorized by law," which include covert law enforcement investigations.

Attached:
RRC2 - [4.2][2-100] - Rule - DFT2 (06-20-15)GSC - CLEAN.docx
RRC2 - [4.2][2-100] - Rule - DFT2 (06-20-15)GSC - Cf. to DFT1.6.docx

June 20, 2015 Kehr Email re 4.2 to Drafting Team, cc Difuntorum & Mohr:

Here are my comments on this draft Rule:

1) There is a slight awkwardness in using "person" in paragraph (a), "represented person" at the beginning of paragraph (b), and "represented organization" in proposed Comment [4]. It would be possible to iron this out, but I think the chance of misunderstanding too slight to take the time to reach for greater neatness and the resulting reorganization of the Rule too great. I support these three usages.

2) It struck me in looking at paragraph (b)(2) that the term "organization" appears often without a string of modifiers or examples, see for instance Rule 1.13(a). I wonder whether we couldn't simplify that part of (b)(2) by merely saying: "any form of private or governmental organization".

3) I have a comment that applies to the use of "partner" in the first alternative (b)(2) and to "employee". This Rule, currently and traditionally, has been applied to organizations only when the communication is with an individual at a control-group level. *Snider v. Superior Court*, 113 Cal. App.4th 1187 (2003), in its excellent discussion of the history of this narrow limitation. Under this measure, the term "partner" is too broad (although contained in the current rule) b/c it fails to distinguish general and limited partners; the latter have no managerial role. I therefore recommend that "partner" be changed to "general partner". Much the same is true of "employee". The term "member" is too broad b/c members of limited liability companies sometimes have no managerial role (that would include any member of a manager-managed LLC if the member is not also a manager). Proposed paragraph (f)(1) is the effort to narrow the overly broad language of (b)(1), and I will get to it in order.

4) Also, proposed (b)(1) speaks of a "represented organization". I don't consider this necessary as I am not aware of any evidence that anyone reads the current rule as prohibiting communications with a member of an organization's control group by a lawyer who does not know that the organization is represented regarding the subject of the communication. Isn't this a solution looking for a problem?

5) I do not support the proposed changes to paragraph (c) except the change from "officer" to "official" and the addition of "or a court order.":

> a. The replacement of the current introductory language of (C) with "Exceptions" merely rearranges the furniture. I see no justification for fixing what is not broken.
>
> b. The replacement of current paragraph (C)(2) with proposed Comment [13] is analytically correct as explained in § VIII.A.11 on p. 22 but would leave the Rule in the same place. The change would not correct an error but could cause confusion by requiring a reader to search rather than finding the answer (to an important question) in the text of the Rule. We should not assume the reader will look at the Comments. This (c)(2) makes an important point and should stay where it is.

6) On proposed paragraph (e):

> a. Because this Rule only addresses communications with represented persons, the phrase "with a represented person" would add nothing. I would remove it and shorten a long single-sentence paragraph.
>
> b. I do not agree with the insertion of "not provide legal advice". One problem with this insertion would be the difficulty of distinguishing legal advice from the statement of a legal position or the assertion of a claim. Would a lawyer provide legal advice by making a claim or asserting a legal position? Among other problems, that language would

conflict with paragraph (c)(1) and arguably would make it impossible for a lawyer to negotiate with public officials or petition the government.

c. I agree with "knows or reasonably should know" based on the assumption that both terms will be defined as did the first Commission.

7) The use of "with respect to the matter" in paragraph (f)(1) would seem to introduce a potentially significant change to the current rule. For example, the current rule would cover unconsented communications with all corporate officers, whether or not that officer is assigned to the matter that is the subject of the communication. Current rule 2-100 has been interpreted and applied so as to create a bright-line test. See, e.g., Snider v. Superior Court, 113 Cal.App.4th 1187, 1297 (2003) and Best Deals on TV, Inc. v. Naveed, 2007 U.S. Dist. LEXIS 43762 (N.D. Cal. 2007) (decided under California law). One might not know whether a particular corporate officer has a direct role in a particular matter, and that uncertainty would interfere with the goal of maintaining a bright line. The effort made by the combination of (b)(1) and(f)(1) to cover most all of the control group permutations would introduce many more words, break up the flow of the Rule, and decrease certainty. I would remove (f)(1) and replace (b)(1) with the following: "a current officer, director, general partner, or managing agent of any private or governmental organization;". The meaning of "managing agent" cannot be captured in a Rule or a Comment; it is well handled by case law, including the lengthy discussion in Snider. If the Commission believes that an explanation is needed, I would simply refer to Snider in a Comment.

8) I agree with the content of proposed Comment [1], but it does not seem to clarify the Rule but only describe its policy. I question whether it is needed in light of the Court's expressed concern about the number and length of the Comments.

9) If the Commission were to decide to retain Comment [1], I would have a concern about its wording. It is based, I think, on *Mitton v. State Bar of California*, 718 Cal.2d 525, 534 (1969) (interpreting former Rule 12). The proposed Comment speaks of "protecting" the other person but the opinion in Mitton instead speaks of shielding the other person. To say that the other person is entitled to protection under the Rule might be taken to mean we have changed California law. Current rule 2-100 generally does not serve as a basis for lawyer disqualification because the interest at stake is the proper functioning of the legal system and not the other person's right not to be contacted. See *Abubakar v. City of Solano*, 2008 WL 336727 (E.D. Cal. 2008) ("Generally, disqualification for ex parte communication is only appropriate where the misconduct will be certain to have "continuing effect" on the judicial proceedings. See *Marcum v. Channel Lumber Co.*, No. 94-2637, 1995 WL 225708, at *2 (N.D.Cal. Mar.24, 1995); *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal.App.3d 597, 607, 168 Cal.Rptr. 196 (1980). Here, plaintiffs argue that they are prejudiced by virtue of the fact that Mr. Cassidy had the opportunity to examine the credibility of the nine officer plaintiffs. They contend that where an employer fails to record time and keep proper records, an employee's testimony is relevant to proving damages. See, e.g., *Brock v. Seto*, 790 F.2d 1446 (9th Cir.1986). But this same credibility assessment can also be made during the course of depositions. See *Marcum*, 1995 WL 225708, at *2. ("Nothing was discussed which could not have been learned through [ ] depositions."). More fundamentally, it does not rise to the level prejudice warranting disqualification."). If the Commission decided to retain this Comment, I would change "protecting" to "shielding" so as to avoid the implication that the contacted person is granted rights.

10) Proposed Comment [3A] is not needed. Paragraph (a) includes a requirement of "knowledge", and that term presumably will be defined in Rule 1.0.1.

11) The content of proposed Comment [4] already is contained in paragraph (a). I would eliminate this Comment.

12) I agree with proposed Comment [5], but I question its necessity. It is an important point that a representation is not all or nothing, but the Rule already says so. See Comment [3]. Again considering the Court's concern about the number of extent of Comments, this one could be eliminated.

13) To the extent proposed Comment [7] says that the prohibition of the Rule applies only to an organization's current managing agents, it merely repeats the Rule and is not needed (to be clear, I support the addition of "current" in (b)(1)). However, the wording of Comment [7] more broadly refers to an organization's former "constituent", a term that is not defined and could be read as meaning something other than what is covered by (b)(1). Cross-references, such as the one here to Rule 4.3, seem to me generally to be a good idea b/c of the interconnectedness of the MRs. I suggest: "If a person is not a 'represented person' within the meaning of this Rule, a lawyer's communications with that person are governed by Rule 4.3."

14) Proposed Comment [8] is not clear. Is it intended to address an organization's officer, director, etc. who is represented separately from the organization? Any lawyer who represents a client is that client's own counsel. Furthermore, it is confusing to speak of consent by the individual's lawyer as being "sufficient" b/c the Rule requires consent only by the person's lawyer. It goes without saying that the lawyer for the organization who does not represent a managing agent in his or her individual capacity has no role under Rule 4.2. I would drop this Comment.

15) Proposed Comment [9] can be read as substantially expanding current California law as explained in the Snider opinion. That opinion says nothing about "implicit or explicit authority" or that "title or rank within an organization is not necessarily determinative of his or her authority". It limits the application of current (B)(1) to officers, directors and managing agents, and it describes the last of these in this way: "In sum, we conclude that the term "managing agent" in rule 2-100 refers to those employees that exercise substantial discretionary authority over decisions that determine organizational policy." 113 Cal. App. 4th at 1209. This says nothing about who "speaks on behalf" of the organization, whatever that might mean. Also, proposed Comment [9] is too broad b/c it applies to all organizational personnel rather than just to "managing agents": no description of managing agents should apply to officers and directors. The Snider opinion is emphatically narrow in its explanation of "managing agent" and carefully limits it to an organization's control group. I recommend that Comment [9] not be adopted.

16) The first sentence of proposed Comment [10] is not on the same topic as the balance of the Comment. Also, the first sentence explains something that I think requires no explanation. I would remove that sentence.

17) The balance of Comment [10] is wordier than is needed and repeats the Rule. I suggest what I think is a simpler and more direct alternative: "Paragraph (c)(1) recognizes that special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution when a lawyer communicates on behalf of a client with a governmental organization. Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who

is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. The lawyer also must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3."

18) A few drafting nits on Comment [11]:

a. Its first sentence speaks of a "person who would otherwise be subject to this rule." However, it a communication not a person that is subject to the Rule. I would say: "Paragraph (c) recognizes that statutory schemes, case law, and court orders may authorize communications ... that otherwise would be subject to this Rule."

b. I suggest shortening the third sentence along the following lines: "Also, prosecutors and other government lawyers are authorized to contact ...."

c. In the final sentence, "such", "legitimate" and "as" are unneeded, as is the statement of intentions. The sentence would say the same thing with fewer words along these lines: "Accordingly, this Rule does not preclude communications with represented persons in the course of investigative activities that are authorized by law." I would place the cites to *Carona* and *Talao* at the end of the paragraph as they apply to the final sentence as well as what precedes it.

19) In the drafting teams Report, at § VIII.B.1 on p. 26, we are told that they rejected the concept of adding a provision along the following lines (this is from the first Commission's Rule 4.2): "(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true." The drafting teams explanation is that this already is prohibited by provisions of the State Bar Act. I would like to know what provisions have that effect. If the drafters have Bus. & Prof. C. § 6104 in mind, I'm not aware that it ever has been used in this context, and in any event it would not cover non-litigation situations.

20) Finally, in several places the word "Rule" is rendered in lower case.