

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 communications with:¹
- (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 the 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:²
- (1) communications with a public official, board, committee, or body; or
 - (2) communications otherwise authorized by law or a court order.

[ALTERNATIVE 1 – Paragraphs (d) & (e): If the Commission decides not to recommend a rule derived from Model Rule 4.3, Drafting Team recommends keeping paragraphs (d) and (e).]

- (d) In any communication with a represented person not prohibited 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

¹ Introductory clause revised in part to avoid repeating the string of identified organizations in the subparagraphs.

² Structure of paragraph (c) of the current rule has been retained.

role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

- (e) In any communication with a represented person not prohibited 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.

[ALTERNATIVE 2 – Paragraphs (d) and (e): If the Commission decides to recommend a rule derived from Model Rule 4.3, Drafting Team recommends deleting paragraphs (d) and (e) and substituting paragraph (d), below.]

- (d) In any communication with a represented person not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.³
- (f) For purposes of this Rule:
- (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial discretionary authority over decisions that determine organizational policy.⁴
 - (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).

Comment:

⁵[1]⁶ The prohibition against communicating “indirectly” with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a

³ Alternative 2, which is recommended by the Drafting Team, is contingent on Commission recommending a rule derived from Model Rule 4.3.

⁴ Definition of managing agent changed to more accurately reflect the standard established in *Snider v. Superior Court*.

⁵ Former comment [1] deleted as unnecessary.

⁶ Comment [1] (formerly Comment [2]) revised in response to public comment from Prof. Stephen Bundy, who urged the Commission to adopt language similar to Model Rule 4.2, cmt. [4], concerning a lawyer assisting client in communicating directly with another party.

communication. 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.

[2] “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.

[2A] [PLACEHOLDER] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances.

[3] This Rule does not prohibit communications with a represented person concerning matters outside the representation. Similarly, 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].)⁷

[4] 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.

[5] 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.

[6] The definition of “managing agent” in paragraph (f)(1) is intended to limit application of paragraph (b)(1) to high-level management within an organization’s “control group.” (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1208-09 [7 Cal.Rptr.3d 119].)⁹

[7] [PLACEHOLDER for a clarifying comment if paragraph (b), **ALTERNATIVE 1**, is approved] Paragraph (b)(2)(ii) applies to a person who is authorized to speak on behalf of, and bind, the organization with respect to the matter.¹⁰ (See *Snider v. Superior Court*

⁷ Former Comments [4] and [5] merged into a single comment [3] because the topics addressed are related.

⁸ Former comment [7] deleted as unnecessary.

⁹ New comment [6] has been added to clarify the scope of paragraph (b)(1).

¹⁰ Former comment [9] (currently comment [7]) revised to better state the standard set forth in *Snider v. Superior Court*.

(2003) 113 Cal.App.4th at 1210 [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.*)

[8] 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).

[9] Paragraph (c) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person that 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.) The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.¹¹

[10] 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.

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

¹¹ Mark Tuft has expressed reservations about the consequences of including this sentence and how it might be interpreted.

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

- (Aa) ~~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.
- (Bb) ~~For purposes of this rule, a “party” includes~~In the case of a represented corporation, partnership, association, or other organization, this Rule prohibits communications with:
- (1) ~~An A current~~ officer, director, ~~partner, or managing agent of a corporation or association, and a partner or managing agent of a partnership of the organization;~~ or
- (2) [ALTERNATIVE 1] An association member or an A current employee, member, agent, or other constituent ~~of an association, corporation, or partnership 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) ~~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, member, agent, or other constituent ~~of an association, corporation, or partnership of the 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 ~~or whose statement may constitute an admission on the part of the organization.~~
- (Cc) This ~~rule~~Rule shall not prohibit:
- (1) ~~Communications~~ communications with a public ~~officer~~official, board, committee, or body;
- (2) ~~Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice;~~ or
- (3)(2) ~~Communications~~ communications otherwise authorized by law or a court order.

[ALTERNATIVE 1 – Paragraphs (d) & (e): If the Commission decides not to recommend a rule derived from Model Rule 4.3, Drafting Team recommends keeping paragraphs (d) and (e).]

(d) In any communication with a represented person not prohibited 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 not prohibited 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.

[ALTERNATIVE 2 – Paragraphs (d) and (e): If the Commission decides to recommend a rule derived from Model Rule 4.3, Drafting Team recommends deleting paragraphs (d) and (e) and substituting paragraph (d), below.]

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

(f) For purposes of this Rule:

(1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial discretionary authority over decisions that determine organizational policy.

(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).

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:~~In the case of a represented corporation, partnership, association, or other organization, paragraph (a) of this ruleRule prohibits communications with:¹
- (1) A current officer, director, partner, or managing agent of ~~a corporation, partnership, association, or other private or governmental represented organization;~~ the organization; or
 - (2) **[ALTERNATIVE 1]** A current employee, member, agent, or other constituent of ~~a corporation, partnership, association, or other private or governmental represented~~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~~the 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—~~This Rule shall not prohibit:²
- (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.

¹ Introductory clause revised in part to avoid repeating the string of identified organizations in the subparagraphs.

² Structure of paragraph (c) of the current rule has been retained.

[ALTERNATIVE 1 – Paragraphs (d) & (e): If the Commission decides not to recommend a rule derived from Model Rule 4.3, Drafting Team recommends keeping paragraphs (d) and (e).]

- (d) In any communication with a represented person ~~permitted~~not prohibited by this ~~rule~~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~~not prohibited by this ~~rule~~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.

[ALTERNATIVE 2 – Paragraphs (d) and (e): If the Commission decides to recommend a rule derived from Model Rule 4.3, Drafting Team recommends deleting paragraphs (d) and (e) and substituting paragraph (d), below.]

(d) In any communication with a represented person not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.³

(f)- For purposes of this Rule:

- (1) “Managing agent” means an employee, member, agent, or other constituent of ~~a represented~~an organization with ~~general powers to exercise discretion and judgment with respect to the matter on behalf of the organization~~ substantial discretionary authority over decisions that determine organizational policy.⁴
- (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).

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~~

³ Alternative 2, which is recommended by the Drafting Team, is contingent on Commission recommending a rule derived from Model Rule 4.3.

⁴ Definition of managing agent changed to more accurately reflect the standard established in Snider v. Superior Court.

~~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.~~⁵

~~[2]~~⁶ The prohibition against communicating “indirectly” with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. ~~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~~ 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]~~

~~[2A]~~ [PLACEHOLDER] This ~~rule~~ Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. ~~However,~~ Actual 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]~~ Similarly, 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].)⁷

~~[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~~ Rule.

⁵ Former comment [1] deleted as unnecessary.

⁶ Comment [1] (formerly Comment [2]) revised in response to public comment from Prof. Stephen Bundy, who urged the Commission to adopt language similar to Model Rule 4.2, cmt. [4], concerning a lawyer assisting client in communicating directly with another party.

⁷ Former Comments [4] and [5] merged into a single comment [3] because the topics addressed are related.

~~[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

[85] 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~~Rule.

[6] The definition of “managing agent” in paragraph (f)(1) is intended to limit application of paragraph (b)(1) to high-level management within an organization’s “control group.” (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1208-09 [7 Cal.Rptr.3d 119].)⁹

[97] [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, ~~and bind~~, the ~~represented organization by virtue of that person's position or by implicit or explicit conferred authority with respect to the matter.~~¹⁰ (See *Snider v. Superior Court* (2003) 113 Cal.App.4th ~~1187, 1209~~at 1210 [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.~~)

[108] 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~~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).

[149] Paragraph (c) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person ~~who~~that would otherwise be subject to this ~~rule~~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

⁸ Former comment [7] deleted as unnecessary.

⁹ New comment [6] has been added to clarify the scope of paragraph (b)(1).

¹⁰ Former comment [9] (currently comment [7]) revised to better state the standard set forth in *Snider v. Superior Court*.

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. This Rule also is not intended to preclude communications with represented persons in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.¹¹

[~~12~~10] 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~~11] This Rule does not prohibit communications initiated by a represented person seeking advice or representation from an independent lawyer of the party's choice.

¹¹ Mark Tuft has expressed reservations about the consequences of including this sentence and how it might be interpreted.