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2015-020b CCAJ [2-100]

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California · 180 Howard Street · San Francisco, CA 94105 · (415) 538-2352 · (415) 538-2524/fax

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Los Angeles

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KELLI M. EVANS
Senior Director Administration of Justice
State Bar of California

June 8, 2015

Honorable Lee Edmon
Presiding Justice, Court of Appeal of California
Second Appellate District, Division Three
Chair, Commission for the Revision of the Rules of Professional Conduct
c/o Audrey Hollins
Professional Competence Unit
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

RE: Rules 1-650, 2-100, and Proposed Rule 6.1

Dear Justice Edmon:

The California Commission on Access to Justice welcomes the opportunity to assist this Commission as it conducts a comprehensive study of the Rules of Professional Conduct and recommends amendments. The Access Commission was established in 1996 to pursue long-term strategies to improve access to justice for low and moderate-income Californians. [1]

It is with this purpose in mind that we write to explain our views on three rules: existing Rules 1-150 and 2-100 and proposed Rule 6.1.

[TEXT OMITTED] -

[TEXT OMITTED] -

1. Rule 2-100

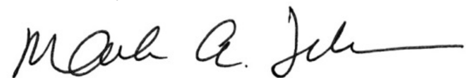
Rule 2-100, subdivision (A), prohibits a member from communicating directly or indirectly about the subject of a representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. Subdivision (C) of the rule explains 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.

[TEXT OMITTED] -

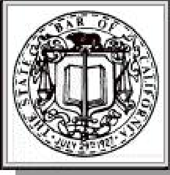
The Access Commission appreciates the opportunity to submit these comments. Please let us know if we can provide any additional information for your Commission's consideration.

Sincerely,



Hon. Mark A. Juhas
Chair, California Commission on Access to Justice

2015-038a California Public Defenders Association [2-100]



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below. *All information submitted is regarded as public record.*

DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation California Public Defenders Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Garrick Byers
(Type 'Anonymous' if you would like to submit comments anonymously.)

*** City** Martinez

*** State** California

Email address garrick.byers@pd.cccounty.us
(You may, but are not required to, provide your email address. You will receive a copy of your comment submission, if you choose to do so.)

The current Rules of Professional Conduct can be viewed by clicking on the following link: Current Rules of Professional Conduct.

*** Select the current California rule that you would like to comment on from the drop down list. To submit comments not specific to a current California rule, please select "General Comments" from the drop down list.**

Rule 2-100 Communication With a Represented Party

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

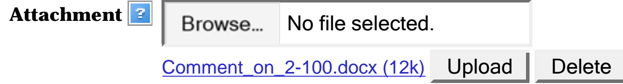
In addition to my comments in Attachment 1, on Rule 2-100,

I am also, in Attachment 2, commenting on ABA Model Rule 3.8, which was discussed in the email that was forwarded to me from: Randall Difuntorum of the State Bar, dated June 2, 2015.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

Attachment



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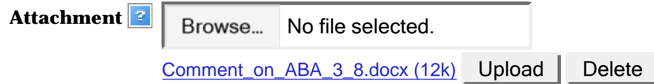

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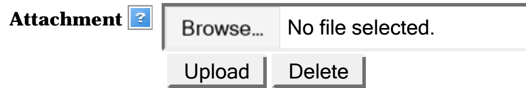

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garrick.byers@pd.cccounty.us

Contact Support

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1 (Rules) / 2

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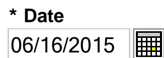
*** Date**



06/16/2015

File :

2015-038a California Public Defenders Association [2-100]

Submitted via:

Online

* Required

Close

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, was President of CPDA from 2014 to 2015, and is currently chair of CPDA's Ethics Committee. These comments are made on behalf of CPDA.

We understand that the State Bar's Commission to study the California Rules of Professional Conduct intends to consider, this summer, current Rule of Professional Conduct 2-100 (Communication with a Represented Party). Current Rule 2-100 prohibits contact with a party known to be represented without permission that party's lawyer.

The previous Proposed Rules of Professional Conduct, by the first Commission to study the California Rules of Professional Conduct, promulgated Proposed Rule 4.2, which would have changed the word "party" to the word "person."

CPDA opposed that change at the time. We continue to oppose any such change.

Our reasons for this opposition are the same as they were before. Such a change would inhibit criminal-defense counsel from carrying out their studies under the U.S. and California Constitutions to provide effective representation of counsel, by inhibiting full investigation of the case. It would change the rule from a sensible bright–line rule easily understood and applied, to a vague rule difficult of application and often not making much sense.

It is easy to determine who is a party, and it is easy to determine if a party is represented in the matter. But it can be difficult, sometimes not possible, to determine if a non-party is represented in the matter; the criminal defense attorney should not be inhibited in a robust investigation in that case.

Likewise, there are good reasons for a no-contact rule concerning a party: when a person's freedom is at stake, interference with the right to counsel is cannot be tolerated. But there are not always good reasons for a no-contact rule concerning a person who is not a party.

Accordingly, the no-contact rule embodied in current Rule 2-100 should continue to cover only known represented parties,

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

Audrey Hollins
State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105-1639

Thank you for circulating this request for comments at this early stage of the process. Below, please find our comments on the two proposed rule changes which are of greatest concern to the Los Angeles County Public Defender and Los Angeles County Alternate Public Defender.

RULE 2-100

The broad purpose of Rule 2-100 is to prevent one attorney from interfering in the communications between a litigant and his or her attorney. Modifying the language of Rule 2-100 to conform to the language of the ABA Model Rule will extend the current limits of Rule 2-100 to prevent criminal lawyers, both prosecutors and defense attorneys, from engaging in several critical types of investigations. Such limits will unconstitutionally interfere with a defendant's right to due process. Such limits will also prevent prosecutors from pursuing certain important types of investigations which are presently permitted under Rule 2-100. For these reasons, explained herein, Rule 2-100 should not be modified as reflected in the ABA Model Rules.

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "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." (Current Rules of Professional Conduct, Rule 2-100(A).)

The ABA Model Rules change "party" to "person:" "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 State

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

consent of the other lawyer or is authorized to do so by law or a court order." (Rule 4.2, Model Rules.)

We oppose any change in Rule 2-100; specifically, we oppose changing Rule 2-100 to the language of the Model Rules.

The previous Commission for the Revision of the Rules of Professional Conduct proposed this very change: "party" to "person." The opposition to this proposed change came not just from the defense bar, but also from the prosecution. At many meetings of the previous Commission, representatives from the U.S. Attorney's Office, the Attorney General's Office, and many County District Attorney's Offices (including Los Angeles) appeared and expressed vehement opposition to this proposed change. At one point the previous Commission modified the proposed rule change by writing in an exception for the prosecution but not the defense. Obviously, we strenuously objected to this proposed modification. Notably, the prosecution attorneys continued to oppose the proposed rule, even as modified to exempt them. The previous Commission passed the proposed rule over the strenuous opposition of both sides of the criminal bar. In the end, the State Bar Board of Governors added in an exception for the criminal defense bar as well.

The previous Commission attempted to justify this change by asserting that the term "party" has actually always been understood to mean "person" in the Rule 2-100 context and that this change was merely a clarification as opposed to a change. Contrary to the claim of the previous Commission, it has always been the understanding of the California legal community that "party" did *not* mean "person," and there are good reasons to make this distinction in this context.

There is actually a California State Bar Court opinion specifically recognizing and adopting the difference between "party" and "person," *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. The State Bar Court examined this

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

precise issue in considerable detail, citing many cases and secondary authorities. The State Bar Court stated, "We find scant authority in the drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party." The State Bar Court stated, "Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party." The State Bar Court concluded, "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented 'party.'" The State Bar Court then found Mr. Dale not culpable for his contact with a *person* who was represented by counsel, but was not a party to the action, where that contact was without the counsel's permission.

An examination of *Dale* completely undermines the previous Commission's assertion that the "historical interpretation of the rule" is that "party" means "person." The legal profession uses terms of art, and the term "party" is such a term. It has always meant "party" and continues to do so today. If the rule is changed, that change would not be trivial or meaningless. It will in fact change the meaning of this rule. Any change will make a difference in the practice of criminal law, and that change will not be trivial.

The defense lawyer in a criminal case sometimes finds it necessary, on behalf of a client, to seek an interview with a person represented by counsel, where that person is not a party. Many situations arise where this becomes an issue. One is the "Amber Frey" situation. In the Scott Peterson murder trial, witness Amber Frey was represented by counsel, Gloria Allred. That representation was not unrelated to the murder trial; the representation was solely with respect to that trial. Obviously, both the prosecution and the defense wanted to interview Ms. Frey, a key witness. Under the rule as it is currently written, there would be no impediment to such an interview by either side, even in the absence of permission from Ms. Frey's counsel.

This situation directly affects the prosecution when a prosecutor is investigating a

LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

criminal accusation to determine whether to file charges. At the previous Commission hearings, a prosecutor raised the following common situation: the prosecutor has a report that a defendant has molested his teen-age step daughter. The prosecutor goes to interview the daughter, for whom the defendant has hired counsel. Under the rule as it is currently written, there would be no impediment to such an interview.

Another situation which arises with some frequency is when a defendant tells his lawyer that the person who really committed the offense is now in jail. When the lawyer checks on this other person, the lawyer finds that the other person is in jail for his own unrelated case. It is a given that the other person's lawyer will never agree to permit the first lawyer to interview the other person, given that the point of the interview is to obtain a confession to another crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the rule as it is currently written, there is no impediment to such an interview. This is in fact commonly done under the current rule.

We believe that it is essential that prosecutors and defense lawyers are permitted to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 857.) We believe that adoption of the Model Rule will inject uncertainty into an area where no uncertainty currently exists. If adoption of the Model Rule actually does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" in fact makes no change, then the term should not be changed.

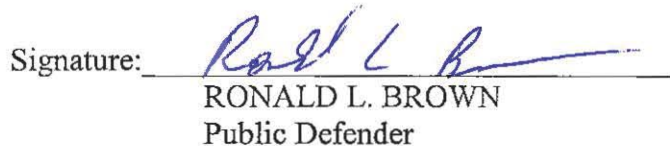
LAW OFFICES OF THE
LOS ANGELES COUNTY PUBLIC DEFENDER
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
(213) 974-3001

RONALD L. BROWN
PUBLIC DEFENDER

June 12, 2015

[TEXT OMITTED]

Date: 6-15-15



Signature: RONALD L. BROWN
Public Defender

Date: 6-15-15

Signature: JANICE FUKAI
Alternate Public Defender

2015-016e Glenn Alex [2-100]

May 25, 2015

2715 Alcatraz Ave.
Berkeley, CA 94705

Ms. Audrey Hollins audrey.hollins@calbar.ca.gov
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comments on the proposal for new or amended rules of Professional Conduct: rules need to recognize differences for non-litigators and government attorneys

Dear Ms. Hollins:

The May electronic edition of the California Bar Journal notes that the State Bar recently appointed a commission to conduct a comprehensive study of the Rules of Professional Conduct and to recommend amendments; and requests comments. I have been a member of the California bar for 33 years, most of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

Five years ago, I wrote to you to comment on the then-draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I never learned anything further about that set of proposed revisions (which was apparently sent to the California Supreme Court for review), and the current Bar Journal article doesn't mention them.

The current committee should start with the following set of principles:

1. If it isn't broken, don't fix it. It is true that there are some new electronic and perhaps other developments that may merit some changes, but is a wholesale, "comprehensive" review and revision of the Rules really merited? Attorneys have enough to do without having to worry about new, unnecessary changes to ethics rules.

2. California is entitled to its own rules. In government, as in many walks of life, there seems to be an almost irresistible compulsion towards standardization. Individual rules that have worked well for California attorneys should not be "synchronized" or "aligned" with ABA or other sets of rules without a compelling reason.

3. The Rules should not allow certain business relationships with non-attorneys. Attorneys should not be newly permitted to enter into business relationships with non-attorneys where part of the business is the practice of law—even though some other jurisdictions permit this. The potential for overpowering the attorneys' legal judgment is too great.

4. Non-attorneys should not be permitted an expanded role in the practice of law, despite the need for additional low-cost legal services for the poor. It does no one any good to have undertrained or undereducated persons practicing law, even if the areas of practice are supposedly circumscribed. There is no shortage of attorneys, including new attorneys, who are well-qualified and need work; the question is how to compensate them, not how to replace them with less-qualified or unqualified technicians as the law becomes ever more complex.

5. The Rules must take into account the different circumstances of litigators, non-litigators, in-house attorneys, and governmental attorneys. The current rules and the old draft new rules do not do this adequately. This is discussed further, in the remainder of this comment letter.

The Rules, understandably, apply to attorneys in California in all types of public and private employment. But they could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

[TEXT OMITTED] -

4. Communication with a person represented by counsel. The Rules should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

   Existing Rule 2-100 (Communication With a Represented Party) 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 "Communications with a public officer, board, committee, or body[.]" Perhaps because of 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?

[TEXT OMITTED] -

Thank you again for the opportunity to comment.

Yours truly,

Glenn C. Alex

2015-047 Stephen Bundy [2-100]

BerkeleyLaw
UNIVERSITY OF CALIFORNIA

STEPHEN McG. BUNDY
Professor of Law, Emeritus
University of California, Berkeley
School of Law
Berkeley, CA 94720-7200
sbundy@law.berkeley.edu

June 22, 2015

Honorable Lee Edmon
Chair, Commission for the Revision of the Rules of Professional Conduct
c/o State Bar of California
180 Howard Street,
San Francisco CA 94105

Dear Justice Edmon and Commissioners:

This comment relates to the draft of proposed Rule 4.2 scheduled for discussion at the Commission's meeting on May 26. It focuses on an issue that arises in many fields of practice: whether a represented person who exercises her right to communicate directly with a represented adversary has a right to competent legal advice from her own lawyer concerning that communication.

Direct communications between represented adversaries are often more productive and less expensive than lawyer-led discussions, in ways that benefit both sides. Despite the recognized value of such communications, current Rule 2-100 has been misread as limiting the lawyer's freedom to advise a client engaged in direct communications, in a manner that conflicts with national standards and that disproportionately disadvantages unsophisticated clients. Without discussion or analysis, Comment [2] to the proposed draft Rule 4.2 appears to invite continuation of that misreading.

This letter suggests that Comment [2] to draft rule 4.2 should be amended to make clear, consistent with sound policy and national interpretations, that the rule is not intended to limit a lawyer's freedom to give legal advice concerning the content of the client's lawful direct communications with a represented adversary.

1. Existing Rule 2-100

The Discussion to existing Rule 2-100 recognizes the right of represented clients to communicate directly with each other. It states that "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." The Rule has nevertheless been interpreted to restrict advice concerning lawful direct communications whenever "the content of the communication…originates with or is directed by the attorney," even if the client has asked the lawyer to draft the communication or to advise concerning its content. COPRAC Formal Opinion 1993-131. When the content of the communication "originates with and is directed by the client," the attorney may advise as to as to strategy, goals and the general nature of the communication—but apparently not as to specific language that should or should not be used. *Id.* There is no explicit textual basis

for this interpretation in either the Rule or the Discussion. Moreover, the tension with the lawyer's duty of competence is obvious: clients who are not sophisticated enough to "originate and direct" the content of their communications apparently get *no* advice about the content of their lawful communications with a represented opponent. Even clients who can originate and direct their own communications do not get all the advice that a competent lawyer would normally be obliged to give. Although the COPRAC opinion is not formally binding, and in my judgment represents a misreading of the Rule, it is frequently consulted by California lawyers seeking to determine their ethical obligations.

2. ABA Model Rule 4.2

The foregoing interpretation of Rule 2-100 conflicts with the interpretive approach reflected in Comment [4] to ABA Model Rule 4.2, which states that "[p]arties to a matter may communicate directly with each other, and *a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make*." (Emphasis added). Relying on this language, ABA Formal Opinion 11-461 expressly rejects COPRAC's approach to advice about the content of communications as inconsistent with ABA Rule 4.2 and Comment [4], with the ALI Restatement (Third) of the Law of Lawyering §99 Comment (k), and with a lawyer's duties of competence and consultation. As the ABA Opinion notes, the COPRAC interpretation "[leaves] the unsophisticated client without the benefit of the lawyer's advice in formulating communications that the rules allow the client to have with a represented person." In light of Comment [4], the ABA reads Model Rule 4.2 as permitting advice to the client about topics, issues, strategies, *and* the content of communications, regardless of where the communication originates, so long as such advice does not involve assisting the client in overreaching the opposing party.

3. First Commission's Rule 4.2

Proposed Rule of Professional Conduct 4.2 directly took on the difference between the COPRAC interpretation and the national approach and clarified that on a going forward basis Rule 4.2 should be interpreted consistent with the national approach. Comment [7] to the rule stated: "This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. *A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e)* [prohibiting improper efforts to obtain privileged or confidential information]." (Emphasis added). This language is more elaborate than Comment [4] to the ABA rule but achieves the same interpretive result. Indeed, the First Commission's elaboration anticipates and closely tracks the ABA's interpretation of Model Rule 4.2 and Comment 4 in Formal Opinion 11-461.

4. Current Draft Rule 4.2

Comment [2] to draft Rule 4.2 appears to preserve the potential conflict between California and national law. In pertinent part it states that: "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."

Unlike the ABA Rule and the First Commission's Rule, the draft Comment does not clarify that proposed Rule 4.2 does not bar a lawyer from giving advice about the content of a permitted direct communication. (Perhaps a few smart and experienced clients will be able to divine what to write or say from a discussion of the "risks and benefits" of direct communications, but not many.) The implication, particularly in light of the First Commission's different approach, is that COPRAC's long-standing interpretation of Rule 2-100 is a correct, or at least defensible, reading of the rule. The drafting memorandum offers no explanation for this formulation except that it is shorter than the corresponding Discussion to the current rule.

5. A Suggested Fix

The draft Comment should be changed. COPRAC's reading of Rule 2-100 shows that there is a real risk that the no contact rule will be interpreted on a going forward basis as barring lawful advice about lawful client conduct. The draft Comment arguably enhances that risk. As the ABA and First Commission recognized, it makes sense to include language in the Comments to elucidate that the rule should be read in a way that is consistent with the duties of competence and loyalty and that does not systematically disadvantage less sophisticated clients. It is also more consistent with the Commission's charge to move towards national uniformity where feasible.

Here is a very simple suggested fix to Comment [2]:

> This Rule does not prevent represented persons from communicating directly with one another with respect to the subject of the representation. <u>The Rule does not prohibit a lawyer from advising a client concerning a communication that the client is legally entitled to make.</u> ~~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.

This revised Comment essentially adopts the ABA language. It is shorter than the proposed draft comment, even though it covers more ground. The First Commission's proposed comment would achieve substantially the same outcome, but more explicitly and at greater length. Either would be an acceptable substitute for the current draft comment, but in my judgment the shorter version is more consistent with the Commission's charge.

Respectfully submitted,

Stephen McG. Bundy
Professor of Law, Emeritus

From:	Lamport, Stanley W.
To:	Edmon, Lee
Cc:	"ajabrown@me.com"; "Langford@usfca.edu"; eaton@scmv.com; danny.chou@cco.sccgov.org; "dean.stout@inyocourt.ca.gov"; dzipser@umbergzipser.com; george.s.cardona@usdoj.gov; hck@kornberglaw.com; James Ham (jham@panskymarkle.com); "jeff.bleich@mto.com"; "kvc@cpuc.ca.gov"; Kevin E. Mohr (kejmohr@gmail.com); LHarris@g3mh.com; Mark Tuft (MTuft@cwclaw.com); ngclinch@sbcglobal.net; "martinez@lbbslaw.com"; rlkehr@kscllp.com; "toby@tjrlaw.net"; wpeters@pubdef.lacounty.gov; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi
Subject:	RRC2d - Proposed Rule 4.3
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Attachments:	image002.png

Dear Members of the Commission:

I dissented to the first commission's adoption of Rule 4.3. This proposed rule is worse than the first commission's draft rule and I continue to believe that the rule should not be adopted. This rule exposes a lawyer to unique risks in communicating with an unrepresented person on a client's behalf. As a result, it creates the potential to compromise a lawyer's ability to represent a client that is not justified.

As a general rule, we want to maintain an identity between what a client lawfully can say and what a lawyer can say on a client's behalf. That identity is a fundamental quality of representation. We start to lose that identity when we expose lawyers to risks in connection with communicating on a client's behalf that are not shared by the client. Rule 4.3 would subject a lawyer to discipline (and potentially other consequences) for communications on a client's behalf with respect to matters that the client can communicate without any penalty. The rule not only limits a lawyer's ability to represent a client vis-à-vis someone who chooses not to be represented, but it can interfere with a lawyer's exercise of independent judgment on a client's behalf, as the lawyer weighs the lawyer-unique risks created by the rule in advising a client about communicating with an unrepresented party.

My concern is tied to both the "implication of disinterestedness" and the "legal advice" elements of paragraph (a) and the "seek to obtain" language in paragraph (b).

The "legal advice" element is my greatest concern. Communication of information about the law and how it applies to a client's dispute with another person is inevitable when a lawyer represents a client in that context. For example, if a client has a neighbor who proposes to trespass on the client's property, the lawyer may need to inform the neighbor that the neighbor's proposed action would be a trespass which would expose the neighbor to

liability and other consequences and that the neighbor should not engage in the trespass. I think we would agree that the lawyer would be providing legal advice if the lawyer provided the foregoing information to the client. Is it legal advice when it is communicated to an unrepresented neighbor? If not, what is?

The first commission attempted to address this problem in Comment [3] which stated in relevant part:

> Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice merely by negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may state a legal position on behalf of the lawyer's client, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

I do not feel the Comment went far enough, because the phrase "merely by stating" created uncertainty, but the Comment still provided much needed clarification. The proposed rule does not include the Comment.

To compound the problem, the rule does not address what happens when the unrepresented person chooses to be unrepresented. As written, the rule would preclude a lawyer from providing "legal advice" to the adverse party who has chosen to be unrepresented, even though the client could communicate the "legal advice" to that person and even though the lawyer could communicate "legal advice" on the client's behalf if the adverse party is represented.

Communicating with an adverse party in circumstances where the lawyer's representative capacity is clearly understood is a fundamental part of representing a client. I do not see how engaging in such communications on a client's behalf reflects adversely on a lawyer's fitness to practice law that would justify a rule of professional conduct.

I have similar concerns about the "disinterested" language in the first sentence of paragraph (a). The word "disinterested" has no established meaning. It can have multiple meanings to different people on different occasions. As a result, the rule creates a situation where a lawyer acts at his or her peril in communicating with an unrepresented person on a client's behalf.

I would have no objection if the rule stated that, in communicating with an unrepresented person, a lawyer shall not represent that the lawyer is not communicating on behalf of a client, when that is not the case. Lawyers cannot engage in a fraud when dealing with other lawyers or an unrepresented person. However, this proposed rule does not say that. Instead, it creates a special prohibition with respect to an unrepresented person (without regard to adversity) that would discipline a lawyer for implying that he or she is "disinterested." The imprecision of the terminology creates the potential to chill lawyer communications on a client's behalf with an unrepresented person, which is not justified.

Finally, I have concerns about the "seek to obtain privileged information" concept in paragraph (b). The phrase "seek to obtain" is not clear. When viewed in hindsight in a disciplinary proceeding, seemingly innocent inquiries that result in the revelation of privileged or confidential information could be litigated as violations of the rule. In addition, paragraph (b) does not have a clear exception for situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer's client are aligned. In such situations, it may be appropriate for the lawyer to seek the information, but I don't think we can fairly say the lawyer is entitled to it (which is the only exception in the rule). Why would we discipline a lawyer for making an appropriate inquiry? Furthermore, under paragraph (b), a lawyer could seek to obtain privileged information from a person who is represented, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses to be unrepresented in the same context. I do not see a justification for saying that the lawyer is deemed fit to practice law in the first case, but is deemed unfit to practice law in the second case.

In summary, this rule is overbroad and unjustifiably chills a lawyer's communication on a client's behalf with an unrepresented party. It should not be adopted.

STAN
Stanley W. Lamport

2029 Century Park East | Suite 2100 | Los Angeles, CA 90067
direct: 310.284.2275
mobile: 213.393.2033 | *fax:* 310.284.2100
slamport@coxcastle.com | vCard | bio | website

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