III.A Rule 2-100
August 14, 2015
Open Session

AGENDA MATERIALS FOR

III.A. Rule 2-100 (Communication with a Represented Party)

- Proposed Rule 4.3 - Redline Comparison to June draft
- Proposed Rule 4.3 – Redline Comparison to ABA Model Rule 4.3
- Drafting Team's Report & Recommendation on Rule 2-100 [4.3]
- Post-Agenda E-mails
  - Bob Kehr's Comments
  - Stan Lamport's Comments
- Commission's Provisional Report & Recommendation on Rule 4.2
  - Carol Langford's Dissent
  - Solano County Public Defender's Comments

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* **NOTE**: These material have been carried over from the June meeting.

Rule 4.3 Communicating with an Unrepresented Person
(Commission's Proposed Rule – Black Letter Rule Text as Amended and Approved at June 26, 2015 Meeting)

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are ~~or may become~~ in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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.

Comment

[1] This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which it is apparent that the interests of an unrepresented persons are in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client.

[3] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.

Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person
(Redline Comparison to ABA Model Rule 4.3)

(a) In ~~dealing~~communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person ~~misunderstands the lawyer's role~~incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. ~~The *lawyer shall not give legal advice to* an unrepresented person, other than the advice to secure counsel, if~~If the lawyer knows or reasonably should know that the interests of ~~such a~~the unrepresented person are ~~or have a reasonable possibility of being~~ in conflict with the interests of the client, the *lawyer shall not give legal advice to* that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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.

Comment

[1] This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

~~[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).~~

[2] ~~The Rule~~Paragraph (a) distinguishes between situations ~~involving~~in which it is apparent that the interests of an unrepresented persons ~~whose interests may be adverse to~~are in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the ~~Rule~~rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. ~~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. This Rule does not prohibit a lawyer from 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 inform the person of the terms on which~~A lawyer does not give legal advice merely by stating a legal position on behalf of 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~~.

[3] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.3 [2-100]

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

I. CURRENT CALIFORNIA RULE

There is no California Rule that corresponds to Model Rule 4.3, from which proposed Rule 4.3 is derived.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

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

III. PROPOSED RULE (CLEAN)

Rule 4.3 Communicating with an Unrepresented Person

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are or may become in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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.

Comment

[1] This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which it is apparent that the interests of an unrepresented persons are in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client.

[3] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.3 [2-100]

Lead Drafter: Tuft
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Meeting Date: June 26, 2015

IV. PROPOSED RULE (REDLINE TO MODEL RULE 4.3)

Rule 4.3 ~~Dealing With~~Communicating with an Unrepresented Person

(a) In ~~dealing~~communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person ~~misunderstands the lawyer's role~~incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if~~ If the lawyer knows or reasonably should know that the interests of ~~such a~~the unrepresented person are or ~~have a reasonable possibility of being~~may become in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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.

Comment

~~[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).~~

[1] This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] ~~The Rule~~Paragraph (a) distinguishes between situations ~~involving~~in which it is apparent that the interests of an unrepresented persons ~~whose interests may be~~are ~~adverse to~~ in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the ~~Rule prohibits the giving of any advice, apart from the advice to obtain counsel. 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. This Rule does not prohibit a lawyer from 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 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~~rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client.

[3] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.

V. PUBLIC COMMENTS SUMMARY

- Commenter Name, Organization (if any), Date: Summary of Comments
- Commenter Name, Organization (if any), Date: Summary of Comments

VI. OCTC / STATE BAR COURT COMMENTS

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

* * *

A. Rule 2-100 Communication with a Represented Party

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

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

Rule 4.3. Dealing with Unrepresented Person.

1. OCTC supports this rule, but believes that there are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.

- **Commenter Name, State Bar Court:** No comments received from State Bar Court.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.3 [2-100]

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

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

- **Massachusetts Rule 4.3** is identical to Model Rule 4.3:

  Massachusetts Rule 4.3 Dealing with Unrepresented Person

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

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed rule 4.3 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf

- 28 states have adopted Model Rule 4.3 verbatim (AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, LA, MA, MS, MO, NE, NV, NH, NM, ND, OH, OK, RI, SC, SD, TN, VT, WV, WY); 22 jurisdictions have adopted something substantially similar to 4.3 (AL, CT, DC, FL, GA, KS, KY, ME, MD, MI, MN, MT, NJ, NY, NC, OR, PA, TX, UT, VA, WA, WI); only California has not adopted a rule derived from Model Rule 4.3 (CA).

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

A. **Concepts Accepted (Pros and Cons):**

1. General: Drafting Team consensus that a version of ABA Model Rule 4.3, as amended, be recommended to the Board for adoption.
   - Pros: Notwithstanding OCTC's objection to the adoption of such a rule on the ground that "overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act," (see 6/4/15 Memo from OCTC to Commission, at page 3, 2-100 comment no. 4), the proposed rule is intended to ensure that unrepresented persons, whatever their interests may be, are not being misled when communicating with a lawyer who is acting for a client. The rule provides important public protection and critical guidance to lawyers interacting with in represented persons by clarifying the conduct that is prohibited rather than requiring them to parse and interpret more general prohibitions in the State Bar Act. Further, proposed rule 4.3 complements rule

4.2's prohibitions on communicating with a represented party. Moreover, Rule 4.3 would provide an alternative basis for discipline to Bus. & Prof. Code §§ 6068(a) and 6106 that does not require the establishment of a fiduciary relationship or proof of an act of moral turpitude. Finally, a version of Model Rule 4.3 has been adopted in every other jurisdiction in the country. There is no reason for California to remain the only state not to have the rule.

- Cons: "A revision to rule 2-100 governing contact with one who is not represented by counsel is unnecessary. Again, overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act." (See 6/4/15 OCTC Memo to Chair & Commission, at page 3, #4.)

2. In title and rule, change "dealing with" to "communicating with". Drafting Team consensus.
   - Pros: The change will clarify what conduct is being reached and make rule parallel with proposed rule 4.2 [2-100].
   - Cons: None identified.

3. In paragraph (a), substitute "incorrectly believes the lawyer is disinterested" for "misunderstands the lawyer's role" in Model Rule 4.3. Drafting Team consensus.
   - Pros: The change will more precisely identify the concern the proposed rule is intended to address. It conforms to the RRC1 language. Note: The use of the word "believe" has been used in anticipation that the terminology rule drafting team will adopt a term similar to Model Rule 1.0(a) ("Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.)
   - Cons: None identified.

4. In paragraph (a), substitute the phrase "may become" for the Model Rule 4.3 phrase "might have a reasonable possibility of being". Drafting Team consensus.
   - Pros: The substituted phrase is more definite regarding what will trigger a lawyer's duty. A similar phrase is found in current rule 3-600(D) and Model Rule 1.13 (Organization As Client).
   - Cons: None identified.

5. In paragraph (a), reverse the sentence structure of the third sentence of ABA Model Rule 4.3, so that the qualifying clause comes first. Drafting Team consensus.
   - Pros: The clause reversal emphasizes that the prohibition and duty identified in the sentence are triggered when the lawyer "knows" the interests of client and unrepresented person conflict.
   - Cons: None identified.

6. Add paragraph (b), which corresponds to paragraph (e) in proposed Rule 4.2, and prohibits a lawyer from seeking to obtain from an unrepresented privileged or confidential information. Drafting Team consensus.

- Pros: Although proposed paragraph (b) is not found in Model Rule 4.3, there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third person. Including a requirement in this rule that prohibits a lawyer from seeking to obtain privileged or other confidential information that 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, is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts.
- Cons: None identified.

7. Add Comment [1], not found in Model Rule 4.3, and delete model rule comment [1]. Drafting Team consensus.
   - Pros: Added comment [1] succinctly states the policy underlying the rule and its intent. The model rule comment repeats the rule and is thus unnecessary.
   - Cons: None identified.

8. Retain and substantially revise Model Rule 4.3, comment [2]. Drafting Team consensus.
   - Pros: The comment contains important guidance that clarifies the prohibition on giving "legal advice" in the third sentence of paragraph (a).
   - Cons: None identified.

9. Add comment [3], which has no counterpart in Model Rule 4.3, which would permit lawyers to conduct lawful covert investigations. Drafting Team consensus.
   - Pros: Comment [3] provides guidance and assurance to both government and private lawyers who engage in lawful covert investigative activities. Comment [3] is identical to a comment recommended by RRC1, which in turn was developed from Oregon Rule 8.4(b), a rule that was adopted in Oregon following the Oregon Supreme Court's decision in *In re Gatti* (2000) 8 P.3d 966, in which the court sanctioned a lawyer for a covert investigation he conducted on behalf of a client in violation of the Oregon DR 1-102(A)(3) [conduct involving dishonesty, fraud, deceit or misrepresentation] and DR 7-102(A)(5) [knowingly making false statement of law or fact]. Subsequently, the Oregon Code was amended to permit the conduct and this was carried forward when Oregon converted to rules based on the ABA Model Rules as Oregon Rule 8.4(b).[1] Use of the qualification "lawful" should prevent the

[1] Oregon Rule 8.4(b) provides:

> (b) Notwithstanding paragraphs (a) (1), (3) and (4) and Rule 3.3 (a)(1) , it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct . "Covert activity," as used in this rule,

comment from swallowing the rule.

- Cons: Some questions/concerns were raised re including comment [3]:
  (1) This exception encompasses actions taken by both governmental and non-governmental/private lawyers and might be construed to be so broad that it "swallows the general prohibition" insofar as covert investigations are involved. See Open Issues discussion in Section IX.
  (2) Even with the limitation that the covert activity be lawful," deciding what is a "lawful" covert investigation in the private sector would leave a great deal of uncertainty in the rule.
  (3) Even if it is determined that the comment is not too broad, it belongs in the blackletter because creates an exception to the rule.
  (4) Even if it is determined that the comment is not too broad and is appropriate either as a comment or a black letter exception, whether rule 4.3 is the appropriate rule in which to place a comment providing that a lawyer who conducts a lawful covert investigation is not in violation of the Rules. Alternative rules would include proposed rule 8.4, should the Commission recommend adoption of a counterpart to MR 8.4 or a rule counterpart to MR 4.1 (Truthfulness in Statements to Others).

B. **Concepts Rejected (Pros and Cons)**:

Not Applicable.

C. **Changes in Duties/Substantive Changes to the Current Rule or Other California Law**:

1. California has similar provisions, (see, e.g., rule 3-600(D) and Business & Professions Code §§ 6068(a) and 6106), so the adoption of proposed rule 4.3 arguably would not create any new duties but instead would provide lawyers with critical guidance in communicating with unrepresented persons.

D. **Non-Substantive Changes to the Current Rule**:

Not Applicable.

E. **Alternatives Considered**:

None.

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means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.3 [2-100]

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

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Comment [3]. Regarding the exception for covert investigations, the drafting team did not reach a strong consensus on the inclusion of non-governmental/private covert investigations. Instead, the team agreed that this issue should be discussed and resolved following full Commission consideration. It was understood that the prior Commission identified the same possible overbreadth issue with this language but ultimately determined that the qualification of "lawful" would serve as a limiting factor for both governmental and private covert investigations. Nevertheless, one member of the drafting teams remains convinced that Comment [3] should be limited to governmental investigations citing the actions taken by some other states that have addressed this issue (e.g., Florida[2] and Utah[3]) and a 2007 study by American Prosecutors Research Institute (Vol. 4, No. 2, 2007, copy on file with the State Bar).
   Several issues have been identified: whether to (i) include comment [3] in Rule 4.3, (ii) make comment [3] into a black letter provision because it creates an exception; (iii) refer the comment [3] concept to the rule 8.4 [1-120] Drafting Team or a Drafting Team that would consider MR 4.1 (Truthfulness in Statements to Others), or (iv) not include the comment [3] concept in the Rules at all.
   See VIII.A.9. Pros & Cons.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

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

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

Chou

[2] See Florida Rule 8.4(c), which provides that it is misconduct for a lawyer:

> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule

[3] See Utah Ethics Advisory Op. 02-05 (3/18/02), available at: http://www.utahbar.org/ethics-advisory-opinions/eaoc-02-05/ [Last visited 6/8/15].

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

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

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

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

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

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 4.3, derived from ABA Model Rule 4.3 as amended, in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4.3, derived from ABA Model Rule 4.3 as amended, in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

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 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.

From: Lamport, Stanley W. <slamport@coxcastle.com>
Sent: Thursday, July 16, 2015 10:29 AM
To: Mark Tuft (MTuft@cwclaw.com); george.s.cardona@usdoj.gov
Cc: rlkehr@kscllp.com; Edmon, Lee; Kevin E. Mohr (kejmohr@gmail.com); Difuntorum, Randall; danny.chou@cco.sccgov.org; dzipser@umbergzipser.com; wpeters@pubdef.lacounty.gov
Subject: RRC2d - Rule 4.3

Mark & George:

After the last meeting, you suggested that I attempt to draft comments for this rule that would address the concerns I have expressed. I have taken the liberty of conferring with Bob Kehr about this. What follows includes Bob's input.

1. It would helpful to break paragraph (a) into to two paragraphs. One paragraph would contain the first two sentences of paragraph (a) and one paragraph would consist of the last sentence in paragraph (a). As currently drafted paragraph (a) encompasses two concepts which I am addressing in separate comments, both of which now refer to paragraph (a). It would be easier to understand the comments if they were referring to separate paragraphs.

2. With respect the first two sentences in paragraph (a), I propose the following comment:

[1] A lawyer communicating on behalf of a client with a person who is not represented would violate the standard of disinterestedness under paragraph (a) when either (i) the lawyer states or implies to the unrepresented person that the lawyer is not communicating with that person on behalf of the lawyer's client or (ii) the lawyer knows or reasonably should know that the unrepresented person believes that the lawyer in not communicating with that person on behalf of the lawyer's client.

3. With respect to the last sentence in paragraph (a), I propose the following comment, which is patterned after Comment [2] in the Model Rule:

[2] A lawyer gives legal advice within the meaning of paragraph (a) when the lawyer communicates a view about the unrepresented person's rights or duties under the law in circumstances or in a manner that would cause the unrepresented person to reasonably believe that the lawyer is not speaking on behalf of or advocating for the interests of the lawyer's client. A lawyer does not give legal advice under paragraph (a) merely by advocating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice within the meaning of paragraph (a) by negotiating the terms of a transaction or of a settlement of a dispute with the unrepresented person or by explaining to the unrepresented person the

lawyer's view of the meaning of a document or the lawyer's view of the underlying legal obligations, so long as the lawyer has informed the unrepresented person that the lawyer represents the lawyer's client and that the lawyer does not represent the unrepresented person.

4. I think you should retain Comment [3] in the current draft rule.

5. I have not yet attempted to draft a comment about what it means to seek to obtain privileged or confidential information in paragraph (b); but I think a comment is warranted. I am heading out for a Yosemite backpacking trip today, so I will not have a chance to work on a comment until I am back next week. My concern is that in practice, unrepresented people will reveal privileged or confidential information without being prompted. The line between whether the lawyer sought to obtain the information is not as clear as some may think. As one of many possible hypos, if an unrepresented person announces that he or she is about to reveal confidential information and the lawyer does not tell the person to refrain from doing so, did the lawyer "seek to obtain" the information by not remonstrating? There needs to be a clear line here. A murky standard creates a broad zone of risk that chills lawyer communication on behalf of a client with unrepresented persons. It would be useful to have a conversation about the circumstances in which you envision the rule applying before attempting a comment.

Notwithstanding the foregoing, I still think (b) should not be in this rule. It is not in the Model Rule. It creates unique risks for a lawyer who is communicating on behalf of a client with an unrepresented person that the client does not share. In other words, a client can hear an unrepresented person's revelation of the privileged or confidential information without facing significant legal consequences, whereas that client's lawyer risks his license to practice being in that conversation. We should not create gaps between what a client can lawfully do and what a lawyer can do on the client's behalf. Nor should we be chilling the legal profession's ability to represent clients' lawful interests by imposing unique risks on the lawyer. I don't think the law in this area has evolved enough to justify a rule that would extend to many more situations than have been addressed in the case law to date.

Regards

STAN

Stanley W. Lamport

COX CASTLE NICHOLSON

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: George Cardona, Danny Chou, Raul Martinez, Winston Peters, Dean Zipser

Meeting Date at which the Rule was Discussed: June 26, 2015

I. CURRENT CALIFORNIA RULE

Rule 2-100 Communication With a Represented Party

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

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

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

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

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

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

(3) Communications otherwise authorized by law.

Discussion

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

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

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

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

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

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

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

II. COMMISSION'S RECOMMENDATION AND VOTE

There was consensus among the Commission members to recommend a proposed amended rule as set forth below.

At the Commission's June 26, 2015 meeting, all members present voted to adopt this recommendation.

III. COMMISSION'S PROPOSED RULE 2-100 [4.2] (CLEAN)

Rule 2-100 [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 private or governmental organization, this Rule prohibits communications with:

(1) A current officer, director, partner, or managing agent of the organization; or

(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:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

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

(e) 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, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] 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.

[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] 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. 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.

[4] 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].)

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

[6] 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.

[7] 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 (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) 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) 660 F.3d 360; *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.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

IV. COMMISSION'S PROPOSED RULE 2-100 [4.2] (REDLINE TO CURRENT CALIFORNIA RULE 2-100)

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

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

~~(B)~~(b) ~~For purposes of this rule, a "party" includes:~~In the case of a represented corporation, partnership, association, or other private or governmental 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~~the organization; or

(2) ~~An association member or an employee of an association, corporation, or partnership~~A current employee, member, agent ~~of a partnership; or~~, 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 ~~or whose statement may constitute an admission on the part of the organization~~.

~~(C)~~(c) This ~~rule~~Rule shall not prohibit:

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

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

~~(3) Communications~~communications otherwise authorized by law or a court order.

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

(e) 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, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

~~Discussion~~ **Comment**

[1] 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.

[2] ~~As used in paragraph (A), "the~~ "Subject of the representation," "matter," and ~~"party"~~ "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.

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

[3] 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. 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.

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

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

[4] 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].)

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct.~~ [5] This Rule does not prohibit communications initiated by a represented person seeking advice or representation from an independent lawyer of the person's choice.

[6] 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.

[7] 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 (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] ~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule.~~ Paragraph (c)(2) 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. ~~These statutes protect a variety of other rights such as~~ 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. ~~Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~ 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) 660F.3d 360; *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.

V. PUBLIC COMMENTS SUMMARY

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

  "Rule 2-100, subdivision (A), prohibits a member from communicating directly or indirectly about the subject of a representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. Subdivision (C) of the rule explains that it does not cover "[c]ommunications with a public officer, board, committee, or body . . . ."

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

- **Glenn Alex (May 25, 2015)**

  The Rules should clarify which public employees may be contacted by an outside attorney without permission of agency counsel. Existing Rule 2-100 provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter…." Subdivision (C)(1) provides an exception for "Communication with a public officer, board, committee or body[.]" Perhaps the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

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

- **Los Angeles County Public Defender (June 12, 2015)**

  Opposed to adoption of Model Rule language, any modification to the current rule, and specifically modification that would prohibit communications with represented "persons."

- **California Public Defenders Association (June 16, 2015)**

  Objects to modifying rule 2-100 language to substitute "person" for "party." Determining whether a non-party is represented is difficult and the rule ultimately would inhibit criminal defense counsel from fully investigating.

- **Stephen Bundy (June 22, 2015)**

  Concerned that proposed rule 4.2 will prohibit lawyers from advising clients on the content of the *client's* direct communications with another represented person as permitted under the

Rule. Recommends adding clarification to Comment [2]: "The Rule does not prohibit a lawyer from advising a client concerning a communication that the client is legally entitled to make."

VI. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, 6/4/2015:

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

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

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

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

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

matter and an opportunity for that counsel to discuss the matter with his or her client before the non-party witness is contacted.

Any overreaching by the attorney during his or her contact with the non-party, such as that discussed in the Dale opinion, can be remedied through discipline under Business and Professions Code sections 6068(a) and 6106.

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

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

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

B. Russell Weiner, OCTC, 6/15/2010:

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

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

C. Mike Nisperos, OCTC, 9/27/2001:

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

Revise the discussion section as follows:

* * *

Discussion:

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

the represented party initiates or consents to the communication.

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

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

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

Rule 2-100 does not prohibit communication with a represented person, or an employee or agent of such person, concerning matters outside the

representation, for example of the existence of a controversy between a government agency and a private party, or between two organizations. Nor does it prohibit a lawyer for either side from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does it prohibit a client who is represented by counsel from filing a complaint with a government agency and communicating with officials of that agency regarding the client's complaint.

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

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

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

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

Perhaps the most difficult aspect of this rule concerns an attorney communicating with employees and other individuals involved with a represented organization or entity.

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

D. State Bar Court:

No comments received from State Bar Court.

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

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

  Massachusetts Rule 4.2 Communication with Person Represented by Counsel

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

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

  Utah Rule 4.2. Communication with Persons Represented by Counsel.

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

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

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

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

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

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

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

(d) Organizations as Represented Persons.

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

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

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

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

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

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

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

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

litigation is pending or imminent after disclosure of the representation to the official.

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

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

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

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

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

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

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

(a) In representing a client, a lawyer shall not communicate *or cause another to communicate* about the subject of the representation with a party the lawyer knows

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- Eight jurisdictions have a black letter provision similar to proposed Comment [5], which addresses the application of the rule in the context of a limited scope representation.[5]

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

A. Concepts Accepted (Pros and Cons):

1. General: There was consensus among Commission members to recommend substituting "person" for "party" in the Rule.
   - Pros: First, this change accords with federal and state law interpreting existing Rule 2-100 as applying outside the litigation context to "persons" represented in connection with a particular matter, even if the "persons" are not "parties" in the matter. Second, this change also accords with ABA Model Rule 4.2 and every other jurisdiction in the country. Only four jurisdictions have retained "party" in the black letter of their rule (Arizona, Connecticut, Michigan, and Mississippi), and: (i) all have a title that states "Communication With A *Person* Represented By Counsel" (Emphasis added), and (ii) all include a comment that provides the rule applies to a represented person: "This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (Emphasis added). Third, changing "party" to "person" will also resolve the limitations inherent in "party" that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule's objectives to protect any "person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation," (See Model Rule 4.2, cmt. [1]), there is no reason to limit the protection of the rule to those persons who are parties.[6] Finally, notwithstanding public comment received that

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[Footnote continued…]

> to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Emphasis added.)

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

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

[6] See also *In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798. Although the court concluded the word "party" must be construed strictly, it recognized that such an interpretation undermined the purposes of the rule:

> 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

opposed the change in the belief it will interfere with criminal investigations, (See V.□ & □, above), the experience in other jurisdictions has not borne that out. (See also discussion of Comment [8] in paragraph 25, below.)

- Cons: Public comment received by the first Commission and this Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of "person" for "party" will inhibit their ability to investigate. However, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. (See discussion of Comment [8] in paragraph 25, below.) Moreover, addition of the phrase "or a court order" to (c)(2) in accordance with the ABA Model Rule further ensures that this rule will not unduly limit the ability of lawyers in the criminal justice system to engage in legitimate investigative activities. (See discussion of (c)(2) in paragraph 13, below.)

2. In proposed paragraph (a), substitute "In" for "While".
   - Pros: Although not a substantive change, it clarifies precisely which communications are governed by the rule and removes unnecessary differences between California and every jurisdiction except one (Georgia).[7]
   - Cons: None identified.
3. In proposed paragraph (a), retain the phrase "directly or indirectly".
   - Pros: This language prevents a lawyer from attempting to circumvent the rule by directing an agent, e.g., private investigator, to communicate with the represented person. Not carrying forward this language may create a risk that a court or lawyers might conclude that indirect communications are no longer prohibited.
   - Cons: Retaining this language would perpetuate an existing difference between the language of the California rule and the rule adopted in a preponderance of other jurisdictions.

[Footnote continued…]

> 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."

(Footnotes omitted.)

[7] Georgia Rule 4.2 provides in relevant part: "(a) A lawyer who is representing a client in a matter shall not communicate . . . ."

4. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting them more easily to determine whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
5. Substituting the term "lawyer" for "member".
   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
6. Retain concept in current rule 2-100(B), which identifies which constituents in an organization are covered by the rule and therefore protected under the Rule's prohibition against communications with represented persons.
   - Pros: Proposed paragraph (b) is necessary to clarify the complicated and recurring issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. It provides important guidance that will foster compliance with the Rule. The Commission disagrees with OCTC that drawing such distinctions is not necessary. (See OCTC comment in paragraph VI.A.3, above.) There is no evidence that current rule 2-100(B) has not provided useful guidance on the application of the rule in the organizational context. Moreover, the definition of the constituents covered by the rule remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
   - Cons: Attempting to clarify this point risks being too narrow or overly broad. (See 6/4/2015 OCTC Memo, #3, at paragraph VI.A.3, above.)
7. Change the introductory clause to proposed paragraph (b) from its current form of being a defined term to a statement of the kinds of entities to which paragraph (b)'s prohibition applies. (See also paragraph 8, below.)
   - Pros: The proposed new structure more accurately demarcates the kinds of entities to which paragraph (b)'s prohibitions apply while also making clearer that its

prohibitions apply based on organizational, as opposed to individual, representation. In particular, unlike the current structure, which could be interpreted as suggesting that its prohibition was based on deemed individual "representation," the proposed structure more accurately describes paragraph (b)'s actual effect, which is to prohibit and prevent communications with the persons identified in subparagraphs (b)(1) and (b)(2) based on the organization's representation; in many instances, this prohibition may apply even before the identified constituents have had an opportunity to consult with an organization lawyer, and at times when they may not even know that the organization is represented in connection with the matter.

- Cons: Notwithstanding the intent of this change, there may be a risk that a court interpreting the new language might view the new structure as an invitation to abandon existing case law concerning the protection afforded by the rule to represented organizations and their constituents.

8. In the introductory clause to paragraph (b)(1) and (b)(2) add the phrase "or other private or governmental organization" after "corporation, partnership, association".
   - Pros: Recognizes that there may be organizations other than corporations, partnerships, or associations to which the rule applies. In addition, explicitly states that the rule applies to governmental organizations, not just private organizations. (See also discussion of (c)(1) in paragraph 11, below.)
   - Cons: The explicit statement that the rule also applies to governmental organizations might cause some confusion given the provision in both the current rule (paragraph (C)(1)) and proposed Rule (paragraph (c)(1)) stating that communications with a public official are not prohibited in recognition of the constitutional right to petition government.
9. In proposed paragraph (b)(1), insert "current" to modify managerial employees of an organization.
   - Pros: Clarifies that the rule's prohibitions based on organizational representation apply only to currently-employed constituents. Current rule 2-100 states the same limitation in Discussion ¶. 6. This limitation on the rule's scope should be in the black letter. Although there is case law so holding, including the concept in the black letter should remove ambiguity and facilitate compliance without requiring further clarification by a court. In particular, the clarification helps assure that this application of the current rule will not be disturbed by the recommended change from party to person.
   - Cons: This clarification in the black letter might be unnecessary as case law already addresses this point (see, e.g., *Nalian Truck Lines v. Nakano Warehouse and Transportation* (1992) 6 Cal.App.4th 1256.) While this clarification may have been important guidance when the rule was revised in 1989, the application of the rule only to currently-employed constituents now appears to be a well-settled point.
10. In proposed paragraph (b)(2), retain the first clause in current rule 2-100(B)(2) (when act or omission "may be binding upon or imputed to the organization"), but delete the second clause in current rule 2-100(B)(2) ("the person's statement may constitute an admission on the part of the organization.")
    - Pros: (1) the second clause was dropped from the Model Rule and is not the law in most states that have adopted rule 4.2, (2) the provision is ambiguous and applies

even if the statement "may" constitute an admission against interest; (3) the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity; (4) deleting the clause generally will not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that might constitute an admission would have to originate from a constituent who is already off-limits under paragraph (b)(1) (which encompasses any officer, director, partner, or managing agent); only in rare situations would a constituent not already covered under paragraph (b)(1) be able to make an admission that would be binding on the organization. The aforementioned burdens placed on the communicating lawyer by the admissions clause and its potential for interfering with pre-filing investigations outweigh the benefits that might be realized in prohibiting communications that would only rarely result in an admission.

- Cons: "Statements" are different from acts and omissions. Constituents of an organization whose statements can result in liability being imposed on the organization should therefore be protected by the Rule. The deletion is a change to existing law.

11. Retain as proposed paragraph (c)(1) current rule 2-100(C)(1), which excepts from the rule communications with public officers, boards, committees, or bodies, but substitute "public official" (defined in (f)(2)) for "public officer".
    - Pros: The exception in current rule 2-100(C)(1) reflects recognition of the important constitutional right to petition the government and is in accord with public comment received from the California Access To Justice Commission. (See Section V.□, above.) The change from "public officer" to "public official" (as defined in (f)(2)) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its constituents. . (See also discussion re Comment [7] in paragraph 24, below.)
    - Cons: None identified.
12. Delete current rule 2-100(C)(2) (represented party seeking second opinion from independent lawyer) but include it as a clarifying comment.
    - Pros: Current (C)(2) is superfluous because an independent lawyer could not be covered by this rule, which applies only to communications *by a lawyer in the course of representing a client*, which would make the lawyer making those communications not independent. In any event, it is properly placed in a paragraph that identifies exception to the rule because the rule does not apply to the described situation in the first instance. Instead, the current rule 2-100(C)(2) concept has been retained as a clarifying comment to assure lawyers that such communications are not prohibited under the Rule. (See Comment [5].)
    - Cons: Notwithstanding the intent of this change, a court might interpret the movement of this concept from the black letter to a comment as a signal that the point is rendered less than authoritative in the context of the proposed rule.

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13. Retain as proposed paragraph (c)(2) the concept in current rule 2-100(C)(3) (exception for communications otherwise authorized by law) and include a further exception for communications authorized by a court order.
    - Pros: Adding the phrase "or a court order" accords with the ABA Model Rule and the rule in 40 jurisdictions. (See Section VII.) Together with proposed Comment [8], which is derived from current rule 2-100, Discussion ¶ 1, the addition of the phrase, "or a court order," is intended to address concerns over the substitution of "person" that were expressed by lawyers in the criminal justice system that the substitution would interfere with their ability to conduct investigations. In 2002, the ABA encountered similar opposition to its proposed amendments to Model Rule 4.2 and responded:

      > Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4] (renumbered Comment [6]).
      > After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.[8]

      The Commission believes the ABA responded appropriately to the concerns of law enforcement by amending Model Rule 4.2 to include a reference to "a court order." (See also discussion of the substitution of "person" for "party" in paragraph 1, above, and of Comment [8] in paragraph 25, below.)
    - Cons: The option of seeking a court order to authorize a communication with a represented person appears to be untested in California in relation to the longstanding legal ethics standard set by current rule 2-100 and its predecessors. Even if such an option is borne out as being technically available as a procedural matter, it might nevertheless be illusory as a practical matter for lawyers who have limitations on time and resources during the investigative phase of a case.
14. Add proposed paragraph (d), which provides that a lawyer must comply with the requirements of proposed rule 4.3 (Communicating with an Unrepresented Person) when the lawyer engages in a communication with a represented person that is not prohibited under the Rule.
    - Pros: This provision aligns with the objectives of rule 4.2 (see discussion of the substitution of "person" for "party" in paragraph 1 & note 2, above) and clarifies that even when a communication with a *represented* person is not prohibited (whether

[8] See Reporter's Explanation of Changes, Rule 4.2, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule42rem.html [Last visited on June 6, 2015]

because it is made with the consent of the lawyer or because it falls within one of the exceptions in paragraph (c)), the lawyer still must not engage in conduct prohibited by proposed rule 4.3,[9] which is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be *charged* for engaging in overreaching conduct, their application to situations governed by this rule is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.

- Cons: Adding this concept might be unnecessary given that OCTC has commented that there are charging bases (i.e., Business and Professions Code sections 6068(a) and 6106) other than the ex parte communication rubric for addressing this type of misconduct. (See OCTC Jayne Kim comment above in section VI.A.1.)
- **Note**: In the event proposed Rule 4.3 is not adopted, the Commission recommends replacing paragraph (d) with two paragraphs that would track the language of Rule 4.3.[10] In addition, reserved for consideration in connection with ABA Model Rule 8.4 is the potential need for an exception to the requirements of proposed Rule 4.3(a) for contacts engaged in as part of a legitimate undercover investigation.

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[9] If adopted, proposed Rule 4.3 would provide:

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are or may become in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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.

[10] The two paragraphs would provide:

(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.

15. In proposed paragraph (e)(1), include definition of "Managing Agent".
    - Pros: Defining managing agent provides an important clarification of when the proposed Rule would apply in organizational settings. Moreover, the definition remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
    - Cons: Codifying a definition may render the rule inflexible and inhibit appropriate application to the various factual settings that are confronted by courts, including the State Bar Court.
16. In proposed paragraph (e)(2), include definition of "Public Official".
    - Pros: See discussion of change from "public officer" to "public official" in paragraph11, above, and of Comment [7] in paragraph 24, below.
    - Cons: None identified.

COMMENTS

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

17. Add proposed Comment [1], which state that the rule applies even though the represented person initiates or consents to the communication.
    - Pros: The comment provides an important clarification that it is not just communications that a lawyer might initiate, but also *any* communication with a represented person where the person's lawyer has not consented, even those that the person initiates or consents to.
    - Cons: None identified.
18. As proposed Comment [2], retain the substance of current rule 2-100, Discussion ¶ 4.
    - Pros: The comment importantly clarifies that "matter," etc., is not limited to litigation contexts. The Commission has added a second sentence that further clarifies the point.
    - Cons: If the word "person" is substituted for "party," there is no longer a need for a clarifying comment re the scope of "matter," etc.
19. Add proposed Comment [2A] as a placeholder.
    - Pros: This comment is designated as a placeholder because it is contingent on the Commission's potential action to recommend a general terminology rule that would define certain key words or phrases used throughout the rules. Unless a general terminology rule/section is adopted that includes a definition of "know," the comment would be necessary to clarify that the knowledge required under the rule is actual knowledge. (See, e.g., *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403 [58 Cal.Rptr.2d 178].) This is the current state of the law, which the Commission believes strikes the appropriate balance between the need to protect represented persons and the need to permit reasonable investigation of claims. As the court in *Jorgensen* explained:

> We will not interpret rule 2-100 so as manifestly to make the routine investigation of claims prior to filing of a lawsuit more difficult, when the persons being interviewed are not in fact known to be represented by counsel in the matter at the time of that interview. If corporations such as Taco Bell wish to avoid having their employees interviewed in such situations, they have a number of options. They can instruct their employees not to speak to claimant's investigators. If they are aware of a matter which has been threatened or asserted but which has not yet resulted in litigation, they can send the other party a letter warning that their employees are represented by counsel in the matter, and may not be interviewed under rule 2-100 without the consent of counsel.

Id.

- Cons: None identified.

20. As proposed Comment [3], retain the substance of current rule 2-100, Discussion ¶ 2.
    - Pros: Current Discussion ¶ 2 identifies kinds of communications that do not violate the policies underlying the rule and therefore are permitted. The Commission has shortened the current Discussion paragraph and added language from Model Rule 4.2, Cmt. [4]. This language clarifies the extent to which a lawyer may advise a client who engages in a communication with a represented opponent without the lawyer violating the prohibition on "indirectly" communicating with a represented person.
    - Cons: None identified.
21. Add proposed Comment [4], which clarifies that the rule prohibits only those communications that relate to the subject of the representation, and also clarifies that when a person is represented on a limited scope basis, only those communications related to that person's representation are prohibited.
    - Pros: The Commission considered Comment [4] necessary to address the concerns of access to justice stakeholders that an indiscriminately applied prohibition on *ex parte* communication could function to denigrate and discourage limited scope representation.
    - Cons: The topics addressed in this comment might be better suited to an ethics opinion as the application of the rule in these settings would be dependent upon the facts.
22. As proposed Comment [5], retain the concept in current rule 2-100(C)(2).
    - Pros: See discussion concerning rule 2-100(C)(2) in paragraph.12, above.
    - Cons: None identified.
23. Add proposed Comment [6], which clarifies that when an organizational constituent is independently represented, the consent of the constituent's lawyer alone will permit communications with the constituent, and consent from the organization's lawyer need not also be obtained.
    - Pros: Proposed Comment [6] clarifies the term, "consent of the other lawyer" in paragraph (a), when applied to communications with constituents of a represented organization.
    - Cons: None identified.
24. Add proposed Comment [7], which clarifies the scope of the exception for communications with public officials, boards, committees, or bodies..
    - Pros: See discussion of the change from "public officer" to "public official" in paragraph 11, above. As noted, paragraph (c)(1) of the rule reflects recognition of

the constitutional right to petition the government. Comment [7], however, clarifies that not every constituent of a government organization is subject to that paragraph's exception and that those persons falling outside the exception must be provided with the same protections afforded private organization constituents under paragraph (b)(2).
- Cons: None identified.

25. Include proposed Comment [8], which is derived from current rule 2-100 Discussion ¶ 1, concerning the scope of the paragraph (c)(2) exception for communications authorized by law or a court order.
    - Pros: This comment clarifies the "authorized by law" exception, including in particular the recognized application of the exception to legitimate government investigative activities. The comment is important to provide reassurance that the change from "party" to "person" is not intended to change application of the exception. In this regard, the last sentence of the comment has been added to assure lawyers in the criminal justice system concerned with the change from "party" to "person" that the rule is not intended to prohibit current legitimate investigative practices. See discussion of the substitution of "person" for "party" in paragraph 1, above.
    - Cons: The last sentence of the comment is unnecessary and may raise problems depending upon how it is interpreted. The concerns raised by those practicing in the criminal justice system have not been borne out. There is no legal authority or empirical evidence that criminal defendants have been deprived of due process or the right to a fair trial in the 20 years since the Model Rule 4.2 was amended to substitute "person" for "party." The purpose of the change is to clarify that represented persons in the matter that is the subject of the communication will receive the same protection whether they are considered parties now or could be named later or are not identified as parties in a particular case or legal matter.

B. Concepts Rejected (Pros and Cons):

1. Add a provision that would prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization unless such representation is true.
    - Pros: Adding the provision would clarify that an organization's lawyer could not inhibit pre-litigation investigations by opposing lawyers by simply claiming to represent all constituents in the organization. (Cf. *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].)
    - Cons: Such misrepresentations are already prohibited under provisions of the State Bar Act.
2. Retain current 2-100(C)(2) in the black letter of the rule.
    - Pros: See VIII.A.12.
    - Cons: See VIII.A.12.
3. Carve out an express exception in the black letter of the rule for government lawyers conducting criminal or civil action investigations.
    - Pros: See VIII.A.13 & 25.
    - Cons: See VIII.A.13 & 25.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

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

1. Substitution of "person" for "party". (See VIII.A.1.) Although rule 2-100, Discussion ¶ 1[11] and case law[12] suggest that substituting "person" for "party" might be a non-substantive change, the better view, in light of *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, which held that the rule's protections were limited to "parties" in a matter, is that this is a substantive change.
2. Substitution of "public official" for "public officer". (See VIII.A.11.) Although there is support for the position that this is a non-substantive clarification of which government employees are excepted from the protections of the rule under paragraph (c)(1), the first Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, considering the substitution as working a substantive change. Consequently, this change is listed under substantive changes.
3. Addition of "or a court order" in proposed paragraph (c)(2) [former rule 2-100(C)(3)]. See VIII.A.13.
4. Addition of paragraph (d). See VIII.A.14.
5. Addition in paragraph (e)(1) of a definition of "managing agent." Although this is intended as a clarification of a term already existing in the rule, as interpreted by existing case law, it is a substantive change to the extent the definition delimits the scope of the term. See VIII.A.15.
6. Addition in paragraph (e)(2) of a definition of "public official." See VIII.A.16 and VIII.C.2.

D. Non-Substantive Changes to the Current Rule:

1. In paragraph (a), substitution of "in" for "while". See VIII.A.2.
2. In paragraph (b)(1), addition of "current" to modify managerial employees of organization. See VIII.A.9.
3. In introductory clause to paragraph (b), addition of phrase, "or other private or governmental organization." See VIII.A.8.
4. None of the comments are intended as substantive changes to the current rule that would have an effect on a lawyer's duties. Several are derived from current Discussion paragraphs to current rule 2-100 (i.e., Comments [2], [3], [5], and [8]). All comments are included to clarify the application of the proposed rule and enhance compliance with it.

E. Alternatives Considered:

None.

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

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

IX. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Dissent submitted by Ms. Langford. See attached.

X. COMMISSION RESPONSE TO DISSENT/MINORITY

Proposed Comment [2A], which is included as a placeholder in the event the Commission does not adopt a general terminology rule defining "knowledge," is intended to reflect current case law, which makes clear that the prohibitions imposed by the rule apply only when a lawyer actually knows that the person being contacted is represented. *See, e.g., Koo v. Rubio's Restaurants, Inc.*, 109 Cal. App. 4th 719, 732 (2003) ("Case law makes clear that Rule 2-100 is only a bar to ex parte contact if the lawyer seeking contact actually *knows* of the representation.") (emphasis in original); *Truitt v.Superior Court*, 59 Cal. App. 4th 1183, 1188 (1997) ("Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge."); *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401-02 [58 Cal.Rptr.2d 178] ((proscription against contact does not apply merely because attorney "should have known" that person would be represented). The Commission does not believe it is "twisting" the rule by including a comment that clarifies the continuing applicability of this limitation on the rule's prohibitions that, as the cases note, is inherent in the rule's use of the word "knows." Nor does the Commission believe that this will impose on OCTC or the State Bar Court any limitation on misconduct prosecutions or findings that does not already exist. Under current law, to prosecute a lawyer for a violation of Rule 2-100 in State Bar Court would require OCTC to prove that the lawyer actually knew the person contacted was represented. For the reasons explained in *Jorgensen*, the Commission believes that this reflects an appropriate balancing of the need to protect represented persons, while not unduly limiting investigation of claims. The recognition in the proposed comment that actual knowledge may be inferred from the circumstances comports with well-established law, see, e.g., *Gomes v. Byrne*, 51 Cal.2d 418, 421 (1959) ("actual knowledge . . . may be inferred from the circumstances.") and prevents a lawyer from willfully avoiding knowledge of representation; depending on the facts, this might apply where a lawyer handling a filed case deliberately avoids checking the docket to see if a party to the matter is represented. And, as *Jorgensen* notes, there are a variety of ways for lawyers to ensure that opposing lawyers are put on notice that their clients are in fact represented.

Proposed Comment [4] (which the Commission believes is referenced as Comment 3 in the dissent) is also intended to reflect both the language of the rule and current case law, both of which make clear that contacts are prohibited only to the extent they are "about the subject of the representation." Limiting the rule's prohibitions to communications about the actual subject of the representation, as opposed to extending them also to communications about matters "reasonably related" to the actual subject of the representation, is also consistent with an appropriate balancing of the need not to unduly limit investigations of potential legal claims. An example provided in the dissent also makes clear the need to limit the rule to the subject of the representation. If a woman has elected to be represented only in connection with dissolution, and not on custody, extending the rule to prohibit contacts relating to custody as well as dissolution because the two are "reasonably related" would create an untenable situation – opposing counsel could not talk to the woman without going through the woman's lawyer, but that lawyer would not be in a position to deal with opposing counsel since the lawyer does not represent the woman in connection with custody. Finally, the Commission believes that

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2-100 [4.2]

Comment [4] appropriately addresses concerns of access to justice stakeholders that an overly broad application of the rule's prohibitions could discourage limited scope representation.

Proposed Comment [8] (which the Commission believes is referenced as Comment 9 in the dissent) discusses application of the "authorized by law" exception. The last sentence of this proposed comment does not reflect an "attempt to legislate through Rule Comments." To the contrary, this last sentence makes clear that the "authorized by law" exception will apply to legitimate investigative activities engaged in by lawyers representing those accused of crimes only "to the extent those investigative activities are authorized by law." This last sentence is included to assure criminal defense lawyers that the change from "party" to "person" is not intended to alter any current law authorizing investigative activities, or to preclude the development of future law authorizing such activities. Far from altering the rule's "authorized by law" exception, this last sentence simply makes clear that interpretation of the "authorized by law" exception as it applies to criminal defense investigations is left to the courts.

The proposed Comment [10] referenced in the dissent was not adopted by the Commission and is not included in the current draft.

XI. COMMISSION RESOLUTION

The Commission recommends that the Board adopt Rule 2-100 [4.2] in the form stated above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the rules.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed amended Rule 2-100 [4.2] as set forth in the Commission's report for the purpose of authorizing the Commission to seek public comment on its proposed comprehensive revision to the rules, and it is

FURTHER RESOLVED: That the publication for public comment is not, and shall not be, construed as a recommendation or approval by the Board of Trustees of the materials published.

XII. FINAL COMMISSION VOTE/ACTION

Date of Vote: June 26,2015

Action: Approve Rule 2-100 [4.2] black letter as revised during the meeting.

Vote: 13 (yes) – 0 (no) – 0 (abstain)

Date of Vote: June 26,2015

Action: Approve Rule 2-100 [4.2] comments as revised during the meeting.

Vote: 12 (yes) – 0 (no) – 0 (abstain)

CAROL M. LANGFORD
100 PRINGLE AVENUE STE. 570
WALNUT CREEK, CALIFORNIA 94596
925.828.3870
CLANGFORD.COM

Mr. Randall Difuntorum
The State Bar of California
180 Howard Street
San Francisco, California 94105-1639

RE: DISSENT TO CHANGES TO RULE 2-100 (4.2)

Dear Randy and the Commission:

This letter is to provide comments and lodge my dissent to some of the changes being made to old Rule 2-100.

First, I strongly agree that changing the word "party" to "person" is a good change, and long overdue. The State Bar Court should not have to reach for a B&P 6106 violation to punish conduct that should be prohibited by the Rule.

I disagree however, with Comment 2A (what is in the current draft called a "placeholder"). This Comment seems to say that actual knowledge is required before a lawyer can be prosecuted under the Rule. This language is not in the current Rule, and there has been no problem with that lack of inclusion so far (for many, many years). I also think that when we heard from Allen Blumenthal from the Office of Chief Trial Counsel that your language saying "The Rule applies where the lawyer has actual knowledge that the person..(..)" will almost completely impair their ability to prosecute a violation of the Rule, then we must take heed.

It is true that the case law says actual knowledge is needed. And it is true that it also says that knowledge may be inferred from the circumstances. However by saying "<u>This Rule applies where the lawyer has actual knowledge</u>..(..)" you are twisting the meaning in a way that implies that only actual knowledge is sufficient for a prosecution of the Rule. You are also inserting a mens rea element that is *not applicable* in the State Bar court. As Mr. Blumenthal explained, in the State Bar all a respondent has to do is to, for example, take money from the trust account and that will alone comprise the willfulness element needed to commit a

State Bar offense. The State Bar does not look to actual knowledge and/or a Respondent's state of mind unless the discipline phase of the trial is over and the second phase of the trial - mitigation - is being heard.

Moreover, adding the Comment proposed could make it possible for a lawyer to contact a person in, for example, a domestic case when a quick online search would show she is represented. The same is true of a post-arraignment defendant. *That completely circumvents the intent of the Rule.* The State Bar Court in their case The Matter of Dale, wanted to stop exactly this type of over-reaching by lawyers. We should support our Court.

I believe the Comment to the Rule should state "This Rule applies **when the member knows or reasonably should know that the person to be contacted is represented by another lawyer in the matter"** if you are going to keep that Comment in.

Comment 3 is also problematic. I get that you want lawyers to be able to talk about things outside of the representation with someone represented by counsel since that is not what the Rule wants to sanction. However, the way your draft reads it would allow a DA to ask a defendant about other offenses that may be considered strikes. Or, a lawyer to ask a woman about a custody issue when she is only represented on the dissolution. Your language is far too broad, and there must be boundaries or the purpose of the Rule is thwarted.

I suggest the following language: "This Rule does not prohibit communications with a represented person concerning matters **not reasonably related** to the representation."

Now let's look at Comments 9 and 10 - particularly the first sentence of Comment 10 and the last sentence of Comment 9 regarding the availability of court orders and investigative activities respectively. Those Comments are a bold attempt to legislate through Rule Comments - something the Supreme Court has already told us they don't want us to do. I do not understand why you would ignore their plain admonishment. They are right in not wanting us - a Commission - to do that. I urge you to listen to them.

Last, I do not recall which Alternative was selected in our Proposed Rule, but if it is Alternative One that includes (ii) - admissions on the part of an organizational constituent - then that is good. Why wouldn't we want to protect organizations from being held to admissions when, for example, the constituent does not understand how statements can hurt him and the organization? And don't we want to protect people who have not been properly "Organizationally Mirandized" that what they say can hurt them, too?

Please consider these comments. I also ask that you seriously consider the comments from the California Public Defender's Association, the Los Angeles Public Defender's Association, the Solano County Public Defender's Association, and Mr. Stan Lamport, all of whom have posited major concerns with the Rule as drafted. The law professors will also have a lot to say about this Rule in its current form - I have already discussed this with their representative.

Since a lot of attorneys will be closely watching this Rule, we might as well get it right - right now.

Very truly yours,
Carol M. Langford

2015-050 Solano County Public Defenders Office [4.2]

From: Najera, Roberto V.
To: Hollins, Audrey
Cc: Caldwell, Lesli M.
Subject: Comment on proposed changes to Rule 2-100 (4.2 &54.3)
Date: Wednesday, July 29, 2015 1:01:44 PM

Lauren McCurdy
Sr. Administrative Specialist
Office of Professional Competence
The State Bar of California
San Francisco, California

Dear Ms. McCurdy:

On behalf of the Solano County Public Defender and Alternate Public Defender Offices we are writing to express our opposition to proposed changes to Rule 2-100. We believe both the California Public Defender's Association as well as the Los Angeles Public Defender's Office have raised most if not all the points we think should be brought to your attention and so will not reiterate them here, other than to express that we are strongly opposed to the proposed change in this Rule, particularly the wording from "party" to "persons" as is reflected in the draft proposal . We do want to add however that this rule will provide an additional impediment for the defense in criminal cases above and beyond the impact it will also have on the prosecution. Thus this change will negatively impact each client's right to effective assistance of counsel as well as the overall fairness that should be expected in the investigation, prosecution and defense of any criminal case.

Oftentimes the essential law enforcement functions of investigation and interviewing witnesses is carried out in anticipation of a prosecution and thus not at the direction of any individual prosecutor or prosecuting attorney office. Criminal investigations are to a large degree performed by the law enforcement agency and their police officers in the discharge of their departmental duties and not by or at the direction of the district attorney offices which ultimately prosecute such cases. What this means is that trained and skilled interrogators who are not lawyers speak with the vast majority of witnesses as part of their pre-charging functions, and only in a handful of all such pre charging situations is any attorney, including a district attorney involved in that stage of the process.

On the other hand public defenders and the private criminal defense bar are appointed or hired to represent an individual client in most cases only after the criminal complaint is filed. At this stage the investigative work for the prosecution is largely completed and only rarely does this happen under the direction of the prosecutors themselves. This means that while law enforcement has free reign to speak with, communicate, and interview any number of witnesses, suspects, and even defendants – so long as the subject of their investigation is not a case in which the defendant is already represented—the defense does not. Even if the prosecution, once they take over a case, is hampered by this new rule, the impact on them is still significantly less than it is to any person who faces criminal charges as it is only then that the defense investigation even begins.

While the prosecution would continue to be hampered by this change to the Rule, the impact on

the defense is substantially greater as the proposed rule would erect yet another barrier for the defense to be able to try to catch up and ultimately gain equal footing and access to all witnesses who might well already have been questioned by the police. Being restricted further only exacerbates existing problems the defense regularly encounters in starting an investigation and contacting witnesses where the prosecution through police agencies has already completed such tasks. Allowing this change in the rule ensures only that the rights of the accused will be even harder to defend. And for these reasons as well as those expressed eloquently by others, we oppose this change

Respectfully submitted,

Roberto Najera
Chief Deputy Alternate Public Defender's Office
Solano County, California

Lesli M. Caldwell
Public Defender,
Solano County, California