

McCurdy, Lauren

RE: Rule 4.2
6/25&26/10 Commission Meeting
Open Session Agenda Item III.VV.

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Thursday, June 17, 2010 4:26 PM
To: Difuntorum, Randall; RAUL MARTINEZ
Cc: Kevin Mohr; McCurdy, Lauren
Subject: RE: Rule 4.2

I disagree with San Diego preference for "party" vs. "person;" although I do agree that the comments play too great a part in interpreting what we intend in this rule. I am on record as favoring the more understandable formulation of the anti contact rule under Model Rule 4.2, but I lost that battle early on.

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~~**From:** Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Thursday, June 17, 2010 4:19 PM
To: RAUL MARTINEZ
Cc: Mark Tuft; Kevin Mohr; McCurdy, Lauren
Subject: Rule 4.2~~

Raul:

Difuntorum, Randall

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Friday, June 18, 2010 12:10 PM
To: Raul Martinez; Kevin Mohr
Cc: McCurdy, Lauren; Difuntorum, Randall
Subject: RE: Rule 4.2

I would not "flag" the issue in a comment to the rule. I could go along with doing so as a response in the commenters' chart if I knew what it would say.

From: Raul Martinez [mailto:MARTINEZ@lbbslaw.com]
Sent: Friday, June 18, 2010 11:55 AM
To: Kevin Mohr; Mark Tuft
Cc: Lauren McCurdy; Randall Difuntorum
Subject: RE: Rule 4.2

I'm not suggesting we "make one up", but that we simply flag the issue by saying its beyond our purview. We already say as much with regard to prosecutors in the comment. The issue should at least be reflected in the comment chart. Because there is no official response to the PD concerns, it will appear like their concerns fell on deaf ears.

>>> On 6/18/2010 at 11:15 AM, in message <43C27BDDAB319F438D82134A0AA43FB8047D7CED@CWC-EXCHANGE.CWCLAW.com>, "Mark Tuft" <MTuft@cwclaw.com> wrote:

We have exhausted this issue and there is nothing new that would justify either Raul's or Randy's version of Comment [19] or a separate comment. George Cardona provided a draft of a comment because, as he states, he was asked to and not because he endorsed it. Unless there is legal authority that establishes parity between prosecutors and defense counsel with regard to the authorized by law exception under 4.2, we cannot make one up. If courts or the legislature think there is a Sixth Amendment concern that warrants defense counsel communicating with a person known to be represented in the matter - such as another accused person or witness under suspicion - without his or her lawyer's consent, that is the court or legislature's province and not ours. I question whether this is a legitimate Sixth Amendment concern. The Supreme Court's decision in Jacinto that there was no prosecutorial misconduct because the sheriff, not the prosecutor, released the witness to immigration authorities, does not address this issue.

Frankly, I am surprise that PDs or retained counsel would want an exception to 4.2 what would permit a lawyer for another suspect in a pre-indictment investigation to communicate with their client without their prior consent for the purpose of obtaining incriminating evidence. I think there is a good chance that if we wrote that possibility into the rule we would be fostering claims of ineffective assistance of counsel. In reality, represented witnesses are often in the zone of potential criminal prosecution in the same matter - that is often why they are represented by counsel.

Let's move on.

~~**From:** Kevin Mohr [mailto:kemohr@charter.net]
Sent: Thursday, June 17, 2010 9:26 PM
To: Raul Martinez
Cc: Lauren McCurdy, Randall Difuntorum; Mark Tuft
Subject: Re: Rule 4.2~~

McCurdy, Lauren

From: Difuntorum, Randall
Sent: Friday, June 18, 2010 9:41 AM
To: Kevin Mohr; Raul Martinez; Mark Tuft
Cc: McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; Paul Vapnek (E-mail)
Subject: RE: Rule 4.2
Attachments: RRC.Rule4.2.AuthorizedByLaw.20081029.pdf

Kevin, Raul and Mark:

Regarding the PD parity issue, I provide the following: (1) message below and attachment from George Cardona in 2008 in which he attempts to the PD issue; and (2) message below from me in 2008 in which I suggested language to Harry for addressing the PD issue (see highlighted text).

On a unrelated 4.2 issue, I am attaching a prior message to the Rule 4.2 drafters concerning *People v. Jacinto*. –Randy D.

-----Original Message-----

From: Cardona, George S. (USACAC) [mailto:George.S.Cardona@usdoj.gov]
Sent: Wednesday, October 29, 2008 2:58 PM
To: Kevin Mohr; Difuntorum, Randall
Cc: kevinmohr04@sprintpcs.com
Subject: Rule 4.2: Authorized by Law Exception

At the last meeting, I indicated that I would try to draft something that sought to address the concerns expressed by the prosecutors and public defenders who attended the meeting while comporting with prior discussions of the commission. In accordance with this representation, attached is a draft. This takes a slightly different approach from the various drafts in the e-mails, attempting simply to: (a) include in the text of the rule a recognition that the authorized by law exception extends to laws recognizing the propriety of investigatory contacts in civil, criminal, or administrative law enforcement investigations (whatever those laws may be, and without seeking to define the circumstances set forth in those laws that render any particular communication authorized by law); (b) alter the comments to follow this same principle; (c) make both the text of the rule and the comments neutral as to application to prosecutors and/or defense attorneys; and (d) address concerns previously expressed by the State AG by adding back in a previously-proposed comment noting that the authorized by law exception can extend to whistleblower situations. My submission of this draft should not be taken as an endorsement for any particular view, as I am precluded from providing such an endorsement, but rather simply in furtherance of my commitment that I would try to draft something that addressed various concerns. In addition, please bear in mind that this is submitted in my personal capacity, and should not be taken as reflecting an official position of either my office or the US Department of Justice. With that, I hope this is at least somewhat helpful.

<<RRC.Rule4.2.AuthorizedByLaw.20081029.pdf>>

From: Difuntorum, Randall
Sent: Monday, June 09, 2008 9:34 AM
To: 'Harry Sondheim'
Cc: Kevin Mohr; Kevin [two] Mohr; McCurdy, Lauren; Kevin Mohr
Subject: RE: RRC - 2-100 [4.2]; 5-100 [3.10]; 4-200 [1.5] - 6/4/2008 Daily Journal Article

Harry: My additional paragraph is pasted below and was drafted to follow your revised Cmt.[20] and not replace it. This paragraph, or something like it, would be an aggressive attempt at parity in the rule's application to prosecutors and

defense counsel. I know your original suggestion was to delete Cmt.[19] but I thought that Cmt.19 might be back since you returned to the idea that the focus should be on the criminal context. -Randy D.

"In part, the change from "party" to "person" is intended to respond to the holding in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 where the State Bar Court Review Department found that no rule of construction overcomes the plain meaning interpretation of the term "party" so as to extend the rule's protection to a person who is not an actual party to the lawsuit which is the subject of the communication. While the change to from "party" to "person" is intended to extend the rule's protection to a non-party, such as a witness who is represented in connection with the subject matter of the communication, the change is not intended to prohibit communications with a witness in a criminal proceeding by a criminal defense counsel or a prosecutor if such communication was not a violation under the former rule due to the application of competing constitutional principles, such as the due process rights of an accused. With respect to defense counsel communications, see *cf. Grievance Committee for Southern Dist. of New York v. Simels* (N.Y., 1995) 48 F.3d 640 at p. 650 [finding that an attorney conduct rule prohibiting ex parte communications should be balanced against "the overriding concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy" so as to avoid inhibiting "defense attorneys' efforts to interview witnesses and develop trial strategies"]."

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Thursday, June 17, 2010 9:26 PM
To: Raul Martinez
Cc: McCurdy, Lauren; Difuntorum, Randall; Mark Tuft
Subject: Re: Rule 4.2

Raul:

1. I didn't mean to imply that the PD's had waived their rights by not submitting a comment or proposed rule. However, the simple fact is that despite repeated requests, they have been unable to provide us with authority. As it now stands, at least as far as we know, there is no law out there that would create parity between prosecutors and defense lawyers re 4.2. Neither Gary Windom nor Michael Judge (or Doreen Boxer for that matter) have ever pointed us in the direction of authority that would support a counterpart to the comment re government lawyers.
2. Regardless, my main point, from the discussion that took place at the 10/31/08 meeting, is that the PD's who attended did not to realize that current rule 2-100 -- and our proposed Rule 4.2 -- both require actual knowledge. They conceded they could not communicate w/ a represented witness -- IF they know that person is represented. Their fear is, I think, that they will be disciplined if they go about their usual investigations, communicate w/ a witness who they don't know is represented, and then find out after the fact that they should have known.
3. My concern is with the imbalance that is apparent if we provide a comment that is favorable for government lawyers, while on the other hand we expressly state that on the same issue for defense lawyers, it is beyond the scope of the rule (even if it is true). Better to say nothing in the rule but emphasize in the response to the public comment from Ms. Boxer that actual knowledge is the standard. At any rate, I don't see the rule being declared as unconstitutional because there's a comment re prosecutors that is supported by some authority but not a similar comment for defense lawyers because, as far as we know, there is no authority to support such a comment.

It's late, I have jury duty tomorrow, and have some other things to do, so I better wrap this up.
Thanks,

Kevin

Raul Martinez wrote:

1. I don't think the PD's waived their rights by not submitting a proposed comment or rule. The group doesn't speak for all PD's. We still have an obligation to try to get it right.

2. If the rule is declared unconstitutional in denying equal protection or some other right, we will have to go back to the drawing board, whereas if we send a message to let the courts know that if it's going to be authorized by law it has to come from some other source, like the courts or statute, they are less likely to knock down the rule as unconstitutional. I can see some criminal defendant arguing that they can't talk to prosecution witnesses that the prosecutor can access but not the defense.

3. The action summary doesn't have the same level of detail as your notes. The action summaries are now on the website and will be seen as the "official" record by some. Harry also wanted to address the parity issue as noted in your notes, but it's unclear what happened to that approach.

4. I think we would be remiss if we didn't leave a better trail.

Raul

>>> On 6/17/2010 at 5:41 PM, in message <4C1AC0CC.1050906@charter.net>, Kevin Mohr <kemohr@charter.net> wrote:

Greetings:

1. I think we asked the defense lawyers a couple of times at our meetings to provide us with authority for an authorized by law exception for defense lawyers and never received a response, although we were told at the meeting that it would be provided. Here is one instance I found in my notes from the **September 26-27, 2008** meeting:

9. Bob (to Michael Judge): Question came up as to how this Rule could impact the criminal defense bar. We have asked the PD's from Riverside to provide us with information on this.

a. We never received this. Asks Michael for information along these lines.

b. Michael: If he finds the information, then he will send it.

(1) However, if we have violated the Rule, do we need to self-report ourselves to the Bar. Or do we try to do our job and then recuse ourselves.

(2) Can we challenge every decision in which this was involved.

c. Bob: We want to know whether there are any cases where the court has stated that a criminal defense lawyer has been able to question a non-party person but there was no discipline.

d. Harry: Doesn't think you'll come up with anything because if the defendant is acquitted, it's too late.

2. And this is from the **October 31, 2008** meeting:

4. Gary Windom: Chief PD for Riverside County.
 - a. Sent requests to CPDA for authority about defense counsel being authorized to communicate w/ non-parties but never followed up with the information. He apologizes.
 - b. Here to support comments of his colleague, Michael Judge (Public Defender, LA County),.

3. Here are the rest of my notes from the **10/31/08 meeting** on this issue. I'm not sure Ms. Boxer remembers what transpired correctly:
 5. Michael Judge: Asked at Monterey whether he had similar authority that would equate with prosecutors.
 - a. Did a survey of PD offices throughout California.
 - b. 93% of them were prevented from communicating with a witness/non-party – their lawyer would not permit the PD to do so.
 - (1) Mostly felony cases, but also in juvenile cases.
 - c. U.S. Supreme Court ruling that defense is required to conduct these kinds of investigations.
 - d. His concern is still the same; by changing the language, unless it is made clear that you do not intended to inhibit us from interviewing persons rather than parties, then there's a good chance of innocent people being convicted, etc.
 - e. We should not be forced to incur that risk.
 - (1) In Dale, the lawyer manipulated the situation by not suing the person so that he did not become a party.
 - (2) PD's are not in a position to do that.
 - (3) We need clear language that the Rule is not intended to prevent public defenders from interviewing the persons who are represented.
 - (4) Otherwise we have a Hobson's choice.
 - (a) Tell court we can't investigate.
 - (b) Go ahead and investigate and take our chances with the State Bar.
 - (c) Risk ineffective assistance of counsel.
 - f. Bob: Are there cases out there where courts have wrestled with the conflict between the Sixth Amendment right of counsel and the no-communication rule.
 - g. Bob: Can you typically go around another defense counsel to get incriminating evidence simply because that person has not been charged?
 - (1) So if a person who has not been named in a complaint, you can still go around the lawyer who is representing that person, to get incriminating evidence.
 - (2) Michael Judge: No, you have an obligation to that lawyer. But what if we don't know. Do we not have a duty to ask.
 - (3) Mark: That is the Rule – paragraph (a).
 - (a) You do not have a duty to ask.
 - (b) ABA opinion is very good on this – See Op. 95-396.
 - h. Stan: See also Cal. Op. 1996-145.
 - (1) KEM: Also look at Truitt v. Superior Court (1997) 59 Cal.App.4th 1183, 69 Cal.Rptr.2d 558, and Jorgensen v. Taco Bell (1996) 50 Cal.App.4th 1398, 58 Cal.Rptr.2d 178.
 - i. Doreen Boxer (PD of San Bernardino).

- (1) Office handles 55,000 cases/year. 150 lawyers.
- (2) Important to make this as clear as possible.
- (3) Does not think that the rule is sufficiently clear for the typical lawyer. Does not want a duty imposed that would require lawyers to ask the person whether he or she is represented.
- (4) There are a lot more words.
- (5) Believes that the change creates vagueness and so can cause a problem.
- (6) Bob: How will the rule change your practice; a person who is not charged but you KNOW that person is represented in the matter?

(a) Boxer: Depends on what you mean by "the matter". E.g., 7-11 owner who is represented on the insurance claim – it arises from the same conduct that arises from the criminal case.

(1) Under your rule, you would be precluded from interviewing the 7-11 owner.

(b) Bob: What if the 7-11 owner's lawyer calls PD and tells PD not to talk to the owner unless you go through me.

(1) What would a defense lawyer do under those circumstances.

(2) Doreen Boxer: Would not talk with the owner because the owner's lawyer has told us not to communicate/harass the owner.

j. George Cardona: Has same understanding about "matter," i.e., if it arises out of the same set of facts and circumstances. It is broader than what Commission members have suggested.

k. Michael Judge: If question whether to use "authorized" or "permissible," then should use "permissible" because it's a little easier to understand.

(1) Would prefer to see it as "not prohibited under law."

(2) If we were doing things the judges or prosecutors thought were wrong, there would be bills in the legislature. But there are not.

(3) There's a lot of things we are permitted to do for which there are no cases and/or statutes that authorize us to do so.

l. Michael Judge: Discusses the Dale case.

(1) Same set of events can generate a number of different legal actions.

(2) It is not clear enough that the person has to be a party to the criminal action.

6. MOTION: Adopt the public comment version of (c)(3).

YES: 8 NO: 1 ABSTAIN: 0

a. Stan: Reads from Jorgensen and Truitt.

(1) Jorgensen: This court held "that former California Rules of Professional Conduct rule 7-103, now rule 2-100, bars ex parte contact with current corporate employees who are specified in the rule as to any matter in which they are known to be represented by counsel. The rule is not limited to matters in litigation, and might be violated where, for instance, an attorney sought to interview the opposing party's covered employees as to a matter not yet in litigation, if the attorney knew the employees were represented by counsel in the matter. [¶.] Here we find no abuse of discretion by the trial court in concluding Jorgensen's counsel did not know the interviewed employees were "represented by another lawyer in the matter." In fact, it appears the employees and Taco Bell were not represented by counsel in "the matter," since no such matter

had yet been asserted against Taco Bell by Jorgensen. Rule 2-100 should be given a reasonable, common sense interpretation, and should not be given a "broad or liberal interpretation" which would stretch the rule so as to cover situations which were not contemplated by the rule." 50 Cal.App.4th 1398, 1401, 58 Cal.Rptr.2d 178, 180.

(2) Truitt: "The proscription against ex parte contact does not apply merely because an attorney should know that the opposing party will be represented by some unidentified attorney at some time after a complaint is filed. Knowledge that a corporation employs in-house counsel 'does not trigger the application of rule 2-100, unless the claimant's lawyer knows in fact that such house counsel represents the person being interviewed when that interview is conducted.' [¶.] A bright line rule is absolutely necessary in this situation. Lawyers should not be at risk of disciplinary action for violating rule 2-100 because they "should have known" that an opposing party was represented or would be represented at some time in the future. Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge. A requirement of actual knowledge does not deprive a represented party of the protection of the rule." 59 Cal.App.4th 1183, 1188; 69 Cal.Rptr.2d 558, 562 (citations omitted).

(3) Stan: Case law has done a good job of carving out a bright line.

b. Doreen Boxer: If there is a specific scenario you want to address, then perhaps you should address that situation.

(1) Bob: In the minds of people on the Commission, we are not making any substantial changes. This is the law as it has existed in California.

(2) Someone does not have to be a party to litigation to be covered under the current rule..

(3) Boxer: The way it is going to be applied is that it is going to change something, it will result in a case you don't like.

c. Mark: This took up the most time at the ABA level as well.

(1) California is not unique. We are simply coming into line with the law of other jurisdictions and how it has always operated.

(2) We have not heard nor seen empirical data that suggests this has proven a problem in other jurisdictions.

(3) Our comment [6] is trying to give guidance on the very narrow application of paragraph (a).

(a) "matter ... that matter ..."

d. Stan: Jorgensen distinguishes our rule from the Model Rule.

(1) Knows or reasonably should know was advanced by Taco Bell.

(2) The court rejected that approach.

(3) This language from Jorgensen is important. See ¶. 6.a.(2), above.

7. MOTION: Adopt Comment [19] as proposed by George.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state constitutional, decisional, and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the

public interest and is necessary to promote legitimate law enforcement functions that would might otherwise be impeded. Communications under paragraph (c)(3) may implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, § 15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a lawyer engages in misconduct or unlawful conduct.

YES: 3 NO: 4 ABSTAIN: 1

- a. Harry: Would address the criminal defense lawyer's concerns re parity.
- b. Bob: Doesn't think we need Comment [19] in light of Comment [18] but, if we are going to have a specific comment on this topic, George's version is better than our public comment version of Comment [19].

8. MOTION: Add "juvenile delinquency proceedings" to Comment [19].

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants.

YES: 4 NO: 3 ABSTAIN: 1

9. KEM Note: Send new draft & meeting notes to PD representatives.

4. **Conclusion.** Having stated all of the foregoing, I'm not sure we should, on the one hand, state that prosecutors have an authorized by law exception but that for defense lawyers, it is beyond the scope of the Rules. That is a bit too stark a discrepancy. Better not to say anything at all in the Rule. I would leave the Rule as is. The PD's never provided us with authority other than vague suggestions of due process and effective assistance of counsel. As for the response to public comment, I think the emphasis has to be on the "knowledge" requirement for the Rule. That seems to be what the PD's were not aware of at the October 2008 meeting.

Kevin

Raul Martinez wrote:

Randy:

The only comment that troubles me is the lengthy letter from Doreen Boxer (SB Pub Defender). She seems to suggest that at the Oct. 31, 2008 meeting (erroneously referred to as COPRAC) she was assured that investigations not prohibited by our current rule would remain permissible under the "authorized by law" exception. Comment [19] recognizes an authorized by law exception for prosecutors but is silent on a reciprocal right for defense attorneys. In fact, by omission Comment [19] appears to suggest that there is no such reciprocal right available to defense attorneys because it addresses the prosecutor's right to such contacts or at least recognizes such right exists, but is silent on the rights of defense attorneys.

My thought, if we do anything, is to indicate in Comment [19] something along the lines of [roughly] before the last sentence in Comment [19]:

"Similarly, whether a reciprocal right of criminal defense lawyers representing persons accused of crimes to engage in such investigations under the "authorized by law" exception is beyond the scope of these rules."

This way we flag the issue for the courts and for future judicial resolution, as opposed to appearing as if we are closing the door to such contacts.

Raul

>>> On 6/17/2010 at 4:19 PM, in message
<B044B9B5C13D964FA34BF4BAB89BE44F02A8EA10@SFMAIL04.calsb.org>, "Difuntorum, Randall"
<Randall.Difuntorum@calbar.ca.gov> wrote:

Raul:

Can you review the attached comments on Rule 4.2 and give us a recommendation as to whether there should be any revisions to the rule? Mark is a co-lead and the only other co-drafter, but he has had a very full plate.

Thanks. -Randy D.

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Rule 4.2

(c) This Rule shall not prohibit

* * *

(3) Communications authorized by ~~law~~ or a court order; or

(4) Communications authorized by law, including, in particular, any law authorizing legitimate investigative communications by lawyers involved in civil, criminal, or administrative law enforcement investigations.

Comments

[19] Paragraph (c)(~~3~~4) recognizes that ~~prosecutors or other lawyers representing government entities~~ in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state constitutional, decisional, and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that ~~would~~ might otherwise be impeded. Communications under paragraph (c)(4) may implicate other rights and policy considerations, including a person’s right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, § 15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. ~~This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3).~~ While the change from “party” to “person” is intended to make clear this Rule’s application to communications with a non-party, such as, for example, a witness who is represented in connection with the subject matter of the communication, it is not intended to alter the law defining when such communications are authorized by law. This change also is not intended to preclude the development of the law with respect to which ~~criminal and civil law enforcement~~ communications are authorized by law.

[New 20A] Ordinarily, this Rule applies even though the represented person initiates or consents to the communication, and 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. This application of the Rule, however, is not meant to expand, limit, or preclude the development of the law with respect to circumstances

under which it is permissible for lawyers to communicate with represented persons who (a) initiate the communication to report an activity, policy, or practice of an entity or association with which the person is associated that may be in violation of law or of environmental or public health and safety requirements, and (b) affirmatively indicate a desire that the lawyer not contact his or her counsel with respect to the communication. See, e.g., United States v. Talao, 222 F.3d 1133, 1141 (9th Cir 2000); United States v. Lopez, 4 F.3d 1455, 1461-62 (9th Cir. 1993).

Rule 4.2: Communication with a Represented Person
(Commission's Proposed Rule – Clean Version)

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a "person" includes:
 - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
 - (2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.
- (c) This Rule shall not prohibit:
 - (1) Communications with a public official, board, committee or body; or
 - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or
 - (3) Communications authorized by law or a court order.
- (d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication permitted by this Rule, 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.
- (f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.
- (g) As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

COMMENT

Overview and Purpose

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] 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.
- [4] As used in paragraph (a), "the 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.
- [5] The prohibition against "indirect" communication 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 or investigator.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

- [7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).
- [8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (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.

Knowledge of Representation and Limited Scope Representation

- [9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)

- [10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

- [11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.
- [12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an

admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)

- [14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.
- [15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.

Represented Governmental Organizations

- [16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented

in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

- [17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3 and 1.7.)

Communications Authorized by Law or Court Order

- [18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that 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.
- [19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule,

nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

- [20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.] Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

June 9, 2010 McCurdy E-mail to Martinez, cc Chair, Vice-Chairs & Staff:

Raul,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsisizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

4.2 (Agenda Item III.VV)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - MARTINEZ - DFT1 (06-09-10).pdf
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 2-100 [4-2] - Rule - PCD [18] (10-19-09) - CLEAN-LAND.pdf
RRC - 2-100 [4-2] - Rule - PCD [18] (10-19-09) - CLEAN-LAND.doc

June 14, 2010 Tuft E-mail to Martinez, cc Chair, Vice-Chairs & Staff:

These are interesting comments regarding proposed rule 4.2(e) which I think are worth considering. However, the issue properly relates to Model Rule 4.4(a), which we declined to recommend, and not rule 4.2.

June 14, 2010 David McGowan E-mail to APRL:

California's proposed rule 4.2(e) allows communications with former employees but also provides that "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."

Is this meant to refer to contractual duties as well as duties imposed by law, such as privilege or work product? The disjunction between privilege and other confidential information makes me think this may be the meaning.

But most employees of even moderately large firms are bound by NDAs that impose continuing obligations of confidentiality. If the proposed extends to those duties then there is not much left of the exception allowing interviews with former employees.

Thoughts?

June 14, 2010 William Wernz E-mail to APRL:

Re the inquiry below, the most problematic words appear to be the last, that a lawyer shall not seek confidential info or docs "which the lawyer is not otherwise entitled to receive."

What would "entitle" (that is, give a legal right to) the lawyer to anything? A discovery request would do so, or any obligation under rules of procedure to produce certain docs that have not yet been the subject of discovery, but then the lawyer could not seek, and hope to obtain, informally anything "confidential" that the lawyer had not sought, or had a right to, formally. "Confidential" could include NDA information and docs, items that are subject to a common law agency non-disclosure obligation, and even that which is simply not public.

As far as I know, courts have not extended 4.4 beyond that which is protected by privilege or work product.

June 16, 2010 McCurdy E-mail to Martinez, cc Chair, Vice-Chairs & Staff:

Raul,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

4.1 (Agenda Item III.UU) - Co-Lead with/Tuft – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

4.2 (Agenda Item III.VV) 4 Comments: **San Bernardino County Public Defender, Oliver & Dalton (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

MR 4.4(a) (Agenda Item III.XX – NRFA) 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

4.4 (Agenda Item III.YY) – OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 2-100 [4-2] - 06-15-10 Dalton Letter to RRC.pdf

RRC - 2-100 [4-2] - 06-14-10 Oliver Letter to RRC.pdf

RRC - 2-100 [4-2] - 06-15-10 San Bernardino PD [Boxer] Letter to RRC.pdf

June 17, 2010 Difuntorum E-mail to Martinez, cc Tuft, McCurdy & KEM:

Can you review the attached comments on Rule 4.2 and give us a recommendation as to whether there should be any revisions to the rule? Mark is a co-lead and the only other co-drafter, but he has had a very full plate.

Attached:

RRC – 2-100 [4-2] – Public Comment Complete – REV (06-17-10).pdf

June 17, 2010 Tuft E-mail to Difuntorum, cc Martinez, McCurdy & KEM:

I disagree with San Diego preference for "party" vs. "person;" although I do agree that the comments play too great a part in interpreting what we intend in this rule. I am on record as favoring the more understandable formulation of the anti contact rule under Model Rule 4.2, but I lost that battle early on.

June 17, 2010 Martinez E-mail Difuntorum, cc Tuft, McCurdy & KEM:

The only comment that troubles me is the lengthy letter from Doreen Boxer (SB Pub Defender). She seems to suggest that at the Oct. 31, 2008 meeting (erroneously referred to as COPRAC) she was assured that investigations not prohibited by our current rule would remain permissible under the "authorized by law" exception. Comment [19] recognizes an authorized by law exception for prosecutors but is silent on a reciprocal right for defense attorneys. In fact, by omission Comment [19] appears to suggest that there is no such reciprocal right available to defense attorneys because it addresses the prosecutor's right to such contacts or at least recognizes such right exists, but is silent on the rights of defense attorneys.

My thought, if we do anything, is to indicate in Comment [19] something along the lines of [roughly] before the last sentence in Comment [19]:

"Similarly, whether a reciprocal right of criminal defense lawyers representing persons accused of crimes to engage in such investigations under the "authorized by law" exception is beyond the scope of these rules."

This way we flag the issue for the courts and for future judicial resolution, as opposed to appearing as if we are closing the door to such contacts.

June 17, 2010 KEM E-mail to Martinez, cc Tuft, Difuntorum & McCurdy:

1. I think we asked the defense lawyers a couple of times at our meetings to provide us with authority for an authorized by law exception for defense lawyers and never received a response, although we were told at the meeting that it would be provided. Here is one instance I found in my notes from the **September 26-27, 2008** meeting:

9. Bob (to Michael Judge): Question came up as to how this Rule could impact the criminal defense bar. We have asked the PD's from Riverside to provide us with information on this.
 - a. We never received this. Asks Michael for information along these lines.
 - b. Michael: If he finds the information, then he will send it.
 - (1) However, if we have violated the Rule, do we need to self-report ourselves to the Bar. Or do we try to do our job and then recuse ourselves.
 - (2) Can we challenge every decision in which this was involved.
 - c. Bob: We want to know whether there are any cases where the court has stated that a criminal defense lawyer has been able to question a non-party person but there was no discipline.
 - d. Harry: Doesn't think you'll come up with anything because if the defendant is acquitted, it's too late.

2. And this is from the **October 31, 2008** meeting:

4. Gary Windom: Chief PD for Riverside County.
 - a. Sent requests to CPDA for authority about defense counsel being authorized to communicate w/ non-parties but never followed up with the information. He apologizes.
 - b. Here to support comments of his colleague, Michael Judge (Public Defender, LA County),.

3. Here are the rest of my notes from the **10/31/08 meeting** on this issue. I'm not sure Ms. Boxer remembers what transpired correctly:

5. Michael Judge: Asked at Monterey whether he had similar authority that would equate with prosecutors.
 - a. Did a survey of PD offices throughout California.
 - b. 93% of them were prevented from communicating with a witness/non-party – their lawyer would not permit the PD to do so.
 - (1) Mostly felony cases, but also in juvenile cases.
 - c. U.S. Supreme Court ruling that defense is required to conduct these kinds of investigations.
 - d. His concern is still the same; by changing the language, unless it is made clear that you do not intended to inhibit us from interviewing persons rather than parties, then there's a good chance of innocent people being convicted, etc.
 - e. We should not be forced to incur that risk.
 - (1) In Dale, the lawyer manipulated the situation by not suing the person so that he did not become a party.
 - (2) PD's are not in a position to do that.
 - (3) We need clear language that the Rule is not intended to prevent public defenders from interviewing the persons who are represented.

- (4) Otherwise we have a Hobson's choice.
 - (a) Tell court we can't investigate.
 - (b) Go ahead and investigate and take our chances with the State Bar.
 - (c) Risk ineffective assistance of counsel.
- f. Bob: Are there cases out there where courts have wrestled with the conflict between the Sixth Amendment right of counsel and the no-communication rule.
- g. Bob: Can you typically go around another defense counsel to get incriminating evidence simply because that person has not been charged?
 - (1) So if a person who has not been named in a complaint, you can still go around the lawyer who is representing that person, to get incriminating evidence.
 - (2) Michael Judge: No, you have an obligation to that lawyer. But what if we don't know. Do we not have a duty to ask.
 - (3) Mark: That is the Rule – paragraph (a).
 - (a) You do not have a duty to ask.
 - (b) ABA opinion is very good on this – See Op. 95-396.
- h. Stan: See also Cal. Op. 1996-145.
 - (1) KEM: Also look at Truitt v. Superior Court (1997) 59 Cal.App.4th 1183, 69 Cal.Rptr.2d 558, and Jorgensen v. Taco Bell (1996) 50 Cal.App.4th 1398, 58 Cal.Rptr.2d 178.
- i. Doreen Boxer (PD of San Bernardino).
 - (1) Office handles 55,000 cases/year. 150 lawyers.
 - (2) Important to make this as clear as possible.
 - (3) Does not think that the rule is sufficiently clear for the typical lawyer. Does not want a duty imposed that would require lawyers to ask the person whether he or she is represented.
 - (4) There are a lot more words.
 - (5) Believes that the change creates vagueness and so can cause a problem.
 - (6) Bob: How will the rule change your practice; a person who is not charged but you KNOW that person is represented in the matter?
 - (a) Boxer: Depends on what you mean by "the matter". E.g., 7-11 owner who is represented on the insurance claim – it arises from the same conduct that arises from the criminal case.
 - (1) Under your rule, you would be precluded from interviewing the 7-11 owner.
 - (b) Bob: What if the 7-11 owner's lawyer calls PD and tells PD not to talk to the owner unless you go through me.
 - (1) What would a defense lawyer do under those circumstances.
 - (2) Doreen Boxer: Would not talk with the owner because the owner's lawyer has told us not to communicate/harass the owner.
 - (b) Bob: What if the 7-11 owner's lawyer calls PD and tells PD not to talk to the owner unless you go through me.
 - (1) What would a defense lawyer do under those circumstances.
 - (2) Doreen Boxer: Would not talk with the owner because the owner's lawyer has told us not to communicate/harass the owner.
- j. George Cardona: Has same understanding about "matter," i.e., if it arises out of the same set of facts and circumstances. It is broader than what Commission members have suggested.
- k. Michael Judge: If question whether to use "authorized" or "permissible," then should use "permissible" because it's a little easier to understand.
 - (1) Would prefer to see it as "not prohibited under law."
 - (2) If we were doing things the judges or prosecutors thought were wrong, there would be bills in the legislature. But there are not.
 - (3) There's a lot of things we are permitted to do for which there are no cases and/or statutes that authorize us to do so.
- l. Michael Judge: Discusses the Dale case.

- (1) Same set of events can generate a number of different legal actions.
- (2) It is not clear enough that the person has to be a party to the criminal action.

6. MOTION: Adopt the public comment version of (c)(3).

YES: 8 NO: 1 ABSTAIN: 0

a. Stan: Reads from Jorgensen and Truitt.

(1) Jorgensen: This court held “that former California Rules of Professional Conduct rule 7-103, now rule 2-100, bars ex parte contact with current corporate employees who are specified in the rule as to any matter in which they are known to be represented by counsel. The rule is not limited to matters in litigation, and might be violated where, for instance, an attorney sought to interview the opposing party's covered employees as to a matter not yet in litigation, if the attorney knew the employees were represented by counsel in the matter. [¶.] Here we find no abuse of discretion by the trial court in concluding Jorgensen's counsel did not know the interviewed employees were "represented by another lawyer in the matter." In fact, it appears the employees and Taco Bell were not represented by counsel in "the matter," since no such matter had yet been asserted against Taco Bell by Jorgensen. Rule 2-100 should be given a reasonable, common sense interpretation, and should not be given a "broad or liberal interpretation" which would stretch the rule so as to cover situations which were not contemplated by the rule.” 50 Cal.App.4th 1398, 1401, 58 Cal.Rptr.2d 178, 180.

(2) Truitt: “The proscription against ex parte contact does not apply merely because an attorney should know that the opposing party will be represented by some unidentified attorney at some time after a complaint is filed. Knowledge that a corporation employs in-house counsel ‘does not trigger the application of rule 2-100, unless the claimant's lawyer knows in fact that such house counsel represents the person being interviewed when that interview is conducted.’ [¶.] A bright line rule is absolutely necessary in this situation. Lawyers should not be at risk of disciplinary action for violating rule 2-100 because they "should have known" that an opposing party was represented or would be represented at some time in the future. Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge. A requirement of actual knowledge does not deprive a represented party of the protection of the rule.” 59 Cal.App.4th 1183, 1188, 69 Cal.Rptr.2d 558, 562 (citations omitted).

(3) Stan: Case law has done a good job of carving out a bright line.

b. Doreen Boxer: If there is a specific scenario you want to address, then perhaps you should address that situation.

(1) Bob: In the minds of people on the Commission, we are not making any substantial changes. This is the law as it has existed in California.

(2) Someone does not have to be a party to litigation to be covered under the current rule.

(3) Boxer: The way it is going to be applied is that it is going to change something, it will result in a case you don't like.

c. Mark: This took up the most time at the ABA level as well.

(1) California is not unique. We are simply coming into line with the law of other jurisdictions and how it has always operated.

(2) We have not heard nor seen empirical data that suggests this has proven a problem in other jurisdictions.

(3) Our comment [6] is trying to give guidance on the very narrow application of paragraph (a).

(a) “matter ... that matter ...”

- d. Stan: Jorgensen distinguishes our rule from the Model Rule.
 - (1) Knows or reasonably should know was advanced by Taco Bell.
 - (2) The court rejected that approach.
 - (3) This language from Jorgensen is important. See ¶. 6.a.(2), above.

7. MOTION: Adopt Comment [19] as proposed by George.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state constitutional, decisional, and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) may implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, § 15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a lawyer engages in misconduct or unlawful conduct.

YES: 3 NO: 4 ABSTAIN: 1

- a. Harry: Would address the criminal defense lawyer's concerns re parity.
- b. Bob: Doesn't think we need Comment [19] in light of Comment [18] but, if we are going to have a specific comment on this topic, George's version is better than our public comment version of Comment [19].

8. MOTION: Add "juvenile delinquency proceedings" to Comment [19].

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants.

YES: 4 NO: 3 ABSTAIN: 1

9. KEM Note: Send new draft & meeting notes to PD representatives.

4. **Conclusion.** Having stated all of the foregoing, I'm not sure we should, on the one hand, state that prosecutors have an authorized by law exception but that for defense lawyers, it is beyond the scope of the Rules. That is a bit too stark a discrepancy. Better not to say anything at all in the Rule. I would leave the Rule as is. The PD's never provided us with authority other than vague suggestions of due process and effective assistance of counsel. As for the response to public comment, I think the emphasis has to be on the "knowledge" requirement for the Rule. That seems to be what the PD's were not aware of at the October 2008 meeting.

June 17, 2010 Martinez E-mail to KEM, cc Tuft, Difuntorum &

1. I don't think the PD's waived their rights by not submitting a proposed comment or rule. The group doesn't speak for all PD's. We still have an obligation to try to get it right.

2. If the rule is declared unconstitutional in denying equal protection or some other right, we will have to go back to the drawing board, whereas if we send a message to let the courts know that if it's going to be authorized by law it has to come from some other source, like the courts or statute, they are less likely to knock down the rule as unconstitutional. I can see some criminal defendant arguing that they can't talk to prosecution witnesses that the prosecutor can access but not the defense.

3. The action summary doesn't have the same level of detail as your notes. The action summaries are now on the website and will be seen as the "official" record by some. Harry also wanted to address the parity issue as noted in your notes, but it's unclear what happened to that approach.

4. I think we would be remiss if we didn't leave a better trail.

June 17, 2010 KEM E-mail to Martinez, cc Tuft, Difuntorum & McCurdy:

1. I didn't mean to imply that the PD's had waived their rights by not submitting a comment or proposed rule. However, the simple fact is that despite repeated requests, they have been unable to provide us with authority. As it now stands, at least as far as we know, there is no law out there that would create parity between prosecutors and defense lawyers re 4.2. Neither Gary Windom nor Michael Judge (or Doreen Boxer for that matter) have ever pointed us in the direction of authority that would support a counterpart to the comment re government lawyers.

2. Regardless, my main point, from the discussion that took place at the 10/31/08 meeting, is that the PD's who attended did not realize that current rule 2-100 -- and our proposed Rule 4.2 -- both require actual knowledge. They conceded they could not communicate w/ a represented witness -- IF they know that person is represented. Their fear is, I think, that they will be disciplined if they go about their usual investigations, communicate w/ a witness who they don't know is represented, and then find out after the fact that they should have known.

3. My concern is with the imbalance that is apparent if we provide a comment that is favorable for government lawyers, while on the other hand we expressly state that on the same issue for defense lawyers, it is beyond the scope of the rule (even if it is true). Better to say nothing in the rule but emphasize in the response to the public comment from Ms. Boxer that actual knowledge is the standard. At any rate, I don't see the rule being declared as unconstitutional because there's a comment re prosecutors that is supported by some authority but not a similar comment for defense lawyers because, as far as we know, there is no authority to support such a comment.

It's late, I have jury duty tomorrow, and have some other things to do, so I better wrap this up.

June 18, 2010 Difuntorum E-mail to Martinez, Tuft & KEM, cc McCurdy:

Regarding the PD parity issue, I provide the following: (1) message below and attachment from George Cardona in 2008 in which he attempts to the PD issue; and (2) message below from me in 2008 in which I suggested language to Harry for addressing the PD issue (see highlighted text).

On a unrelated 4.2 issue, I am attaching a prior message to the Rule 4.2 drafters concerning People v. Jacinto.

October 29, 2008 George Cardona E-mail to Difuntorum & KEM (forwarded to RRC on 10/29/08 by Difuntorum):

At the last meeting, I indicated that I would try to draft something that sought to address the concerns expressed by the prosecutors and public defenders who attended the meeting while comporting with prior discussions of the commission. In accordance with this representation, attached is a draft. This takes a slightly different approach from the various drafts in the e-mails, attempting simply to: (a) include in the text of the rule a recognition that the authorized by law exception extends to laws recognizing the propriety of investigatory contacts in civil, criminal, or administrative law enforcement investigations (whatever those laws may be, and without seeking to define the circumstances set forth in those laws that render any particular communication authorized by law); (b) alter the comments to follow this same principle; (c) make both the text of the rule and the comments neutral as to application to prosecutors and/or defense attorneys; and (d) address concerns previously expressed by the State AG by adding back in a previously-proposed comment noting that the authorized by law exception can extend to whistleblower situations. My submission of this draft should not be taken as an endorsement for any particular view, as I am precluded from providing such an endorsement, but rather simply in furtherance of my commitment that I would try to draft something that addressed various concerns. In addition, please bear in mind that this is submitted in my personal capacity, and should not be taken as reflecting an official position of either my office or the US Department of Justice. With that, I hope this is at least somewhat helpful.

Proposed Paragraph (c)(4) (Cardona)

(c) This Rule shall not prohibit

* * *

(3) Communications authorized by law or a court order; or

(4) Communications authorized by law, including, in particular, any law authorizing legitimate investigative communications by lawyers involved in civil, criminal, or administrative law enforcement investigations.

Comments

[19] Paragraph (c)(34) recognizes that ~~prosecutors or other lawyers representing government entities~~ in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state constitutional, decisional, and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the

exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that ~~would~~ might otherwise be impeded. Communications under paragraph (c)(4) may implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, § 15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. ~~This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3).~~ While the change from “party” to “person” is intended to make clear this Rule’s application to communications with a non-party, such as, for example, a witness who is represented in connection with the subject matter of the communication, it is not intended to alter the law defining when such communications are authorized by law. This change also is not intended to preclude the development of the law with respect to which ~~criminal and civil law enforcement~~ communications are authorized by law.

[New 20A] Ordinarily, this Rule applies even though the represented person initiates or consents to the communication, and 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. This application of the Rule, however, is not meant to expand, limit, or preclude the development of the law with respect to circumstances under which it is permissible for lawyers to communicate with represented persons who (a) initiate the communication to report an activity, policy, or practice of an entity or association with which the person is associated that may be in violation of law or of environmental or public health and safety requirements, and (b) affirmatively indicate a desire that the lawyer not contact his or her counsel with respect to the communication. See, e.g., United States v. Talao, 222 F.3d 1133, 1141 (9th Cir 2000); United States v. Lopez, 4 F.3d 1455, 1461-62 (9th Cir. 1993).

May 28, 2010 Difuntorum E-mail to Drafters (Martinez & Tuft), cc cvs:

The California Supreme Court has issued its decision in *People v. Jacinto* which, in part, addresses the issue of whether county sheriff personnel are agents of prosecutors for purposes of finding certain prosecutorial misconduct. (Go to: <http://www.courtinfo.ca.gov/opinions/documents/S164011.PDF> .)

Here is an excerpt from the Court’s decision.

“Because it was the sheriff, not the prosecutor, who released Esparza to immigration officials, to satisfy this element defendant must show the jail officials were part of the prosecution team (or otherwise acted at the prosecution’s behest). This he did not do.

As in other counties, the Sonoma County Sheriff has legal authority to run the county jail and acts as the custodian of the prisoners and detainees therein. (Pen. Code, § 4000; Gov. Code, § 26605.) Another division of the sheriff’s department provides law enforcement services to certain parts of the county. Indeed, Detective Basurto of the Sonoma County Sheriff’s Department investigated the crime in this case. But this formal identity between sheriff’s deputies operating and providing protective services in the jail and detectives in the law enforcement division investigating crimes does not automatically render the deputies assigned to the jail members of the prosecutorial team. Absent some additional showing of affirmative prosecutorial involvement in Esparza’s removal,³ we cannot hold the prosecutor legally responsible merely because a sheriff’s deputy working at the jail was involved. As the Court of Appeal explained below: “The sheriff’s department was no more than the custodian of witness Esparza. In this case, it was not a part of the prosecutorial investigative team. . . . [and] the action of the sheriff’s department or county jail personnel may not be attributed to the prosecution.” (Slip opinion at pp. 7 – 8, footnote omitted.)

Like current rule 2-100, proposed Rule 4.2 prohibits indirect communications with a represented client. Proposed Rule 4.2 includes a comment intended to provide guidance on the prohibition against indirect communications, Comment [5] (text pasted below), that is not found in either current rule 2-100 or Model Rule 4.2. Please consider whether Comment [5] could be revised to include a reference to the *Jacinto* decision as possible guidance to prosecutors on the general issue of whether and to what extent the conduct of other law enforcement personnel may be attributed to prosecutors. I do not believe a revision is necessary, but I thought it should at least be considered. Thanks. –Randy D.

Proposed Rule 4.2, Comment [5]:

- [5] The prohibition against “indirect” communication 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 or investigator.

June 18, 2010 Tuft E-mail to Martinez & KEM, cc Difuntorum & McCurdy:

We have exhausted this issue and there is nothing new that would justify either Raul's or Randy's version of Comment [19] or a separate comment. George Cardona provided a draft of a comment because, as he states, he was asked to and not because he endorsed it. Unless there is legal authority that establishes parity between prosecutors and defense counsel with regard to the authorized by law exception under 4.2, we cannot make one up. If courts or the legislature think there is a Sixth Amendment concern that warrants defense counsel communicating with a person known to be represented in the matter - such as another accused person or witness under suspicion - without his or her lawyer's consent, that is the court or legislature's province and not ours. I question whether this is a legitimate Sixth

Amendment concern. The Supreme Court's decision in Jacinto that there was no prosecutorial misconduct because the sheriff, not the prosecutor, released the witness to immigration authorities, does not address this issue.

Frankly, I am surprised that PDs or retained counsel would want an exception to 4.2 what would permit a lawyer for another suspect in a pre-indictment investigation to communicate with their client without their prior consent for the purpose of obtaining incriminating evidence. I think there is a good chance that if we wrote that possibility into the rule we would be fostering claims of ineffective assistance of counsel. In reality, represented witnesses are often in the zone of potential criminal prosecution in the same matter - that is often why they are represented by counsel.

Let's move on.

June 18, 2010 Martinez E-mail to Tuft & KEM, cc Difuntorum & McCurdy:

I'm not suggesting we "make one up", but that we simply flag the issue by saying its beyond our purview. We already say as much with regard to prosecutors in the comment. The issue should at least be reflected in the comment chart. Because there is no official response to the PD concerns, it will appear like their concerns fell on deaf ears.

June 18, 2010 Tuft E-mail to Martinez & KEM, cc Difuntorum & McCurdy:

I would not "flag" the issue in a comment to the rule. I could go along with doing so as a response in the commenters' chart if I knew what it would say.

June 18, 2010 Martinez E-mail to Tuft & KEM, cc Difuntorum & McCurdy:

I propose adding the following sentence before the last sentence of Comment [20]:

"Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right."

Here are the reasons:

1. In changing the rule from party to person, we have gone to great lengths to accommodate prosecutors by telling them the change was not intended to alter the status quo from Rule 2-100. Comment [20] thus states that the change is "not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law...." The reason for the comment is that prosecutors were under the impression--wrongly or rightly--that "party" meant party to an action or proceeding. Yet, to the extent defense attorneys may have harbored the same impression, we offer them nothing in the comment--not even a bone. In fact, we send them the opposite message: only prosecutors are allowed to contact unrepresented witnesses in their investigation. Defense lawyers fend for yourselves.

2. In fact, there *is authority* that recognizes a Sixth Amendment right for a criminal defense attorney to contact a witness represented by counsel. This is the case cited by George Cardona: *Grievance Comm. v. Simels*, 48 F.3d 640 (2d Cir. N.Y. 1995). *Simels* states:

Moreover, as a matter of policy, the broad and ambiguous interpretation of "party" employed by the Committee threatens to chill all sorts of investigation essential to a defense attorney's preparation for trial. ...Taken to its extreme, the Committee's interpretation of "party" might well bar defense counsel from contacting represented co-targets during the investigative phase of a large conspiracy. ...We are not prepared to hold that a defense attorney engaging in critical pre-trial investigation, which might produce valuable sources of impeachment material or, better, direct evidence of his or her client's innocence, is committing professional misconduct. That attorney is providing the effective defense and the zealous representation required by the Sixth Amendment and DR 7-101, respectively.

Id. at 650-651.

At the same time, *Simels* recognized that there was another side to the coin in that an "uncounselled statement from a witness or potential codefendant ...could be used against him or her at trial." Id. at 651. *Simels* then stated that this was beyond the purview of ethical rules because it raised "policy issues that should be resolved against the backdrop of federal law enforcement concerns" and "that choice should be made either by Congress or the Supreme Court, and not by district courts' expansive interpretations of disciplinary rules." Id.

3. The added sentence merely states that such communications "might" be protected by the 6th Amendment. It's rather innocuous and leaves the door open for future debate in the courts. Since we have attempted to clarify our intent vis a vis prosecutors, the absence of any reference to the rights of defense lawyers will be seen as conspicuous by its absence. We are not leaving behind a level playing field and will be perceived as favoring the prosecution.

June 18, 2010 Tuft E-mail to Martinez & KEM, cc Difuntorum & McCurdy:

New York was a Model Code state until recently. How would that case relate to 4.2? How would the case provide authority for PDs in California? Why should the issue be any different for defense lawyers in California than in other jurisdictions that has made the change from "party" to "person" without all this angst? We are making this up by having a comment that has no support in California law and no precedent in any other rule. I think we have gone too far to accommodate a special interest group here just as we have done with 1.5.

June 18, 2010 Tuft E-mail to Martinez, cc Difuntorum, McCurdy, Sondheim & KEM:

What about the 5th amendment that applies to appointed counsel in Immigration and parental rights cases? Do we want to "flag" that as well? Each time we come up with a creative comment for one class of lawyers there are invariably unintended consequences. There is legal support for prosecutors which the ABA and most jurisdictions recognize in applying 4.2. I am not aware of any precedent for what you propose and I don't believe we should be making one up.

June 21, 2010 McCurdy E-mail to Martinez, cc Drafters, Chair & Staff:

Raul,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter – XDFT2 (06-21-10).doc
RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

June 21, 2010 Sapiro E-mail to RRC List:

I agree with Raul's recommendation. I should have seen this issue the first time around.

June 22, 2010 Martinez E-mail to McCurdy, cc Chair, Vice-Chairs & Staff:

Lauren, here is the revised commenter chart for Rule 4.2.

Attached:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - XDFT2 (06-22-10)RM.doc

June 22, 2010 KEM E-mail to McCurdy, cc Difuntorum:

I've attached the following files, which are the files Raul sent earlier, reformatted:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)RM.doc
RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-MLT-RM.doc

That's it for now on public comment charts. I'll start sending the e-mail compilations presently.

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

TOTAL = 6 Agree =
Disagree = 4
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Alex, Glenn C.	M	No		<p>The Proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.</p> <p>The Proposed Rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-attorney governmental employees may be contacted by an outside lawyer without permission. However, the Rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the Rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency.</p> <p>A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.</p>	<p>The Commission disagrees that "public official" should be defined independent of the cross-reference to business entities in subparagraph (b). In defining "public official" the intent was not to bring in all agency employees within that rubric of "public official," but only those with managerial authority comparable to the authority conferred on officers, directors, partners, or managing agents of non-public organizations. While it may in some cases be difficult to draw the line between categories of public officials, these concerns are found in both the private and public sectors. For example, whether a constituent is a partner or managing agent may have to be determined on a case by case basis since an all-encompassing delineation of permissible versus impermissible contacts is not possible.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Dalton, John W.	D	No		<p>The Proposed Rule will severely prejudice plaintiffs in employment cases and be tremendously helpful to the defense in such cases. All the defense would have to do is send a letter to plaintiff's counsel indicating that all employees of the company are "represented" for the sole purpose of litigation and plaintiffs will be prohibited from interviewing percipient witnesses.</p> <p>Such a rule has no impact on "attorney misconduct" by an attorney, it would merely allow the defense in employment cases to "hide the ball" from plaintiff's counsel who are conducting good faith investigations into, what are often, very serious allegations of work place misconduct. The Proposed Rule places plaintiffs at a huge disadvantage and strongly favors the defense in employment cases.</p>	<p>The Commission disagrees. The commenter has overlooked Paragraph (f) of the Rule which provides: "[a] lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true."</p>
6	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>OCTC is concerned that this rule may still not address the issues raised in <i>In the Matter of Dale</i>. In <i>Dale</i>, 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</p>	<p>The Commission does not believe any additional clarification is necessary. The change from "party" to "person" is intended to make clear that whether a communication is prohibited under the Rule does not depend on whether the person contacted is a party to a criminal, civil or other judicial proceeding. The Rule errs on the side of protecting the attorney-client relationship regardless whether the person contacted is a party to any proceeding.</p>

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [7] & [12]	<p>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 conduct in 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 <i>Dale</i> type of situation is covered by this rule.</p> <p>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.</p> <p>Comments [7] and [12] should be in the Proposed Rule, not a Comment.</p>	<p>As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.</p>

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Oliver, Jason L.	D	No		<p>I am writing to voice my strong opposition to the Proposed Rule which would prohibit contacting a “person” represented by counsel, as opposed to the current rule which prohibits contact with a “party” represented by counsel.</p> <p>Currently, a plaintiff’s lawyer may contact “persons” (who are not managing agent/control group types) as long as that person is not a “party” in the case. Under the current system, a defense lawyer or employer defendant may not “convert” a rank and file employee, whether represented or not, into a “party,” just by sending a letter or by having the employer include a provision in an employee handbook about representation. Under the new rule, this would be possible. Based on what I see every day, I would say such abuse will not just be possible, but likely, as defendants fight these cases tooth and nail and seek every advantage they can get.</p> <p>In civil rights and employment cases, our pre-filing and post-filing investigations are of paramount importance to vindicating the important rights of our clients. If the Proposed Rule is adopted, defendant employers will be handed a huge advantage over plaintiffs with</p>	<p>The Commission disagrees. The commenter has overlooked Paragraph (f) of the Rule which provides: “[a] lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.”</p>

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					meritorious cases, since there will likely be wholesale restrictions on who we can speak to in our investigations.	
5	San Bernardino County Public Defender [Doreen B. Boxer]	D	Yes		<p>Proposed Rule 4.2 will impermissibly infringe on a criminally accused's right to effective assistance of counsel by limiting defense counsel's ability to fulfill his/her duty to investigate.</p> <p>Proposed Rule 4.2 restricts defense counsel's ability to investigate, will overburden scant judicial resources, and cause unnecessary costs, delay and backlog.</p> <p>Comment [4] seems to indicate the defense could not speak with the owner of a location where a crime occurred, or a witness of the crime, since it states, "the subject of the representation,' 'matter,' and 'person' are not limited to a litigation context. This Proposed Rule applies to communication 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."</p> <p>Neither Comments [4] or Comment [19], nor the language of the Proposed Rule clearly protect the rights of the accused. The</p>	<p>The Commission disagrees. Whether a defense attorney has a reciprocal right under the Sixth Amendment to communicate with a person represented by counsel depends on whether such a communication is "authorized by law" pursuant to Paragraph (c) (3). Whether such contacts are authorized by law is beyond the scope of the Rule. Comment [20] explains that the change from "party" to "person" is not intended to preclude legitimate communications by or behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations. However, because Comment [20] may be read to suggest that an "authorized by law" exception in this area applies only to prosecutors and that a reciprocal right does not exist in favor of defense lawyers or investigators, the Commission has amended Comment [20] to allow for that possibility. The penultimate sentence has been added as follows: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.</p>

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Proposed Rule's silence as to the rights of the criminal defendant is aggravated by its specific protection of prosecutorial investigation. Thus, an attorney or court, seeing a specific exemption for prosecutorial investigation and no equivalent language for defense investigation, will predictably and understandably read the Proposed Rule to prohibit the defense, but not the prosecution, from contacting a represented witness without counsel's approval.</p> <p>Recognizing the inevitable confusion of this Proposed Rule, Comment [21] suggests a lawyer may seek a court order in order to communicate with a represented person. This suggestion will bring possibly thousands of otherwise unnecessary proposed orders to the courts, thereby wasting judicial resources, slowing case processing, and increasing case backlog in our already overburdened justice system.</p> <p>Proposed Rule 4.2 will deprive the criminally accused the right to equal protection of the law. Both the government and the defendant are entities similarly situated as both deserving due process in a criminal proceeding. However, Proposed Rule 4.2 violates the equal protection clause because</p>	

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>prosecutors will have an overwhelming advantage prosecuting cases because they can contact any “person” while the defense cannot.</p> <p><i>Jorgensen v. Taco Bell</i> does not alleviate the defense bar’s concerns regarding the scope of Proposed Rule 4.2 or the prosecutor exemption. <i>Jorgensen</i> held the interview of Taco Bell employees was permissible because it took place long before there was a law suit. However, in the case of a criminal prosecution where the accused has been formally charged, there will always be a legal action filed/pending. Therefore, <i>Jorgensen</i> will never apply to a situation where an accused is formally charged and, therefore, offers no relief from the suffocating effects of Proposed Rule 4.2.</p> <p>In conclusion, Proposed Rule 4.2 impermissibly infringes on the rights of the criminally accused to effective assistance of counsel by curtailing defense investigation. The proposed exemption for prosecutors does nothing more than exacerbate the problem by giving prosecutors an unfair advantage over the criminally accused in the prosecution of criminal cases. The State has not established how the granting of this advantage to</p>	

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>prosecutors is necessary to promote a compelling state interest or even rationally related to a legitimate state interest. Therefore, the proposed exemption violates the equal protection clause.</p> <p>To correct this problem, allow the exemption to apply to prosecutors <i>and</i> the defense bar. That will level the playing field and the Proposed Rule 4.2 will accurately articulate the Commission's intent.</p>	
1	San Diego County Bar Association ("SDCBA")	D	Yes		<p>Change from "party" to "person" is not a clarifying change as Commission has asserted. (Dale, 4 Cal. State. Bar. Rptr. 798)</p> <p>Proposed rule would expand a lawyer's duties to non-clients, increase risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court.</p> <p>Keep existing rule 2-100 but modify to add a</p>	<p>The discussion section to current Rule 2-100, in part, states that "matter" and "party" are "not limited to a litigation context" and the Commission believes that many lawyers have construed the rule's use of "party" as a term of art.</p> <p>Substituting "person" for "party" adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule's use "person" have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any. Other additions codify case law and other developments in this area of lawyer conduct (see, i.e., paragraph (e)).</p> <p>The Commission believes that the decision in the Dale</p>

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					new subsection (C)(4) for communications with an investigative officer in civil or criminal case.	case requires that the existing rule be modified.