

CLEAN VERSION

Rule 2-100. Communication With a Represented Party

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

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

(1) A current¹ officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current² employee or other agent of an association, corporation, partnership, or other organization:

(a) if the acts, omissions or statements of the employee or other agent may be binding upon or imputed to the organization for purposes of civil or criminal liability;

(b) if the statement of the employee or other agent may constitute an admission on the part of the organization under the applicable rules of evidence;

(c) if the employee or other agent supervises, directs or regularly consults with the lawyer and has the power to settle, compromise, or direct legal strategy in the matter.³

(C) This rule shall not prohibit:

(1) Communications with employees or agents of a governmental agency, board, committee, or body; or

¹The limitation that the rule is applicable only to persons employed at the time of the communication is contained in the discussion of the current Rule, but is not included in the Rule itself.

²See Footnote No. 1.

³Comment [7] of ABA Rule 4.2.

(2) Communications initiated by a party seeking advice or representation from a lawyer who is not already representing another party in the matter; or⁴

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

(D) During the course of a communication otherwise permitted by this Rule, a lawyer may not seek to obtain privileged or confidential information to which the lawyer would not otherwise be entitled.

Discussion:

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

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

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

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

⁴Subdivision (C)(2) seeks to clarify the notion that the rule does not apply to a party seeking independent advice from another lawyer, as long as that lawyer does not already represent another party in the matter.

Subparagraph (C)(2) is intended to permit a member who is not already representing another party in the matter to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

This Rule does not prohibit communications with respect to subjects that are unrelated to the representation.

This Rule applies only to circumstances where the lawyer has actual knowledge that the person contacted is represented by counsel. However, such knowledge may be inferred from the circumstances. At the inception of any communication with a person who potentially may be protected by this Rule, the lawyer should inquire whether the person is represented by counsel, and in the case of an agent or employee of an organization, the lawyer should inquire as to that person's position and role within the organization to ascertain whether contact with that person is permissible under subdivision (B).⁵

"Managing agent" as used in subdivision (B)(1) refers to employees or agents invested by the organization with general powers to exercise discretion and judgment in dealing with matters on behalf of the organization. The factors that should be considered in determining whether an employee or agent is a "managing agent" include: (1) whether the organization invested the person with discretion to exercise judgment, (2) whether the agent or employee could be depended upon to carry out the organization's directions, and (3) whether the person could be expected to identify himself or herself with the interests of the organization. (Wright, et al., 8A Fed. Prac. & Proc. Civ.2d § 2103.) "Managing agent" includes high-ranking organizational agents, as well as middle and lower-level agents and employees, who have actual or implied authority to speak for and bind the organization. (*Triple A Mach. Shop v. State* (1989) 213 Cal. App. 3d 131, 139 ; *Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)⁶

⁵This portion of the discussion clarifies that persons whose acts or omissions may be imputed to the organization are not limited to high ranking employees or agents. Thus, this is a departure from *Snider*, which held that the category of employees whose statements may constitute an admission on the part of the organization applies only to high ranking executives and spokespersons. (*Snider, supra*, 113 Cal.App.3d at 135.)

⁶This part of the discussion attempts to clarify the requirement of "actual knowledge," but with an obligation to inquire as to whether the person contacted is represented by counsel, and in the case of organizational employees, the need to inquire as to the persons' status in the organization in order to determine the propriety of the communication.

Subdivision (B)(2)(a) applies to persons, regardless of their rank within the organization, whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability. Similarly, subdivision (B)(2)(b) applies to employees or agents, regardless of their rank, whose statements may constitute an admission on the part of the organization under the applicable rules of evidence. (*Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)⁷

An attorney for an organization may instruct or induce an employee or agent of the organization not to communicate or cooperate with a lawyer who represents an opposing party in a matter if such instruction is otherwise permitted by law. However, the lawyer for the organization does not necessarily represent all employees of the organization. Further, such instruction does not preclude the lawyer for the opposing party from communicating or attempting to communicate with an employee or agent who is not a "party" under subdivision (B).⁸

If the employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this rule.⁹

⁷This clarification of which employees can be considered managing agents departs from the definition utilized in *Snider*, and instead, attempts to track the *Wright* and *Miller* definition of managing agent for purposes of complying with discovery. The discussion also seeks to clarify that a managing agent can include a lower level agent or employee as long as that person has actual or implied authority to speak and bind the corporation.

⁸See Restatement, § 100, comment f, which states: "A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so. In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law." The phrase "otherwise permitted by law" in the text above is in reference to the possibility of an obstruction of justice – e.g., instructions not to communicate with a prosecutor.

⁹Restatement of the Law Governing Lawyers, § 100, Comment h. ABA Rule 4.2, comment [7].

REDLINE VERSION

Rule 2-100. Communication With a Represented Party

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

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

(1) A current¹ officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current² employee or other agent of an association, corporation, partnership, or other organization:

(a) if the acts, omissions or statements of the employee or other agent may be binding upon or imputed to the organization for purposes of civil or criminal liability;

(b) if the statement of the employee or other agent may constitute an admission on the part of the organization under the applicable rules of evidence;

(c) if the employee or other agent supervises, directs or regularly consults with the lawyer and has the power to settle, compromise, or direct legal strategy in the matter.³

(C) This rule shall not prohibit:

(1) Communications with employees or agents of a governmental agency, board, committee, or body; or

¹The limitation that the rule is applicable only to persons employed at the time of the communication is contained in the discussion of the current Rule, but is not included in the Rule itself.

²See Footnote No. 1

³Comment [7] of ABA Rule 4.2.

(2) Communications initiated by a party seeking advice or representation from a lawyer who is not already representing another party in the matter; or⁴

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

(D) During the course of a communication otherwise permitted by this Rule, a lawyer may not seek to obtain privileged or confidential information to which the lawyer would not otherwise be entitled.

Discussion:

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

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

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

⁴Subdivision (C)(2) seeks to clarify the notion that the rule does not apply to a party seeking independent advice from another lawyer, as long as that lawyer does not already represent another party in the matter.

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

Subparagraph (C)(2) is intended to permit a member who is not already representing another party in the matter to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

This Rule does not prohibit communications with respect to subjects that are unrelated to the representation.

This Rule applies only to circumstances where the lawyer has actual knowledge that the person contacted is represented by counsel. However, such knowledge may be inferred from the circumstances. At the inception of any communication with a person who potentially may be protected by this Rule, the lawyer should inquire whether the person is represented by counsel, and in the case of an agent or employee of an organization, the lawyer should inquire as to that person's position and role within the organization to ascertain whether contact with that person is permissible under subdivision (B).⁵

"Managing agent" as used in subdivision (B)(1) refers to employees or agents invested by the organization with general powers to exercise discretion and judgment in dealing with matters on behalf of the organization. The factors that should be considered in determining whether an employee or agent is a "managing agent" include: (1) whether the organization invested the person with discretion to exercise judgment, (2) whether the agent or employee could be depended upon to carry out the organization's directions, and (3) whether the person could be expected to identify himself or herself with the interests of the organization. (Wright, et al., 8A Fed. Prac. & Proc. Civ.2d § 2103.) "Managing agent" includes high-ranking organizational agents, as well as middle and lower-level agents and employees, who have actual or implied authority to speak

⁵This portion of the discussion clarifies that persons whose acts or omissions may be imputed to the organization are not limited to high ranking employees or agents. Thus, this is a departure from *Snider*, which held that the category of employees whose statements may constitute an admission on the part of the organization applies only to high ranking executives and spokespersons. (*Snider, supra*, 113 Cal.App.3d at 135.)

for and bind the organization. (*Triple A Mach. Shop v. State* (1989) 213 Cal. App. 3d 131, 139 ; *Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)⁶

Subdivision (B)(2)(a) applies to persons, regardless of their rank within the organization, whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability. Similarly, subdivision (B)(2)(b) applies to employees or agents, regardless of their rank, whose statements may constitute an admission on the part of the organization under the applicable rules of evidence. (*Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)⁷

An attorney for an organization may instruct or induce an employee or agent of the organization not to communicate or cooperate with a lawyer who represents an opposing party in a matter if such instruction is otherwise permitted by law. However, the lawyer for the organization does not necessarily represent all employees of the organization. Further, such instruction does not preclude the lawyer for the opposing party from communicating or attempting to communicate with an employee or agent who is not a "party" under subdivision (B).⁸

If the employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this rule.⁹

⁶This part of the discussion attempts to clarify the requirement of "actual knowledge," but with an obligation to inquire as to whether the person contacted is represented by counsel, and in the case of organizational employees, the need to inquire as to the persons' status in the organization in order to determine the propriety of the communication.

⁷This clarification of which employees can be considered managing agents departs from the definition utilized in *Snider*, and instead, attempts to track the *Wright* and *Miller* definition of managing agent for purposes of complying with discovery. The discussion also seeks to clarify that a managing agent can include a lower level agent or employee as long as that person has actual or implied authority to speak and bind the corporation.

⁸See Restatement, § 100, comment f, which states: "A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so. In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law." The phrase "otherwise permitted by law" in the text above is in reference to the possibility of an obstruction of justice -- e.g., instructions not to communicate with a prosecutor.

⁹Restatement of the Law Governing Lawyers, § 100, Comment h. ABA Rule 4.2, comment [7].

Cal. Rule 2-100 – Communication With a Represented Party	ABA Model Rule 4.2 – Communication With Person Represented by Counsel	Comments
<p>(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.</p>	<p>In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.</p>	<p>The Cal Rule part (A) and the ABA rule are similar. There two major differences: (1) CA states that the communication cannot be direct or indirect; (2) MR 4.2 governs communication with any represented “person,” not just represented “parties.”</p> <p>Another important difference is that there is an exception that the lawyer may communicate with the party by a court order, and not just consent of the other lawyer.</p> <p>Note: <i>Prior to the early 1990’s, MR 4.2 also governed contacts with “parties.” ABA then changed “party” to “person,” broadening MR 4.2 to apply to any represented “person,” not just a represented “party” to the matter.</i></p>
<p>(B) For purposes of this rule, a “party” includes:</p> <p>(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or</p>	<p>Discussion [2] This rule applies to communications with any person, who is represented by counsel concerning the matter to which the communication relates.</p>	<p>There is no section in the ABA model rule that specifically defines “party”. Included is a part of the discussion that come close to a definition of a “party”. <i>See</i> Comment, above.</p> <p>For a comprehensive discussion of rule 2-100, see <i>Snider v. Superior Court</i> (2003) 113 Cal.App.4th 1187, 7 Cal.Rptr.3d 119.</p>
<p>(2) An association member or an employee of an association, corporation or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may not constitute an</p>	<p>[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.</p> <p>[7] This rule prohibits communications with a constituent of the organization, who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the</p>	<p>No section of the ABA rule is exactly like CA paragraph (B)(2). These sections of the discussion are similar.</p>

Cal. Rule 2-100 – Communication With a Represented Party	ABA Model Rule 4.2 – Communication With Person Represented by Counsel	Comments
admission on the part of the organization.	organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.	
(C) This rule shall not prohibit: (1) Communications with public officer, board, committee or body; or		No relevant ABA Rule for this provision. <i>See, however</i> , ABA Formal Ethics Opn. 97-408 (8/2/1997).
(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or	[4] Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.	
(3) Communications otherwise authorized by law.	[4] A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. [5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative agents, prior to the commencement of criminal or civil enforcement proceedings.	<i>See also</i> MR 4.2, last clause (“unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”)
DISCUSSION: [1] Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory	[8] The prohibition on communications with a represented person only applies, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. [5] Communications authorized by law may also include investigative activities of	Re requirement of actual knowledge, see <i>Truitt v. Superior Court</i> (1997) 59 Cal.App.4th 1183, 1188; <i>Jorgensen v. Taco Bell Corp.</i> (1996) 50 Cal.App.4th 1398, 1401. Discussion [8] in the ABA rule is similar to the first sentence of the CA discussion. There is no mention in the ABA rule of examples in

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<p>schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.</p>	<p>lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.</p>	<p>employment situations. The ABA in [5] discusses the lawyer acting as investigator and that being an exception.</p>
<p>[2] Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party and (2) not to accept or engage in communications with the lawyer-party.</p>	<p>[4] Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.</p>	<p>The ABA once again does not have a discussion section directly on point to the CA discussion section. One section that addresses the same issue but contains a different rule is [3] which states: “The 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.” <i>See also</i> ABA Formal Ethics Opn. 95-396 (7/28/1995).</p>

Cal. Rule 2-100 – Communication With a Represented Party	ABA Model Rule 4.2 – Communication With Person Represented by Counsel	Comments
<p>[3] Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party’s counsel, seeks A’s independent advice. Since A is employed by the opposition, the member cannot give independent advice.</p>	<p>[3] The Rule applies even though the represented person initiates or consent 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] Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.</p>	<p>Discussion [3] is consistent with this rule but does not specify that the client has to be dissatisfied with their representation and seeks independent advice. [4] applies because it limits the rule to communication between a represented party and the opposite counsel in the matter.</p>
<p>[4] As used in paragraph (A), “the subject of the representation,” “matter,” and “party” are not limited to a litigation context.</p>		<p>No ABA equivalent. <i>But see</i> ABA Formal Ethics Opn. 95-396, Part II (7/28/1995).</p>
<p>[5] Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See <i>Triple A Machine Shop, Inc. v. State of California</i> (1989) 213 Cal.App.3d 131).</p>		<p>No ABA equivalent. <i>But see</i> ABA Formal Ethics Opn. 91-359 (3/22/1991) (rule 4.2 applies only to “current employees”); <i>accord</i> ABA Formal Ethics Opn. 95-396, Part VI & n.47 (7/28/1995).</p>
<p>[6] Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)</p>	<p>[4] Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.</p>	<p>The ABA does not have specific language similar to the Cal language, but [4] is close.</p>