

**Rule 4.2 [2-100] Communication With a Represented Person  
(Commission’s Proposed Rule Adopted on June 26, 2015 – 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) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
  - (1) A current officer, director, partner,\* or managing agent of the organization; or
  - (2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.
- (c) This Rule shall not prohibit:
  - (1) communications with a public official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person\* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:
  - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

**Comment**

[1] This Rule applies even though the represented person\* initiates or consents to the communication. A lawyer must immediately terminate communication with a person\* if, after commencing communication, the lawyer learns that the person\* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,\* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] This Rule applies where the lawyer has actual knowledge that the person\* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f))

[3] The prohibition against communicating “indirectly” with a person\* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person\* through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation.)

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

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 4.2**  
**(Current Rule 2-100)**  
**Communication With a Represented Person**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 2-100 (Communication With a Represented Party) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 4.2 (concerning communications with a represented person) and the Restatement of Law Governing Lawyers counterpart, Restatement § 99 (Represented Nonclient – The General Anti-contact Rule). The result of the Commission’s evaluation is proposed rule 4.2 (Communication With a Represented Person). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 4.2 carries forward the substance of current rule 2-100, the “no contact” rule, and prohibits a lawyer who represents a client in a matter from communicating, either directly or indirectly, about the subject matter of the representation with a person represented by a lawyer in the same matter. The Rule is intended to protect the represented person against (i) possible overreaching by the prohibited lawyer, (ii) interference by the prohibited lawyer with the client-lawyer relationship, and (iii) the uncounseled disclosure of privileged or other confidential information.

In addition to containing the basic prohibition in paragraph (a), the proposed Rule would carry forward, largely intact, the other black letter provisions in current rule 2-100(B) and (C) as paragraphs (b) and (c). There are also two new paragraphs: paragraph (d), which imposes a duty on a lawyer to treat with fairness a represented person with whom communications are permitted under the Rule (e.g. a public official), and paragraph (e), which includes two definitions intended to avoid ambiguity in the application of the Rule.

Proposed Rule 4.2, like current rule 2-100, is substantially more detailed than the corresponding Model Rule, which is a single blackletter sentence supplemented by nine Comments, many of which expand or provide express exceptions to the rule. The Commission believes that a rule similar to current rule 2-100 is preferred to the Model Rule because it more closely adheres to the Charter’s principle that the Rule function as a minimal disciplinary standard. Further, the detailed proposed rule enhances compliance and facilitates enforcement, as well as promotes protection for the public and respect for the legal profession and administration of justice.

Paragraph (a), the basic prohibition, presents a key issue: whether to substitute the term “person” for “party” in current rule 2-100. This substitution has been made by every jurisdiction, either by making the substitution in the black letter provision of its Rule 4.2 counterpart or by stating in a comment that “party” applies to any person involved in a matter who is represented by a lawyer. Changing “party” to “person” will also resolve the limitations inherent in using the term “party” that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule’s aforementioned objectives to protect any person who has chosen to be represented by a lawyer in a matter against

possible overreaching by lawyers who are employed in the matter, interference by those lawyers with the lawyer-client relationship, or the uncounseled disclosure of confidential information, there is no principled reason to limit the protection of the rule to those persons who are parties. Nevertheless, public comment received by the first Commission and this Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of “person” for “party” will inhibit their ability to investigate. However, the experience in other jurisdictions has not borne that out. In any event, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. In light of these contentions, this change in language creates a point of controversy in considering the Rule. See also discussion of paragraph (c), below.

Paragraph (b), which carries forward the substance of current rule 2-100(B), is intended to clarify the operation of the proposed rule when the represented “person” is an organization, including a governmental organization.<sup>1</sup> The only substantive change to that paragraph is to no longer view as a “represented person” a constituent of the organization “whose statement may constitute an admission on the part of the organization.” That clause was deleted because it is ambiguous and applies even if the statement “may” constitute an admission against interest, and the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity. Most states do not include this as the ABA deleted a similar clause as a part of its Ethics 2000 Commission’s comprehensive revisions of the Model Rules. In any event, deleting the clause should not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that could constitute an admission would have to originate from a constituent who is already off-limits under subparagraph (b)(1) (which encompasses any officer, director, partner, or managing agent).

Paragraph (c) carries forward most of current Rule 2-100(C), which explicitly recognizes several exceptions to application of the rule, including communications with public officials or public entities and communications otherwise authorized by law. Paragraph (c) does not carry forward current paragraph (C)(2), which excepts communications initiated by a represented person seeking advice from an independent lawyer. Current rule 2-100(C)(2) is superfluous because an independent lawyer could not be covered by the rule, which applies only to communications *by a lawyer in the course of representing a client in the matter*, which would make the lawyer making those communications not independent.

A key issue, however, is the addition of the phrase, “or a court order.” This is intended to address concerns expressed by lawyers in the criminal justice system to the prior Commission that the substitution of “person” would interfere with the ability to conduct investigations. Including this phrase removes any ambiguity that might otherwise suggest that, for example, a prosecutor could not seek a court order to communicate with a represented witness in conducting a criminal investigation. Most states that have a version of Model Rule 4.2 include the option of seeking a court order. When considered in light of the substitution of “person” for “party,” the phrase represents an appropriate balancing between protecting lawyer-client relationships of any person involved in a matter and permitting lawyers, whether on behalf of private or governmental interests, to effectively represent their clients by conducting investigations into the matters for which they had been retained. During the first Commission’s process, the provision generated substantial input from interested

---

<sup>1</sup> Proposed Rule 1.0.1(g-1) defines “person” to mean “a natural person or an organization.”

stakeholders both in formal public comment and in appearances at Commission meetings and public hearings. This Commission also received communications from interested stakeholders regarding this change. To address the expressed concerns, this Commission has also recommended including proposed Comment [8].

Paragraph (d) is new. It requires that when lawyers deal with a represented person as permitted by the rule, i.e., pursuant to paragraph (c)(1), the lawyer must comply with the requirements of Rule 4.3, which in effect requires lawyers to treat unrepresented persons fairly and is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be charged for engaging in overreaching conduct, e.g., Bus. & Prof. Code §§ 6068(a) and 6106, their application to situations governed by proposed Rule 4.2 is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.

Paragraph (e) includes two definitions, one for “managing agent” and another for “public official.” They are intended to clarify the application of the rule in an organizational context and when a lawyer is attempting to exercise the right to petition the government, respectively.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission’s general proposal to use the Model Rule numbering system and the substitution of the term “lawyer” for “member.”

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

Of particular note is Comment [8] which, as noted above, has been added to clarify that the Rule is not intended to preclude communications with represented persons in the course of legitimate investigations as authorized by law. A similar comment was included in the first Commission’s proposed Rule to address the concerns of lawyers on both sides in the criminal justice system.<sup>2</sup>

---

<sup>2</sup> One member of the Commission submitted a written dissent stating support for the Commission’s significant proposed change from “party” to “person” but objecting to some of the proposed Comments, including proposed Comment [2A] concerning the “actual knowledge” standard. The full text of the dissent is attached to this summary.

## **Commission Member Dissent to the Recommended Adoption of Proposed Rule 4.2, Submitted by Carol M. Langford**

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

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

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

It is true that the case law says actual knowledge is needed. And it is true that it also says that knowledge may be inferred from the circumstances. However by saying "This Rule applies where the lawyer has actual knowledge..(..)" you are twisting the meaning in a way that implies that only actual knowledge is sufficient for a prosecution of the Rule. You are also inserting a mens rea element that is not applicable in the State Bar court. As Mr. Blumenthal explained, in the State Bar all a respondent has to do is to, for example, take money from the trust account and that will alone comprise the willfulness element needed to commit a State Bar offense. The State Bar does not look to actual knowledge and/or a Respondent's state of mind unless the discipline phase of the trial is over and the second phase of the trial - mitigation - is being heard.

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

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

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

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

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

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

Please consider these comments. I do know that others outside of the Commission will be closely watching this Rule and we might as well get it right - right now.

Very truly yours,  
Carol M. Langford

**Rule 2-100 [4.2] Communication With a Represented ~~Party~~ Person**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person\* the ~~member~~lawyer knows\* to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.
- (b) ~~For purposes of this rule, a "party" includes~~In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
- (1) ~~An~~A current officer, director, partner,\* or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or
  - (2) ~~An association member or an employee of an association, corporation, or partnership~~A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization.~~
- (c) This Rule shall not prohibit:
- (1) communications with a public ~~officer~~official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person\* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:
- (1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

## Comment

[1] This Rule applies even though the represented person\* initiates or consents to the communication. A lawyer must immediately terminate communication with a person\* if, after commencing communication, the lawyer learns that the person\* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,\* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] This Rule applies where the lawyer has actual knowledge that the person\* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)

[3] The prohibition against communicating “indirectly” with a person\* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person\* through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5]~~(2)~~ This Rule does not prohibit communications initiated by a party represented person\* seeking advice or representation from an independent lawyer of the party’s person’s choice; or.

~~(3) Communications otherwise authorized by law.~~

## **Discussion**

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal~~

~~employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~

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

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

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

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

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)~~

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental

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

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that **would otherwise be subject to this Rule.** Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

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

### Commission Drafting Team Information

**Lead Drafter:** Mark Tuft

**Co-Drafters:** George Cardona, Danny Chou, Raul Martinez, Winston Peters, Dean Zipser

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

**Action Summary Approval Date:** August 14, 2015

### I. CURRENT CALIFORNIA RULE

#### Rule 2-100 Communication With a Represented Party

- (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
- (B) For purposes of this rule, a “party” includes:
- (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
  - (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.
- (C) This rule shall not prohibit:
- (1) Communications with a public officer, board, committee, or body; or
  - (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or
  - (3) Communications otherwise authorized by law.

#### Discussion

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

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

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

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

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

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

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

### II. COMMISSION'S RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

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

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

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

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person\* the lawyer knows\* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
  - (1) A current officer, director, partner,\* or managing agent of the organization; or

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

- (2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.
- (c) This Rule shall not prohibit:
  - (1) communications with a public official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person\* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:
  - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

### Comment

[1] This Rule applies even though the represented person\* initiates or consents to the communication. A lawyer must immediately terminate communication with a person\* if, after commencing communication, the lawyer learns that the person\* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,\* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] This Rule applies where the lawyer has actual knowledge that the person\* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f))

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

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

not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation.)

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

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

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

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

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

- (a) ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person\* the ~~member~~lawyer knows\* to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.
- (b) ~~For purposes of this rule, a "party" includes~~In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
- (1) ~~An~~A current officer, director, ~~partner,~~\* or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or
  - (2) ~~An association member or an employee of an association, corporation, or partnership~~A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person\* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization.~~
- (c) This Rule shall not prohibit:
- (1) communications with a public ~~officer~~official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person\* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:
- (1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

#### Comment

[1] This Rule applies even though the represented person\* initiates or consents to the communication. A lawyer must immediately terminate communication with a person\* if, after

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

commencing communication, the lawyer learns that the person\* is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person,\* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] This Rule applies where the lawyer has actual knowledge that the person\* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)

[3] The prohibition against communicating “indirectly” with a person\* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person\* through an intermediary such as an agent, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5](2) This Rule does not prohibit communications initiated by a ~~party~~represented person\* seeking advice or representation from an independent lawyer of the ~~party’s~~person’s choice; ~~or.~~

~~(3) Communications otherwise authorized by law.~~

### **Discussion**

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

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit~~

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

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

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

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

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

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

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th

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

[Cir. 2011\) 630 F.3d 917; United States v. Talao \(9th Cir. 2000\) 222 F.3d 1133.](#) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

### V. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 6/4/2015:**

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

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

Expansion of the rule may be appropriate and consistent with the important purposes of the rule.<sup>2</sup> However, broad expansion could cause unintended consequences, such as

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

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

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

providing counsel for a non-party witness the ability to prohibit communications between a party's attorney and the non-party witness. This could inhibit attorneys from contacting witnesses relevant to their cases. This would be true for criminal and civil proceedings. As an alternative to a broad expansion of the rule, the Commission should consider requiring attorneys to provide notice to counsel representing the non-party witness in a related matter and an opportunity for that counsel to discuss the matter with his or her client before the non-party witness is contacted.

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

2. There should be no change to the current exception that permits an attorney to contact a represented public officer, board, committee, or body without first obtaining the permission of the attorney representing the public officer or body. While one could conceive of situations where a limitation might be appropriate, the Rules of Professional Conduct should not infringe on the right of citizens to petition the government.
  3. The rule need not clarify which person in a corporation or other organizational setting is entitled to the protection afforded by the rule. A bright-line rule is likely to be too narrow or overly broad. The appropriate balance will depend on the facts of each case and the specific structure of each organization. Instead of attempting to define the persons in every corporation or organization covered by the rule, it should be left to the courts to develop the defining principles on this issue on a case-by-case basis.
  4. A revision to rule 2-100 governing contact with one who is not represented by counsel is unnecessary. Again, overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act.
- **State Bar Court:** No comment was received from the State Bar Court.

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

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

#### **Massachusetts Rule 4.2 Communication with Person Represented by Counsel**

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

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

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

### Utah Rule 4.2. Communication with Persons Represented by Counsel.

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

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

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

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

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

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

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

(d) Organizations as Represented Persons.

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

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

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

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

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

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

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

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

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

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

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

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

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

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_4\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.authcheckdam.pdf)

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

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

- 46 states have adopted “person” (AL, AR, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MD, MN, MO, MI, MT, NE, NV, NH, ND, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY). Four jurisdictions besides California have retained “party” in their rule (AZ, CT, MI, MS). All four jurisdictions: (i) have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) include a comment providing the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added).
- 40 jurisdictions have adopted a rule that includes “or a court order” (AK, CO, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, MA, ME, MD, MN, MO, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); and 11 jurisdictions do not have “or a court order” (AL, AR, AZ, CA, CT, FL, MI, MS, NY, TX, VA).
- Seven jurisdictions include “organizations” and a definition of what is considered an “organization” (CA, DC, LA, MD, NJ, TX, UT); and 1 state includes “organization” but refers to rule 1.13 for the definition (NM).
- Two jurisdictions expressly prohibit indirect as well as direct violations of the rule.<sup>4</sup>
- Eight jurisdictions have a black letter provision similar to proposed comment [5], which addresses the application of the rule in the context of a limited scope representation.<sup>5</sup>

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

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

1. General: There was consensus among Commission members to recommend substituting “person” for “party” in the Rule.
  - Pros: First, this change accords with federal and state law interpreting existing Rule 2-100 as applying outside the litigation context to “persons” represented in connection

<sup>4</sup> The two jurisdictions are New York and Texas. See, e.g., New York Rule 4.2(a), which provides:

(a) In representing a client, a lawyer shall not communicate *or cause another to communicate* about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Emphasis added.)

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

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

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

with a particular matter, even if the “persons” are not “parties” in the matter. Second, this change also accords with ABA Model Rule 4.2 and every other jurisdiction in the country. Only four jurisdictions have retained “party” in the black letter of their rule (Arizona, Connecticut, Michigan, and Mississippi), and: (i) all have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) all include a comment that provides the rule applies to a represented person: “This Rule also covers *any person*, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added). Third, changing “party” to “person” will also resolve the limitations inherent in “party” that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule’s objectives to protect any “person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship and the uncounseled disclosure of information relating to the representation,” (See Model Rule 4.2, cmt. [1]), there is no reason to limit the protection of the rule to those persons who are parties.<sup>6</sup> Finally, notwithstanding public comment received that opposed the change in the belief it will interfere with criminal investigations, the experience in other jurisdictions has not borne that out. (See also discussion of comment [8] in paragraph 25, below.)

- Cons: Public comment received by the first Commission and this Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of “person” for “party” will inhibit their ability to investigate. However,

---

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

We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez, supra*, 4 F.3d 1455, 1458-1459: “The rule against communicating with a represented party without the consent of that party’s counsel shields a party’s substantive interests against encroachment by opposing counsel . . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition.” Our Supreme Court echoed this same assessment in *Mitton v. State Bar, supra*, 71 Cal.2d 524, 534: “[The no contact rule] shields the opposing party not only from an attorney’s approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party’s counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.”

(Footnotes omitted.)

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

proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. (See discussion of comment [8] in paragraph 25, below.) Moreover, addition of the phrase “or a court order” to (c)(2) in accordance with the ABA Model Rule further ensures that this rule will not unduly limit the ability of lawyers in the criminal justice system to engage in legitimate investigative activities. (See discussion of (c)(2) in paragraph 13, below.)

2. In proposed paragraph (a), substitute “In” for “While”.
  - Pros: Although not a substantive change, it clarifies precisely which communications are governed by the rule and removes unnecessary differences between California and every jurisdiction except one (Georgia).<sup>7</sup>
  - Cons: None identified.
3. In proposed paragraph (a), retain the phrase “directly or indirectly”.
  - Pros: This language prevents a lawyer from attempting to circumvent the rule by directing an agent, e.g., private investigator, to communicate with the represented person. Not carrying forward this language may create a risk that a court or lawyers might conclude that indirect communications are no longer prohibited.
  - Cons: Retaining this language would perpetuate an existing difference between the language of the California rule and the rule adopted in a preponderance of other jurisdictions.
4. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction’s rule, thus permitting them more easily to determine whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
5. Substituting the term “lawyer” for “member”.
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules

---

<sup>7</sup> Georgia Rule 4.2 provides in relevant part: “(a) A lawyer who is representing a client in a matter shall not communicate . . . .”

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

- apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
6. Retain concept in current rule 2-100(B), which identifies which constituents in an organization are covered by the rule and therefore protected under the Rule’s prohibition against communications with represented persons.
- Pros: Proposed paragraph (b) is necessary to clarify the complicated and recurring issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. It provides important guidance that will foster compliance with the Rule. The Commission disagrees with OCTC that drawing such distinctions is not necessary. (See OCTC comment in paragraph V.3, above.) There is no evidence that current rule 2-100(B) has not provided useful guidance on the application of the rule in the organizational context. Moreover, the definition of the constituents covered by the rule remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
  - Cons: Attempting to clarify this point risks being too narrow or overly broad. (See 6/4/2015 OCTC Memo, #3, at paragraph V.3, above.)
7. Change the introductory clause to proposed paragraph (b) from its current form of being a defined term to a statement of the kinds of entities to which paragraph (b)’s prohibition applies. (See also paragraph 8, below.)
- Pros: The proposed new structure more accurately demarcates the kinds of entities to which paragraph (b)’s prohibitions apply while also making clearer that its prohibitions apply based on organizational, as opposed to individual, representation. In particular, unlike the current structure, which could be interpreted as suggesting that its prohibition was based on deemed individual “representation,” the proposed structure more accurately describes paragraph (b)’s actual effect, which is to prohibit and prevent communications with the persons identified in subparagraphs (b)(1) and (b)(2) based on the organization’s representation; in many instances, this prohibition may apply even before the identified constituents have had an opportunity to consult with an organization lawyer, and at times when they may not even know that the organization is represented in connection with the matter.
  - Cons: Notwithstanding the intent of this change, there may be a risk that a court interpreting the new language might view the new structure as an invitation to abandon existing case law concerning the protection afforded by the rule to represented organizations and their constituents.
8. In the introductory clause to paragraph (b)(1) and (b)(2) add the phrase “or other private or governmental organization” after “corporation, partnership, association”.
- Pros: Recognizes that there may be organizations other than corporations, partnerships, or associations to which the rule applies. In addition, explicitly states

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

that the rule applies to governmental organizations, not just private organizations. (See also discussion of (c)(1) in paragraph 11, below.)

- Cons: The explicit statement that the rule also applies to governmental organizations might cause some confusion given the provision in both the current rule (paragraph (C)(1)) and proposed Rule (paragraph (c)(1)) stating that communications with a public official are not prohibited in recognition of the constitutional right to petition government.
9. In proposed paragraph (b)(1), insert “current” to modify managerial employees of an organization.
- Pros: Clarifies that the rule’s prohibitions based on organizational representation apply only to currently-employed constituents. Current rule 2-100 states the same limitation in Discussion ¶. 6. This limitation on the rule’s scope should be in the black letter. Although there is case law so holding, including the concept in the black letter should remove ambiguity and facilitate compliance without requiring further clarification by a court. In particular, the clarification helps assure that this application of the current rule will not be disturbed by the recommended change from party to person.
  - Cons: This clarification in the black letter might be unnecessary as case law already addresses this point (see, e.g., *Nalian Truck Lines v. Nakano Warehouse and Transportation* (1992) 6 Cal.App.4th 1256.) While this clarification may have been important guidance when the rule was revised in 1989, the application of the rule only to currently-employed constituents now appears to be a well-settled point.
10. In proposed paragraph (b)(2), retain the first clause in current rule 2-100(B)(2) (when act or omission “may be binding upon or imputed to the organization”), but delete the second clause in current rule 2-100(B)(2) (“the person’s statement may constitute an admission on the part of the organization.”)
- Pros: (1) the second clause was dropped from the Model Rule and is not the law in most states that have adopted rule 4.2, (2) the provision is ambiguous and applies even if the statement “may” constitute an admission against interest; (3) the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity; (4) deleting the clause generally will not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that might constitute an admission would have to originate from a constituent who is already off-limits under paragraph (b)(1) (which encompasses any officer, director, partner, or managing agent); only in rare situations would a constituent not already covered under paragraph (b)(1) be able to make an admission that would be binding on the organization. The aforementioned burdens placed on the communicating lawyer by the admissions clause and its potential for interfering with pre-filing investigations outweigh the benefits that might be realized in prohibiting communications that would only rarely result in an admission.
  - Cons: “Statements” are different from acts and omissions. Constituents of an organization whose statements can result in liability being imposed on the

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

organization should therefore be protected by the Rule. The deletion is a change to existing law.

11. Retain as proposed paragraph (c)(1) current rule 2-100(C)(1), which excepts from the rule communications with public officers, boards, committees, or bodies, but substitute “public official” (defined in (f)(2)) for “public officer”.
  - Pros: The exception in current rule 2-100(C)(1) reflects recognition of the important constitutional right to petition the government and is in accord with public comment received from the California Access To Justice Commission. The change from "public officer" to "public official" (as defined in (f)(2)) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its constituents. . (See also discussion re comment [7] in paragraph 24, below.)
  - Cons: None identified.
12. Delete current rule 2-100(C)(2) (represented party seeking second opinion from independent lawyer) but include it as a clarifying comment.
  - Pros: Current (C)(2) is superfluous because an independent lawyer could not be covered by this rule, which applies only to communications *by a lawyer in the course of representing a client*, which would make the lawyer making those communications not independent. In any event, it is properly placed in a paragraph that identifies exception to the rule because the rule does not apply to the described situation in the first instance. Instead, the current rule 2-100(C)(2) concept has been retained as a clarifying comment to assure lawyers that such communications are not prohibited under the Rule. (See Comment [5].)
  - Cons: Notwithstanding the intent of this change, a court might interpret the movement of this concept from the black letter to a comment as a signal that the point is rendered less than authoritative in the context of the proposed rule.
13. Retain as proposed paragraph (c)(2) the concept in current rule 2-100(C)(3) (exception for communications otherwise authorized by law) and include a further exception for communications authorized by a court order.
  - Pros: Adding the phrase “or a court order” accords with the ABA Model Rule and the rule in 40 jurisdictions. (See Section VI.) Together with proposed comment [8], which is derived from current rule 2-100, Discussion ¶ 1, the addition of the phrase, “or a court order,” is intended to address concerns over the substitution of “person” that were expressed by lawyers in the criminal justice system that the substitution would interfere with their ability to conduct investigations. In 2002, the ABA encountered similar opposition to its proposed amendments to Model Rule 4.2 and responded:

Although a communication with a represented person pursuant to a court order will ordinarily fall within the “authorized by law” exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are

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

described generally in Comment [4] (renumbered Comment [6]). After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.<sup>8</sup>

The Commission believes the ABA responded appropriately to the concerns of law enforcement by amending Model Rule 4.2 to include a reference to “a court order.” (See also discussion of the substitution of “person” for “party” in paragraph 1, above, and of comment [8] in paragraph 25, below.)

- **Cons:** The option of seeking a court order to authorize a communication with a represented person appears to be untested in California in relation to the longstanding legal ethics standard set by current rule 2-100 and its predecessors. Even if such an option is borne out as being technically available as a procedural matter, it might nevertheless be illusory as a practical matter for lawyers who have limitations on time and resources during the investigative phase of a case.

14. Add proposed paragraph (d), which provides that a lawyer must comply with the requirements of proposed rule 4.3 (Communicating with an Unrepresented Person) when the lawyer engages in a communication with a represented person that is not prohibited under the Rule.

- **Pros:** This provision aligns with the objectives of rule 4.2 (see discussion of the substitution of “person” for “party” in paragraph 1 & note 2, above) and clarifies that even when a communication with a *represented* person is not prohibited (whether because it is made with the consent of the lawyer or because it falls within one of the exceptions in paragraph (c)), the lawyer still must not engage in conduct prohibited by proposed rule 4.3,<sup>9</sup> which is intended to prevent overreaching by

<sup>8</sup> See Reporter’s Explanation of Changes, Rule 4.2, available at: [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule42rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule42rem.html) [Last visited on June 6, 2015]

<sup>9</sup> If adopted, proposed Rule 4.3 would provide:

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

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

lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be *charged* for engaging in overreaching conduct, their application to situations governed by this rule is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.

- Cons: Adding this concept might be unnecessary given that OCTC has commented that there are charging bases (i.e., Business and Professions Code sections 6068(a) and 6106) other than the ex parte communication rubric for addressing this type of misconduct. (See OCTC Jayne Kim comment above in section V.1.)

15. In proposed paragraph (e)(1), include definition of “Managing Agent”.

- Pros: Defining managing agent provides an important clarification of when the proposed Rule would apply in organizational settings. Moreover, the definition remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
- Cons: Codifying a definition may render the rule inflexible and inhibit appropriate application to the various factual settings that are confronted by courts, including the State Bar Court.

16. In proposed paragraph (e)(2), include definition of “Public Official”.

- Pros: See discussion of change from “public officer” to “public official” in paragraph 11, above, and of comment [7] in paragraph 24, below.
- Cons: None identified.

### COMMENTS

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

17. Add proposed comment [1], which states that the rule applies even though the represented person initiates or consents to the communication.

- Pros: The comment provides an important clarification that it is not just communications that a lawyer might initiate, but rather *any* communication with a represented person where the person’s lawyer has not consented, even those that the person initiates or consents to.

---

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

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

- Cons: None identified.

18. As proposed comment [2], retain the substance of current rule 2-100, Discussion ¶ 4.

- Pros: The comment importantly clarifies that “matter,” etc., is not limited to litigation contexts. The Commission has added a second sentence that further clarifies the point.
- Cons: If the word “person” is substituted for “party,” there is no longer a need for a clarifying comment re the scope of “matter,” etc.

19. Add proposed comment [2A] as a placeholder.

- Pros: This comment was designated as a placeholder because it is contingent on the Commission’s potential action to recommend a general terminology rule that would define certain key words or phrases used throughout the rules. Unless a general terminology rule/section is adopted that includes a definition of “know,” the comment would be necessary to clarify that the knowledge required under the rule is actual knowledge. Although the Commission has recommended the adoption of a definition of “know” in proposed Rule 1.0.1(f), it has retained this placeholder pending adoption of the term by the Board of Trustees.

Regarding the requirement that the lawyer have actual knowledge that the person is represented, see, e.g., *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403 [58 Cal.Rptr.2d 178]. This is the current state of the law, which the Commission believes strikes the appropriate balance between the need to protect represented persons and the need to permit reasonable investigation of claims. As the court in *Jorgensen* explained:

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

*Id.*

- Cons: None identified.

20. As proposed comment [3], retain the substance of current rule 2-100, Discussion ¶ 2.

- Pros: Current Discussion ¶ 2 identifies kinds of communications that do not violate the policies underlying the rule and therefore are permitted. The Commission has shortened the current Discussion paragraph and added language from Model Rule 4.2, cmt. [4]. This language clarifies the extent to which a lawyer may advise a client who engages in a communication with a represented opponent without the lawyer violating the prohibition on “indirectly” communicating with a represented person.

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

- Cons: None identified.
21. Add proposed comment [4], which clarifies that the rule prohibits only those communications that relate to the subject of the representation, and also clarifies that when a person is represented on a limited scope basis, only those communications related to that person's representation are prohibited.
- Pros: The Commission considered comment [4] necessary to address the concerns of access to justice stakeholders that an indiscriminately applied prohibition on *ex parte* communication could function to denigrate and discourage limited scope representation.
  - Cons: The topics addressed in this comment might be better suited to an ethics opinion as the application of the rule in these settings would be dependent upon the facts.
22. As proposed comment [5], retain the concept in current rule 2-100(C)(2), with the addition of the phrase, "of the person's choice."
- Pros: See discussion concerning rule 2-100(C)(2) in paragraph.12, above. The addition of the phrase "of the person's choice" is a clarifying change.
  - Cons: None identified.
23. Add proposed comment [6], which clarifies that when an organizational constituent is independently represented, the consent of the constituent's lawyer alone will permit communications with the constituent, and consent from the organization's lawyer need not also be obtained.
- Pros: Proposed comment [6] clarifies the term, "consent of the other lawyer" in paragraph (a), when applied to communications with constituents of a represented organization.
  - Cons: None identified.
24. Add proposed comment [7], which clarifies the scope of the exception for communications with public officials, boards, committees, or bodies..
- Pros: See discussion of the change from "public officer" to "public official" in paragraph 11, above. As noted, paragraph (c)(1) of the rule reflects recognition of the constitutional right to petition the government. Comment [7], however, clarifies that not every constituent of a government organization is subject to that paragraph's exception and that those persons falling outside the exception must be provided with the same protections afforded private organization constituents under paragraph (b)(2).
  - Cons: None identified.
25. Include proposed comment [8], which is derived from current rule 2-100 Discussion ¶ 1, concerning the scope of the paragraph (c)(2) exception for communications authorized by law or a court order.
- Pros: This comment clarifies the application of the "authorized by law" exception, including in particular the recognized application of the exception to legitimate government investigative activities. The comment is important to provide reassurance that the change from "party" to "person" is not intended to change application of the exception. In this regard, the last sentence of the comment has

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

been added to assure lawyers in the criminal justice system concerned with the change from “party” to “person” that the rule is not intended to prohibit current legitimate investigative practices. See discussion of the substitution of “person” for “party” in paragraph 1, above.

- Cons: The last sentence of the comment is unnecessary and may raise problems depending upon how it is interpreted. The concerns raised by those practicing in the criminal justice system have not been borne out. There is no legal authority or empirical evidence that criminal defendants have been deprived of due process or the right to a fair trial in the 20 years since the Model Rule 4.2 was amended to substitute “person” for “party.” The purpose of the change is to clarify that represented persons in the matter that is the subject of the communication will receive the same protection whether they are considered parties now or could be named later or are not identified as parties in a particular case or legal matter.

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

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

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

1. Substitution of “person” for “party”. (See VII.A.1.) Although rule 2-100, Discussion ¶ 1<sup>10</sup> and case law<sup>11</sup> suggest that substituting “person” for “party” might be a non-substantive change, the better view, in light of *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, which held that the rule’s protections were limited to “parties” in a matter, is that this

<sup>10</sup> Discussion ¶ 1.1 provides: “Rule 2-100 is intended to control communications between a member and *persons* the member knows to be represented by counsel unless a statutory scheme or case law will override the rule.” (Emphasis added.)

<sup>11</sup> See *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1167 (although rule 2-100 applies to a *person* represented by counsel, the lawyer had not violated the rule because even assuming the *person* was represented by counsel, the lawyer had no knowledge of the representation.)

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

is a substantive change.

2. Substitution of “public official” for “public officer”. (See VII.A.11.) Although there is support for the position that this is a non-substantive clarification of which government employees are excepted from the protections of the rule under paragraph (c)(1), the first Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, considering the substitution as working a substantive change. Consequently, this change is listed under substantive changes.
3. Addition of “or a court order” in proposed paragraph (c)(2) [former rule 2-100(C)(3)]. See VII.A.13.
4. Addition of paragraph (d). See VII.A.14.
5. Addition in paragraph (e)(1) of a definition of “managing agent.” Although this is intended as a clarification of a term already existing in the rule, as interpreted by existing case law, it is a substantive change to the extent the definition delimits the scope of the term. See VII.A.15.
6. Addition in paragraph (e)(2) of a definition of “public official.” See VII.A.16 and VII.C.2.

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

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

### E. Alternatives Considered:

None.

## VIII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Dissent submitted by Ms. Langford. See attached.

## IX. COMMISSION RESPONSE TO DISSENT/MINORITY

Proposed Comment [2A], which has been included as a placeholder in the event the Commission does not adopt a general terminology rule defining “knowledge,” (see Section VII.A.19, above), is intended to reflect current case law, which makes clear that the prohibitions imposed by the rule apply only when a lawyer actually knows that the person being contacted is represented. See, e.g., *Koo v. Rubio’s Restaurants, Inc.*, 109 Cal. App. 4th 719, 732 (2003) (“Case law makes clear that Rule 2-100 is only a bar to ex parte contact if the lawyer seeking contact actually *knows* of the representation.”) (emphasis in original); *Truitt v. Superior Court*, 59 Cal. App. 4th 1183, 1188 (1997) (“Rule 2-100 does not provide for constructive knowledge. It

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

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

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

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

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

law” exception, this last sentence simply makes clear that interpretation of the “authorized by law” exception as it applies to criminal defense investigations is left to the courts.

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

**X. COMMISSION RECOMMENDATION FOR BOARD ACTION**

That the Board of Trustees of the State Bar of California adopt Rule 4.2 [2-100] in the form stated above for purposes of public comment authorization as a part of the Commission’s proposed comprehensive revisions to the rules.

**XI. FINAL COMMISSION VOTE/ACTION**

Date of Vote: June 26,2015

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

Vote: 13 (yes) – 0 (no) – 0 (abstain)

Date of Vote: June 26,2015

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

Vote: 12 (yes) – 0 (no) – 0 (abstain)