

May 6, 2010

Ms. Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

<b>Re:</b>	<b>TITLE</b>
<b>RULE</b>	
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

**2010 Board of Directors**

**President**

Patrick L. Hosey

**President-Elect**

Dan F. Link

**Vice-Presidents**

Elizabeth S. Balfour

Thomas M. Buchenau

John H. Gomez

Marvin E. Mizell

Timothy J. Richardson

**Secretary**

Marcella O. McLaughlin

**Treasurer**

Duane S. Horning

**Directors**

Christopher M. Alexander

Tina M. Fryar

Jeffrey A. Joseph

Margo I. Lewis

James E. Lund

Nory R. Pascua

Gita M. Varughese

Jon R. Williams

**Young/New Lawyer  
Representative**

Kristin E. Rizzo

**Immediate Past President**

Jerrilyn T. Malana

**Executive Director**

Ellen Miller-Sharp

**ABA House of Delegates  
Representatives**

William E. Grauer

Monty A. McIntyre

**State Bar Board of Governors  
District Nine Representative**

Wells B. Lyman

**Conference of California  
Bar Associations  
District Nine Representative**

James W. Talley

Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
<b>Rule 4.2</b>	<b>Communication with a Person Represented by Counsel</b>
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President  
San Diego County Bar Association

## MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct  
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3<sup>rd</sup> Batch," Proposed New or Amended Rules of Professional Conduct of the  
State Bar of California

**Subject: Proposed Rule 4.2 – Communications with a Person Represented by  
Counsel  
[Existing CRPC Rule 2-100]**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

\* \* \* \* \*

Comment 1: Disapprove Proposed Rule 4.2 and keep existing rule 2-100

Rationale For Comment 1: The new rule changes an attorney's duty to avoid communicating *ex parte* with a represented "party" to a rule barring *ex parte* communications with a represented "person." The new rule is designed to protect an attorney's relationship with a client who is represented in a matter, but who is not formally a party in the matter. The rule also is designed to keep a lawyer from taking advantage of an unrepresented person outside of the presence of the person's lawyer, who would be able to protect that person from the attorney's wiles.

The Committee claims this is "a clarifying change." It isn't. The recent State Bar Court opinion *In the matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798 makes that clear. The existing rule uses the term "party" deliberately to limit the scope of an attorney's duty to avoid talking to people who may be represented, broadly speaking, "in the matter" (whatever that means) in which he or she represents a client, but who is not a party in the matter, with all of the legal risk that comes with being a party to a lawsuit or criminal proceeding. No authority is cited for the Bar's conclusion that the revision conforms to the "historical interpretation of the rule." The Committee's interpretation ends up restoring an interpretive "history" without a past.

Beyond that, the Committee does not give adequate weight to the countervailing policy considerations for allowing an attorney to talk to party represented in some capacity in a matter (whatever that means) in pursuit of his or her client's interest in the case in which the client is a party and to the tools at the represented "person's" disposal. A lawyer's duty is to his or her client. That duty is first and foremost; it is not first among equal duties to other constituencies, other than the duty as an officer of the court. There may be legitimate reasons, in both the civil and criminal areas, where a lawyer would prefer to talk to a person outside of the presence of the person's attorney. This broadening of an attorney's duty counsels a timidity that is unwarranted and unwise. The tools at the disposal of the represented person? They can just say no . . . or call their own attorney. The power of an attorney to overwhelm these tools of a person savvy enough to have retained a lawyer even though they are not a party may be overstated.

We must remember that the very first sentence of the rules of professional conduct announce that the purpose and function of the rules is "to regulate professional conduct of members of the State Bar *through discipline.*" (RPC 1-100(A), emphasis added.) Nothing more and nothing less. (See *Ibid.*: "Nothing in these rules is intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.") Putting lawyers at risk of discipline where it is, at best, unclear where the ultimate public interest is best served would be unfair.

The comments play too great a role in setting the parameters of the rule and its exception.

This proposed change would expand a lawyer's duties to non-clients, increase the risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court. No evidence is cited that the current rule is broken; that is evidence enough that it needn't be fixed.

Comment 2: Disapprove Proposed Rule 4.2 and keep existing CRPC Rule 2-100 modified to add a new sub-section "(C)(4) Communications with an investigative officer in civil or criminal case".

Rationale for Comment 2: Investigative officers should be included in the scope of both the existing CRPC Rule 2-100 and in ABA Rule 4.2.g. since it is required for the proper functioning of an adversary system.

May 16, 2010

2715 Alcatraz Ave.  
Berkeley, CA 94705

Ms. Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Comments on proposed new or amended rules of Professional Conduct:  
adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

- ~~1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.~~

~~Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel— a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The~~

**Ms. Audrey Hollins**  
**Comments on Draft Rules of Professional Conduct**

~~conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.~~

~~The first question in these situations is, who is the attorney’s client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?~~

~~These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities—for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential “masters,” each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act “on the record”; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.~~

~~While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.~~

- ~~2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.~~

**Ms. Audrey Hollins**  
**Comments on Draft Rules of Professional Conduct**

~~Not all governmental agencies in California are subject to “whistleblower” statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.~~

- ~~3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term “a representation.”~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

- ~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term “proceeding.”~~

~~Under subdivision (a), “[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . .” Official comment [4] states that “[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings.” But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines “proceeding.” (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an “adjudicative proceeding”; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: “A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . .”~~

**Ms. Audrey Hollins**  
**Comments on Draft Rules of Professional Conduct**

~~(Emphasis added.) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

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

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that “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. . . .” Subdivision (c) states that the rule “shall not prohibit: (1) Communications with a public official, board, committee or body[.]” Unlike the existing rule, which does not define “public officer,” the proposed rule then defines “public official” in subdivision (g) as a “public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” Subdivision (b), in turn, identifies a “person” as: “(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]”

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

**Ms. Audrey Hollins**  
**Comments on Draft Rules of Professional Conduct**

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

- ~~6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

**Ms. Audrey Hollins**  
**Comments on Draft Rules of Professional Conduct**

~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

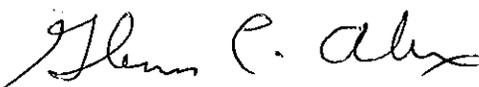
~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

- ~~7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6].  
Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.~~

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,



Glenn C. Alex

Law Offices of  
**John W. Dalton**  
674 Via De La Valle, Suite 212  
Solana Beach, California 92075

Telephone (858) 720-8422

Fax (858) 720-8424

June 15, 2010

**Sent Via Facsimile (415/538-2171)**

Audrey Hollins  
Office of Professional Competence, Planning and Development  
180 Howard Street  
San Francisco, CA 94105

Re: Rule Change Regarding Ex Parte Contact With Percipient Witnesses

Dear Ms. Hollins:

The proposed rule change which would prohibit contacting a "person" represented by counsel, as opposed to the current rule which prohibits contact with a "party" represented by counsel will severely prejudice plaintiffs in employment cases and be tremendously helpful to the defense in such cases. All the defense would have to do is send a letter to plaintiffs counsel indicating that all employees of the company are "represented" for the sole purpose of litigation and plaintiffs will be prohibited from interviewing percipient witnesses. This will almost immediately put an end to meritorious employment discrimination and harassment cases, or at a minimum, have a serious negative impact on such cases. Further, such a rule change has no impact on "attorney misconduct" by an attorney, it would merely allow the defense in employment cases to "hide the ball" from plaintiffs counsel who are conducting good faith investigations into, what are often, very serious allegations of workplace misconduct.

In employment discrimination cases, plaintiffs counsel are on the outside looking in, and in most cases must seek out their evidence because defense attorneys are loathe to provide witness information to plaintiffs. Moreover, many times this work is done "pre-litigation," meaning the plaintiffs counsel will investigate first to insure the case is meritorious. In most instances, employees contacted in such an investigation want to cooperate because the misconduct (many times sexual assaults and batteries) in the workplace is quite despicable and they want to try and put a stop to it. If employees do not want to cooperate with an investigation, all they have to do is say so.

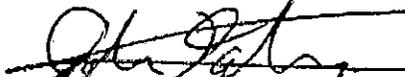
Audrey Hollins  
June 15, 2010  
page 2

---

The proposed rule change places plaintiffs at a huge disadvantage and strongly favors the defense in employment cases. I have spoken to many of my employment lawyer colleagues, as well as many of my clients, and all are strenuously against such a rule change.

Thank you for taking the time to read my correspondence about this extremely important issue.

Sincerely,  
LAW OFFICES OF JOHN W. DALTON

  
John W. Dalton

JWD/sc

LAW OFFICES OF  
**JASON L. OLIVER**  
128 N. FAIR OAKS AVENUE  
SUITE 107  
PASADENA, CALIFORNIA 91103  
Office (626) 797-2777  
Fax (626) 797-2477

---

June 14, 2010

**By Fax: 415-538-2171**

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Comment on Proposed Rule Change Regarding Ex Parte Contact ("Party" v. "Person")

Dear Ms. Hollins:

I am writing to voice my strenuous opposition, as well as that of my clients and fellow plaintiff's employment lawyers, to the proposed rule change which would prohibit contacting a "person" represented by counsel, as opposed to the current rule which prohibits contact with a "party" represented by counsel.

Imagine if, upon receiving a demand letter, all a defense lawyer had to do to prevent a plaintiff's employment lawyer from interviewing company witnesses was to send a letter that all employees and former employees of the defendant employer were represented by him or her.

That could be reality if this proposed rule change to the State Bar rules on ex parte contact passes.

I regularly receive witness lists in discovery from defense lawyers who despite being asked to provide phone numbers and address information for potential employee witnesses in the Judicial Council approved Form Interrogatory, refuse to give the information, stating the person "may be contacted through counsel." I am then forced to go to court and seek an order compelling the information. To this date, I have not been date such information by a court. No plaintiffs lawyer should have to divulge work by telegraphing to defense counsel whose testimony he deems important by requiring the plaintiff's attorney to contact the employee only through defense counsel. (See, e.g., *Nacht & Lewis Architects, Inc. v. Superior Court* (App. 3 Dist. 1996) 47 Cal.App.4th 214 [Identities of and information regarding individuals interviewed by defendants']

**Audrey Hollins**

**Page 2**

**June 14, 2010**

---

counsel concerning incident that was subject of plaintiff's lawsuit were protected from discovery by virtue of qualified work product privilege, as list of potential witnesses interviewed by defendants' counsel would necessarily reflect counsel's evaluation of case by revealing which persons counsel deemed important enough to interview].) The proposed rule change will only encourage such improper conduct, as defense attorneys will likely have the employer add provisions to the handbook or simply send letters to the employee witness pool stating that, unless they opt out, one of the "benefits" of their employment is that they have been provided a lawyer free of charge, who should be notified if they are contacted by any lawyers. Such a result will harm plaintiffs with valid civil rights claims by prohibiting their access to evidence, while allowing unfettered access by employers to those same employees.

Currently, a plaintiff's lawyer may contact "persons" (who are not managing agent/control group types) as long as that person is not a "party" in the case. Under the current system, a defense lawyer or employer defendant may not "convert" an rank and file employee, whether represented or not, into a "party," just by sending a letter or by having the employer include a provision in an employee handbook about representation. Under the new rule, this would be possible. Based on what I see every day, I would say such abuse will is not just possible, but likely, as defendants fight these cases tooth and nail and seek every advantage they can get.

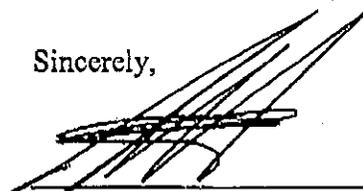
Moreover, passing the proposed rule will likely lead to increased "frivolous lawsuits" which although frivolous when filed, become frivolous after filing and the plaintiff's lawyer gets access to evidence through discovery, since a plaintiff's attorney will likely be forced to bring a lawsuit based only on the testimony of one person, i.e., the client.

In civil rights and employment cases, our pre-filing and post-filing investigations are of paramount importance to vindicating the important rights of our clients. If the proposed rule is passed, defendant employers will be handed a huge advantage over plaintiffs with meritorious cases, since there will likely be wholesale restrictions on who we can speak to in our investigations.

This proposal is awful and I would hope the State Bar would not pass a rule which would cause undue harm to countless civil right victims in California.

Thank you for your kind consideration of this important issue.

Sincerely,

  
\_\_\_\_\_  
JASON L. OLIVER



**THE STATE BAR OF  
CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT  
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

June 15, 2010

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

re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,<sup>1</sup> we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.<sup>2</sup> We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

---

<sup>1</sup> OCTC refers the Commission to its previous comments and recommendations.

<sup>2</sup> We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).<sup>3</sup>

## GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.<sup>4</sup>

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.<sup>5</sup> The 1974 rules were 13 pages; contained 25 rules; and 6 comments.<sup>6</sup> The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

<sup>3</sup> Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

<sup>4</sup> See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

<sup>5</sup> The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

<sup>6</sup> The 1974 rules had 6 footnotes (\*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.<sup>7</sup>

---

<sup>7</sup> There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

**Rule 4.2. Communication with a Person Represented By Counsel.**

1. OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. In *Dale*, the Review Department failed to find an attorney culpable of violating current rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the Dale type of situation. Even the court in Dale appeared to encourage that. While the rule now states person and not party so that the Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a comment should be added to clarify that the *Dale* type of situation is covered by this rule.
2. There are way too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

# Law Offices of the Public Defender

Administration

Doreen B. Boxer  
Public Defender



SAN BERNARDINO COUNTY

June 15, 2010

Office of Professional Competence,  
Planning and Development  
ATTENTION: Ms. Audrey Hollins  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Public Comment About Proposed Rule 4.2

Sent via email ([Audrey.hollins@calbar.ca.gov](mailto:Audrey.hollins@calbar.ca.gov)) and first-class mail

Ladies and Gentlemen:

As the San Bernardino County Public Defender, I submit this letter in opposition to Proposed Rule 4.2 in its present form as it violates criminal defendants' constitutional rights and will cause significant additional costs, case processing delays, and backlog and will further overburden limited judicial, prosecutorial, and defense resources.

**1. Proposed Rule 4.2 Will Impermissibly Infringe on a Criminally Accused's Right to Effective Assistance Counsel**

**a. Defense Counsel's Duty to Investigate**

It is well settled that the criminally accused have a right to the assistance of counsel. (U.S. Const., 6<sup>th</sup> Amend; Cal. Const. Art. I, §15.) These protections not only entitle the criminally accused to the assistance of counsel but to *effective* assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691.) (See also *In re Visciotti* (1996) 14 Cal.4<sup>th</sup> 325, 348; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *Bakker v. Grutman* (4<sup>th</sup> Cir.1991) 942 F.2d 236, 239-242 [counsel in civil cases also has a duty to fully investigate his client's case].) Defense attorneys not only have a duty to make reasonable investigation, they also have a duty to make reasonable decisions that render further investigation based on the facts of their case unnecessary. (*Strickland, supra*, 466 U.S. at p. 691.) Counsel's duty to investigate requires the exercise of "considerable ingenuity" to locate potential witnesses and to secure their cooperation. (ABA Stds. for Crim. Justice (3d ed. 1993) std. 4-4.1, p. 182.) A criminal conviction can be reversed on appeal as a result of an attorney's failure to fully investigate potential witnesses who may possess or know of information relevant to an accused's defense. (*People v. Shaw* (1984) 35 Cal.3d 535; *In re Edward S.* (2009) 173 Cal.App.4<sup>th</sup> 387; *People v. Bess* (1984) 153 Cal.App.3d 1053.)

**b. Proposed Rule 4.2 Restricts Defense Counsel's Ability to Investigate, Will Overburden Scant Judicial Resources, and Cause Unnecessary Costs, Delay, and Backlog**

Proposed Rule 4.2 prohibits direct or indirect communication of any kind with *any* person represented by another lawyer "in the matter" without prior approval of counsel. The proposed changes make the rule far too vague, especially since investigation into a witness' credibility will affect any "matter" in which he is involved, regardless of his involvement or the status of his representation. In addition to delaying prosecutions by increasing barriers to the defense, the proposed rule significantly impacts the ability of defense lawyers to zealously represent their clients because they will not know what to do and, out of fear of being found culpable of ethical misconduct, may not initiate or further pursue investigations they normally would in order to effectively defend their client.

The question for the defense bar becomes, in the case of a criminal complaint, does the proposed rule apply only to *any* person, *e.g.*, victim, witness, etc. who retains counsel to insulate themselves from defense inquiry related to the criminal investigation, or does it apply to situations where counsel is retained on a collateral legal issue tangentially related to the criminal case? Take for example the following scenario:

There is a shooting at a convenience store, and the owner of the store was present and witnessed the shooting. The owner is sued on a premises liability claim relating to the shooting and retains counsel. The defendant in the criminal case wants to interview the owner on an issue related to suspect identification. The defendant is not the least bit interested and has no involvement in the premises liability claim. May defendant interview the owner?

Neither the proposed rule nor its numerous official comments answers this question. At the Commission for the Revision of the Rules of Professional Conduct's October 31, 2008, meeting, members of the Commission assured me and other public commenters that the "authorized by law" language in the Rule's (c)(3) paragraph ensures that "investigations not prohibited by current RPC 2-100" would remain permissible under Proposed Rule 4.2 and for that reason denied a request for an express exception, protecting criminal defense investigations. (Minutes of October 31, 2008, Commission meeting, page 5.) Nevertheless, when I posed the above hypothetical, the members were unable to answer whether the proposed rule would prevent the defense attorney from interviewing the convenience store owner without prior approval from his premises liability attorney, thereby illustrating that, without the requested clarifying language, Proposed Rule 4.2 broadens the scope of prohibited attorney investigation without limitation in criminal proceedings and fails to reliably protect the rights of the accused.

Comment 4 seems to indicate in the above scenario the defense could not speak with the owner/witness since it states, "'the subject of the representation,' 'matter,' and 'person' are not limited to a litigation context. This proposed 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." Comment 19 states, "[a]lthough the 'authorized by law' exception in these circumstances may run counter to the broader policy that underlies this proposed rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the Fifth and Sixth Amendments of the U.S. Constitution and parallel provisions of the California Constitution (Cal. Const., Art. I, §15) that are beyond the scope of this Comment." Neither these comments nor the language of the proposed rule clearly protect the rights of the accused. The proposed rule's silence as to the rights of the criminal defendant is aggravated by its specific protection of prosecutorial investigation. Thus, an attorney or a court, seeing a specific exemption for prosecutorial investigation and no equivalent language for defense investigation, will

predictably and understandably read the proposed rule to prohibit the defense, but not the prosecution, from contacting a represented witness without counsel's approval.

Recognizing the inevitable confusion of this proposed rule, Comment 21 then offers, "[a] lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order." This suggestion will bring possibly thousands of otherwise unnecessary proposed orders to the courts, thereby wasting judicial resources, slowing case processing, and increasing case backlog in our already overburdened justice system. Even if it is feasible to seek and obtain orders to conduct investigation, this requirement unconstitutionally inserts judicial oversight into the scope of criminal defense investigation and case preparation. Moreover, if the Commission's intent is to maintain 2-100's scope as it relates to criminal investigations, this confusion, delay, and expense are unnecessary and imprudent.

Similarly, Proposed Rule 4.2 undermines the vitality of the Sixth Amendment right to the effective assistance of counsel since arguably a criminal defendant may be able to more effectively investigate his case if he were to be unrepresented.

Proposed Rule 4.2 in many cases will prevent defense attorneys from providing the level of representation they are obligated to provide and deprive the criminally accused the level of representation to which they are entitled. Consider, for example, a situation where an accused has an alibi that he was at another location when the crime occurred and has an alibi witness who will corroborate his story. If this witness is represented by counsel on an unrelated case that would be used by the defense attorney to attack the witness' credibility on the present matter and the witness knows several other witnesses who would corroborate the accused's alibi, Proposed Rule 4.2 may prohibit counsel from contacting this witness, which would also prevent him from locating and interviewing the other potential witnesses. Such a scenario would effectively deprive the accused of his fundamental right to effective assistance of counsel. This our Federal and State Constitutions do not allow. In an abundance of caution, defense attorneys may find themselves subpoenaing witnesses with whom they were prevented from speaking, increasing the costs to courts and defense, as well as delaying the prosecution of such cases.

At the October 31, 2008, Commission hearing on Proposed Rule 4.2, when confronted with the above convenience store example, members stated the rule was not intended to change a criminal defense attorney's ability to speak with witnesses from the scope that exists presently under Rule 2-100. This statement was not recorded and is not clearly stated in any literature. However, if the Commission's intent was truly to maintain the ability of defense attorneys to effectively investigate on behalf of their clients, Proposed Rule 4.2 does not make that clear and should include an exemption like that granted to the prosecution. The proposed rule, in its present form, impermissibly interferes with the defense function and will cause substantial delays and costs, as well as wrongful convictions.

## **2. Proposed Rule 4.2 Will Deprive the Criminally Accused the Right to Equal Protection of the Law**

### **a. Criminally Accused Persons Are Entitled to Equal Protection Under the Law**

Equal protection under the law means that no person or class of persons shall be denied the same protection of the law enjoyed by another in like circumstances. (*People v. Leng* (1999) 71 Cal.App.4<sup>th</sup> 1, 11.) Those similarly situated shall not be treated differently unless the disparity is justified. (*Ibid.*)

Classifications affecting fundamental rights are subject to strict judicial scrutiny. (*Leng, supra*, at p. 11.) A law that has a discriminatory effect upon a fundamental right will not be given effect unless the state "...establishes the classification bears a close relation to the promotion of a compelling state interest, the

classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible.” (*Ibid.*) All other classifications will satisfy the requirements of equal protection if they bear a rational relationship to a legitimate state interest. (*Ibid.*)

The right to assistance of counsel is a fundamental right guaranteed to the criminally accused under the Sixth Amendment to the Federal Constitution and applicable to the states through the due process clause of the Fourteenth Amendment to the Federal Constitution. (*Gideon v. Wainwright* (1963) 372 U.S. 335.)

#### **b. Proposed Rule 4.2 Violates Equal Protection Guarantees**

The entities similarly situated here are the government and the defendant; both are entitled to due process in a criminal proceeding. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 122 (overruled on other grounds in *Malloy v. Hogan* (1964) 378 U.S. 1); *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092.) California demonstrated its desire to further level the field in criminal proceedings with the passage of Proposition 115 in 1990, which created the reciprocal discovery provisions now found in Penal Code section 1054, et seq. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Proposed Rule 4.2 would provide one side, the government, with a distinct advantage in the investigation of criminal cases than that which is provided the other side, the defense.

The disturbing equal protection problem involving Proposed Rule 4.2 stems not from its original language but from the added language exempting prosecutors. Prosecutors will have an overwhelming advantage prosecuting cases because they can contact any “person” while the defense cannot. In situations where a person represented by counsel is contacted by the prosecution and has information that may be helpful to the accused, the accused is now at the mercy of the prosecution to procure and divulge the information. The problem here is that the prosecution may not know the accused’s defense and, therefore, will not probe a potential witness for information related to the defense. Defense counsel, knowing the accused’s defense, will know what questions to ask and seek the information needed. Another scenario is where a person who has information helpful to the accused will not speak with the prosecution but will speak with the defense. In this scenario, the information helpful to the accused will never get to him because the person who has it will not reveal it to the only party allowed to obtain it, the prosecution.

That prosecutors in other instances are allowed to do things in criminal prosecutions that the defense bar is not does not insulate Proposed Rule 4.2 from scrutiny under the equal protection clause. If this were so, the State could enact statutory provisions with impunity and grant prosecutors one advantage after another in criminal prosecutions simply because there is a law that already allows prosecutors to run a RAP sheet, or grant a confidential informant immunity, etc. This issue here is whether *this* proposed rule violates the equal protection clause; and if not, no other unrelated rule remedies its constitutional defects.

It is true that Proposed Rule 4.2 does not prohibit defense counsel from speaking to any person; it only requires they first request permission from the person’s lawyer before speaking to the person. However, a prima facie showing of an equal protection violation having been established, the burden is on the Commission to establish why Proposed Rule 4.2 is necessary to further a compelling state interest or, at minimum, how it is rationally related to a legitimate state interest; it is not the defense bar’s burden to establish how the proposed rule burdens the defense. Nowhere in the discussion draft does the Commission satisfy either test. Proposed Rule 4.2 violates the equal protection clause.

### 3. *Jorgensen v. Taco Bell* Does Not Solve the Problem

On October 31, 2008, at the Commission's hearing, one member of the panel claimed any concern the defense bar may have regarding the scope of Proposed Rule 4.2 or the prosecutor exemption is alleviated by *Jorgensen v. Taco Bell* (1996) 50 Cal.App.4<sup>th</sup> 1398. This is not so.

In *Jorgenson, supra*, the respondent filed a sexual harassment lawsuit against Taco Bell; respondent was an ex-employee. Seven months prior to filing suit against Taco Bell, a private investigator hired by respondent's attorney interviewed the alleged harasser and two other Taco Bell employees. Taco Bell brought a motion to disqualify respondent's counsel on the grounds he violated Rule 2-100. The claim was those interviewed were represented by Taco Bell corporate counsel; therefore, they were parties represented by counsel, and their interviews were conducted in violation of Rule 2-100. The motion was denied. The denial of the motion was affirmed because the Taco Bell employees were interviewed long before there was a lawsuit. Since there was no lawsuit when the employees were interviewed, the employees were not parties represented by counsel and, therefore, no violation of Rule 2-100 occurred.

As *Jorgenson* relied upon Rule 2-100 (now Proposed Rule 4.2), it only applies to situations where an action has been filed. In the case of a criminal prosecution where the accused has been formally charged, there is always a legal action filed, e.g., complaint, indictment. There will never be a situation where an accused is formally charged where no legal action will be pending. Therefore, *Jorgenson* will never apply to a situation where an accused is formally charged and, therefore, offers no relief from the suffocating effects of Proposed Rule 4.2.

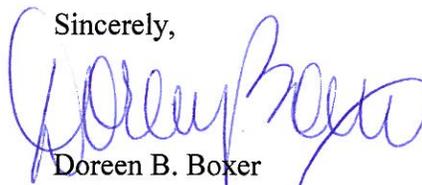
In addition, the *Jorgenson* Court refused to extend 2-100 to situations that were covered by the ABA's Model Rules and ethics opinions on which Proposed Rule 4.2 is based. The Court contrasted the scope of 2-100 against that which is articulated by the ABA's rules and opinions (and is now proposed in Rule 4.2) and arrives at its holding based on the differences between the two, not the similarities. Thus, if the Bar were to change the rule from 2-100 to 4.2, the holding of the *Jorgenson* case would likely be superseded.

### 4. Conclusion

Proposed Rule 4.2 impermissibly infringes on the rights of the criminally accused to effective assistance of counsel by curtailing defense investigation. The proposed exemption for prosecutors does nothing more than exacerbate the problem by giving prosecutors an unfair advantage over the criminally accused in the prosecution of criminal cases. The State has not established how the granting of this advantage to prosecutors is necessary to promote a compelling state interest or even rationally related to a legitimate state interest. Therefore, the proposed exemption violates the equal protection clause.

The solution is simple: Allow the exemption to apply to prosecutors *and* the defense bar. That will level the playing field and the Proposed Rule 4.2 will accurately articulate the Commission's intent.

Sincerely,



Doreen B. Boxer  
San Bernardino County Public Defender