***NOTE:*** Please see page 6 for the full text of this agenda item. Staff has placed an additional copy of the clean version of the rule at the beginning of the materials for this item.

**CalBar – RRC – Rule 2-100**
**Clean Version**

## CLEAN VERSION

Rule 2-100. Communication With a Person Represented By Counsel

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a person 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 "person" includes:

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

(2) A current[2] employee or other agent of a corporation, partnership, association, or other organization:

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

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

(c) if the employee or other agent supervises, directs or oversees the legal representation of the corporation, partnership, association, or other organization.[3]

(C) This rule shall not prohibit:

(1) Communications with public officer, board, committee, or body, except a communication in connection with the negotiation or litigation of a specific claim; or

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

[2/]See Footnote No. 1.

[3/]Comment [7] of ABA Rule 4.2.

(2) Communications initiated by a person seeking advice or representation from a lawyer who is not already representing another person in the matter; or[4]

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

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

**Discussion:**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.[5]

[2] 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.

[3] Rule 2-100 is not intended to prevent the represented 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.

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[4/]Subdivision (C)(2) seeks to clarify the notion that the Rule does not apply to a person seeking independent advise from another lawyer, as long as that lawyer does not already represent another person in the matter. See Restatement Section 101. The issue is whether the allowing contacts with government officials goes to far.

[5/]From Comment [1] to ABA Rule 4.2.

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

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

[6] Subparagraph (C)(2) is intended to permit a member who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion. A member contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 [7.3] and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

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

[8] This Rule applies only to circumstances where the lawyer has actual knowledge that the person contacted is represented by counsel. However, such knowledge may be inferred from the circumstances. At the inception of any communication with a person who potentially may be protected by this Rule, the lawyer should inquire whether the person is represented by counsel, and in the case of an agent or employee of an organization, the lawyer should inquire as to that person''s position and role within the organization to ascertain whether contact with that person is permissible under subdivision (B).[6]

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

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

213 Cal. App. 3d 131, 139; *Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)[7]

[10] Subdivision (B)(2)(a) applies to persons, regardless of their rank within the organization, whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability. Similarly, subdivision (B)(2)(b) applies to employees or agents, regardless of their rank, whose statements may constitute an admission on the part of the organization under the applicable rules of evidence. (*Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)[8]

[11] An attorney for an organization may instruct or induce an employee or agent of the organization not to communicate or cooperate with a lawyer who represents an opposing party in a matter if such instruction is otherwise permitted by law. However, the lawyer for the organization does not necessarily represent all employees of the organization. Further, such instruction does not preclude the lawyer for the opposing party from communicating or attempting to communicate with an employee or agent who is not a "person" under subdivision (B).[9]

[12] If the employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this rule.[10]

[13] The exception under subdivision (C)(1) refers to persons to whom a communication

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

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

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

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

would be constitutionally protected by the First Amendment right to petition the government. When a governmental body is represented in a dispute involving a specific claim, the status of the governmental body is analogous to that of a corporation, partnership, association or other organization. Under this standard, communication with a represented government witness regarding a specific claim normally would not be permitted.[11] However, communication with a government official to discuss general policies that relate to the claim would be permissible.

[14] Subdivisions (C)(1) and (C)(2) apply to Limited Liability Companies, Limited Liability Partnerships or unincorporated associations.

[15] The term "other organization" as used in subparagraph (B) includes governmental entities. The Rule is not intended to prevent communications with a public officer, board or body under subdivision C(1) which are permitted by Constitutional rights to communicate with government entities.

[16] The prohibition against "indirect" communication with a person represented by counsel in subparagraph (A) is intended to address situations where a lawyer seeks to communicate with an unrepresented party through an intermediary such as an agent or investigator. The rule is not intended to preclude a lawyer from assisting or preparing a client to communicate directly with the opposing party. A client is entitled to confidential advice about what to say or not to say to an opposing party or to have his or her lawyer draft or edit proposed communications with an opposing party.

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[11] State Bar Formal Opinion Interim No. 98-0002 addressed the issue of who is a public officer. Ethics Hotline Staff requested clarification of the meaning of "public officer, board, committee, or body."

LEWIS BRISBOIS BISGAARD & SMITH LLP

**M E M O R A N D U M**

**TO:** Rules Revision Commission

**FROM:** Raul L. Martinez

**DATE:** November 1, 2004

**RE:** Rule 2-100

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Attached are the red line and clean revisions to Rule 2-100. The principal changes from the last draft are the additions of Discussion Items [15] and [16].

The meaning of the word "public officer" under subparagraph C(1) remains problematic. Case law has defined "public officer" broadly to include even police officers. Under section Penal Code section 148, which makes it a crime to willfully resist, delay, or obstruct a "public officer" in the discharge of his or her duties, the term "public officer" has been construed broadly to include a peace officer. (*In re Frederick B*. (1987)192 Cal. App. 3d 79, 89-90; *In re Eddie D.* (1991) 235 Cal. App. 3d 417.) Government Code section 82048 defines "public official" to mean "every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government."

In determining who are "county officers," the Supreme Court's construed "public officer" and "public office" in *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1211-1212 as follows:

> "A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. . . . . The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. . ."

COPRAC Interim Opinion NO. 98-0002 (which was never finalized) attempted to explain the meaning of "public officer" as used in Rule 2-100. The opinion concluded that the exception for "public officers" referred only to government employees to whom a constitutionally

protected communication could be made. The Digest of the proposed opinion states:

> A "public officer" under rule 2-100(C)(1) is a person to whom a communication would be constitutionally protected by the First Amendment right to petition the government. Such a person would be one who, for example, has the authority to address, clarify or alter governmental policy; to correct a particular grievance; or to address or grant an exemption from regulation (or if the employee otherwise is obligated to provide information on the subject of the inquiry). Under this standard, an attorney, while representing a client in a matter, may not directly or indirectly communicate with a non-party police officer witness whom the attorney knows to be represented by counsel in that matter about the subject of the representation without the consent of that counsel unless the police officer is a "public officer." If the police officer is a "public officer," then the 2-100(A) contact prohibition does not apply. Ordinarily, a line police officer would not be a "public officer."

While COPRAC made a valiant effort to fix a deficiency in the rule, the problem is not definitional, but conceptual. If the object is to allow constitutionally protected communications with public officials, the solution is not to search for suitable definitions for categories of government officials or bodies, but to provide an exception for permissible First Amendment communications. If the intent is to permit communications protected by the First Amendment, does it matter which government officials or bodies are subject to subparagraph C(1)? If so, why not refer to the targets of those communications in a more general manner--e.g., governmental entities or employees? As long as it is made clear that it is the nature and content of the communication that is permitted, the exact category of recipients becomes less important.

**RED-LINE VERSION**

Rule 2-100. Communication With a Person Represented ~~Party~~By Counsel

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person 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"~~"person" includes:

(1) A current[12] officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current[13] employee or other agent of ~~an association,~~a corporation, partnership, association, or other organization:

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

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

(c) if the employee or other agent ~~supervises, directs or regularly consults with the lawyer and has the power to settle, compromise, or direct legal strategy in the matter.~~ supervises, directs or oversees the legal representation of the corporation, partnership, association, or other organization.[14]

(C) This rule shall not prohibit:

(1) Communications with a ~~employees or agents of a governmental agency~~public officer, board, committee, or ~~body; or~~ body, except a communication in connection with the negotiation or litigation of a specific claim; or

(2) Communications initiated by a ~~party~~person seeking advice or representation from a lawyer who is not already representing another ~~party~~person in the matter; or[15]

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

[13]See Footnote No. 1.

[14]Comment [7] of ABA Rule 4.2.

[15]Subdivision (C)(2) seeks to clarify the notion that the Rule does not apply to a person seeking independent advise from another lawyer, as long as that lawyer does not already represent

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

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

**Discussion:**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.[16]

~~[1]~~[2] 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.

~~[2]~~[3] Rule 2-100 is not intended to prevent the represented **parties** themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a **party** to a legal matter from directly or indirectly communicating on his or her own behalf with a represented **party**. Such a member has independent rights as a **party** which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing **party** may advise that **party** (1) about the risks and benefits of communications with a **lawyer-party**, and (2) not to accept or engage in communications with the **lawyer-party**.

~~[3]~~[4] Rule 2-100 also addresses the situation in which member A is contacted by an opposing ~~party~~person who is represented and, because of dissatisfaction with that ~~party's~~person's counsel, seeks A~~'~~'s independent advice. Since A is employed by another ~~party~~person in the matter, the member cannot give independent advice.

~~[4]~~[5] As used in paragraph (A), ~~"the~~"the subject of the representation,~~" "matter~~" "matter,~~"~~" and ~~"party"~~"person" are not limited to a litigation context.

~~[5]~~[6] Subparagraph (C)(2) is intended to permit a member who is not already representing another ~~party~~person in the matter to communicate with a ~~party~~person seeking to hire new counsel or to

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another person in the matter. See Restatement Section 101. The issue is whether the allowing contacts with government officials goes to far.

[16] From Comment [1] to ABA Rule 4.2.

obtain a second opinion. A member contacted by such a ~~party~~person continues to be bound by other Rules of Professional Conduct. (See, e.g., rules **1-400** **[7.3]** and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

~~[6]~~[7] This Rule does not prohibit communications with respect to subjects that are unrelated to the representation.

~~[7]~~[8] This Rule applies only to circumstances where the lawyer has actual knowledge that the person contacted is represented by counsel. However, such knowledge may be inferred from the circumstances. At the inception of any communication with a person who potentially may be protected by this Rule, the lawyer should inquire whether the person is represented by counsel, and in the case of an agent or employee of an organization, the lawyer should inquire as to that person~~'~~'s position and role within the organization to ascertain whether contact with that person is permissible under subdivision (B).[17]

~~[8]~~[9] "Managing agent~~"~~" as used in subdivision (B)(1) refers to employees or agents invested by the organization with general powers to exercise discretion and judgment in dealing with matters on behalf of the organization. The factors that should be considered in determining whether an employee or agent is a ~~"managing~~"managing agent~~"~~" include: (1) whether the organization invested the person with discretion to exercise judgment, (2) whether the agent or employee could be depended upon to carry out the organization~~'~~'s directions, and (3) whether the person could be expected to identify himself or herself with the interests of the organization. (Wright, et al., 8A Fed. Prac. & Proc. Civ.2d § 2103.) ~~"Managing~~ "Managing agent~~"~~" includes high-ranking organizational agents, as well as middle and lower-level agents and employees, who have actual or implied authority to speak for and bind the organization. (*Triple A Mach. Shop v. State* (1989) 213 Cal. App. 3d 131, 139 ; *Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)[18]

~~[9]~~[10] Subdivision (B)(2)(a) applies to persons, regardless of their rank within the organization, whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability. Similarly, subdivision (B)(2)(b) applies to employees or agents, regardless of their rank, whose statements may constitute an admission on the part of the organization under the applicable rules of evidence. (*Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)[19]

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

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

[19] This portion of the discussion clarifies that persons whose acts or omissions may be imputed to the organization are not limited to high ranking employees or agents. Thus, this is a

~~[10]~~[11] An attorney for an organization may instruct or induce an employee or agent of the organization not to communicate or cooperate with a lawyer who represents an opposing **party** in a matter if such instruction is otherwise permitted by law. However, the lawyer for the organization does not necessarily represent all employees of the organization. Further, such instruction does not preclude the lawyer for the opposing **party** from communicating or attempting to communicate with an employee or agent who is not a ~~"party"~~"person" under subdivision (B).[20]

~~[11]~~[12] If the employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this rule.[21]

[13] The exception under subdivision (C)(1) refers to persons to whom a communication would be constitutionally protected by the First Amendment right to petition the government. When a governmental body is represented in a dispute involving a specific claim, the status of the governmental body is analogous to that of a corporation, partnership, association or other organization. Under this standard, communication with a represented government witness regarding a specific claim normally would not be permitted.[22] However, communication with a government official to discuss general policies that relate to the claim would be permissible.

[14] Subdivisions (C)(1) and (C)(2) apply to Limited Liability Companies, Limited Liability Partnerships or unincorporated associations.

[15] The term "other organization" as used in subparagraph (B) includes governmental entities. The Rule is not intended to prevent communications with a public officer, board or body under subdivision C(1) which are permitted by Constitutional rights to communicate with government entities.

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departure from *Snider*, which held that the category of employees whose statements may constitute an admission on the part of the organization applies only to high ranking executives and spokespersons. (*Snider, supra,* 113 Cal.App.3d at 135.)

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

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

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[16] The prohibition against "indirect" communication with a person represented by counsel in subparagraph (A) is intended to address situations where a lawyer seeks to communicate with an unrepresented party through an intermediary such as an agent or investigator. The rule is not intended to preclude a lawyer from assisting or preparing a client to communicate directly with the opposing party. A client is entitled to confidential advice about what to say or not to say to an opposing party or to have his or her lawyer draft or edit proposed communications with an opposing party.

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(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a person 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 "person" includes:

(1) A current[23] officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current[24] employee or other agent of a corporation, partnership, association, or other organization:

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

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

(c) if the employee or other agent supervises, directs or oversees the legal representation of the corporation, partnership, association, or other organization.[25]

(C) This rule shall not prohibit:

(1) Communications with public officer, board, committee, or body, except a communication in connection with the negotiation or litigation of a specific claim; or

(2) Communications initiated by a person seeking advice or representation from a lawyer who is not already representing another person in the matter; or[26]

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[25/]Comment [7] of ABA Rule 4.2.

[26/]Subdivision (C)(2) seeks to clarify the notion that the Rule does not apply to a person seeking independent advise from another lawyer, as long as that lawyer does not already represent another person in the matter. See Restatement Section 101. The issue is whether the allowing contacts with government officials goes to far.

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

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

**Discussion:**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.[27]

[2] 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.

[3] Rule 2-100 is not intended to prevent the represented 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.

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

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

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have actual or implied authority to speak for and bind the organization. (*Triple A Mach. Shop v. State* (1989) 213 Cal. App. 3d 131, 139; *Cf. Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)[29]

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[12] If the employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this rule.[32]

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

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

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

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

organization. Under this standard, communication with a represented government witness regarding a specific claim normally would not be permitted.[33] However, communication with a government official to discuss general policies that relate to the claim would be permissible.

[14] Subdivisions (C)(1) and (C)(2) apply to Limited Liability Companies, Limited Liability Partnerships or unincorporated associations.

[15] The term "other organization" as used in subparagraph (B) includes governmental entities. The Rule is not intended to prevent communications with a public officer, board or body under subdivision C(1) which are permitted by Constitutional rights to communicate with government entities.

[16] The prohibition against "indirect" communication with a person represented by counsel in subparagraph (A) is intended to address situations where a lawyer seeks to communicate with an unrepresented party through an intermediary such as an agent or investigator. The rule is not intended to preclude a lawyer from assisting or preparing a client to communicate directly with the opposing party. A client is entitled to confidential advice about what to say or not to say to an opposing party or to have his or her lawyer draft or edit proposed communications with an opposing party.

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[33] State Bar Formal Opinion Interim No. 98-0002 addressed the issue of who is a public officer. Ethics Hotline Staff requested clarification of the meaning of "public officer, board, committee, or body."

LEWIS BRISBOIS BISGAARD & SMITH LLP

**M E M O R A N D U M**

**TO:** Rules Revision Commission

**FROM:** Raul L. Martinez

**DATE:** September 23, 2004

**RE:** Rule 2-100 (ABA Rules 4.3 and 4.4)

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At the August 2004 meeting, the Subcommittee was asked to look at Model Rules 4.3 and 4.4 as part of the Commission's consideration of Rule 2-100. We have also considered Rules 3.4(a) and (f). These rules are discussed below.

## 1. RULE 4.3

**Rule 4.3 Dealing With Unrepresented Person**

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

**Recommendation**.

We believe Rule 4.3 goes too far insofar as it completely prohibits giving legal advice to an unrepresented person. For example, an attorney representing the employer in a wrongful termination suit should be able to speak with the, as yet represented, supervisor (e.g. who fired the plaintiff) about issues where there is a common interest with the employer. Rule 4.3 would compel the employee to hire his or her own attorney. Also, the

rule is unclear as to what is prohibited because virtually anything a lawyer says can be construed as legal advice. We instead propose the following language:

> In dealing or communicating, directly or indirectly, with a person who is not represented by counsel on behalf of a client, a lawyer shall not state or imply that the lawyer is disinterested and where the interests of the client are adverse to those of the person shall identify himself or herself as the attorney for the client and explain that the client has interests opposed to those of the unrepresented person.

## 2. RULE 4.4

### Rule 4.4 Respect For Rights Of Third Persons

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

### Recommendation

We do not recommend the language in Rule 4.4 because it is vague and overly broad. Aggressive or thorough questioning of a third-party witness at a deposition could be construed to violate the rule. What attorney hasn't argued that questions at a deposition have "no substantial purpose other than to embarrass, delay, or burden a third person"? The line between legitimate advocacy and abuse is blurred by this rule.

## 3. RULE 3.4

### Rule 3.4 Fairness To Opposing Party And Counsel

> A lawyer shall not:
>
> (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ...
>
> * * *
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information

**Recommendation**

Rule 3.4 impacts Rule 2-100 in that it deals with obstructing access to witnesses, and thus, indirectly deals with the situation where the organization's lawyer improperly bars access to employee-witnesses. We recommend that Rule 3.4 be addressed separately from Rule 2-100 with the idea of cross-referencing Rule 3.4 (if adopted) in the Discussion to Rule 2-100.