

**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<sup>1</sup> officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current<sup>2</sup> 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.<sup>3</sup>

(C) This rule shall not prohibit:

(1) Communications with governmental entities that are protected by the California or U.S. Constitutions, or

(2) Communications with governmental entities concerning the negotiation or litigation of a specific claim or suit if reasonable advance notice is given to the lawyer for the governmental entity prior to the communication.

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<sup>1</sup>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.

<sup>2</sup>See Footnote No. 1.

<sup>3</sup>Comment [7] of ABA Rule 4.2.

(3) Communications initiated by a person seeking advice or representation from a lawyer who is not already representing another person in the matter; or<sup>4</sup>

(4) 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.<sup>5</sup>

[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.

[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

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<sup>4</sup>Subdivision (C)(3) seeks to clarify the notion that the Rule does not apply to a person seeking independent advice from another lawyer, as long as that lawyer does not already represent another person in the matter.

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

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 not related to the representation. Where a lawyer does not know that another lawyer is assisting an unrepresented person, because another lawyer's involvement in the matter is not disclosed to the opposing party or to the opposing attorney, the first lawyer is free to contact the person on all aspects of the matter. If a person is represented by another lawyer on a limited basis, the lawyer may contact the person with respect to matters outside the scope of the limited 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).<sup>6</sup>

[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

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<sup>6</sup>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.

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.)<sup>7</sup>

[10] "Other organization" as used in Subdivisions (B) includes governmental entities, as well as other forms of business organizations, including Limited Liability Companies, Limited Liability Partnerships and unincorporated associations.

[11] 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.)<sup>8</sup>

[12] 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).<sup>9</sup>

[13] If the employee or agent of the organization is represented in the matter by his or her own

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<sup>7</sup>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.

<sup>8</sup>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.)

<sup>9</sup>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.

counsel, the consent by that counsel is sufficient for purposes of this rule.<sup>10</sup>

[14] The exception under subdivision (C)(1) refers to persons with whom a communication would be constitutionally protected by the First Amendment right to petition the government. Subdivision (C)(2) permits communications with governmental employees and representatives concerning the negotiation or litigation of a specific claim or suit where the attorney for the governmental agency or body is given reasonable advance notice prior to the communication. Subdivision (C)(2) recognizes that communications regarding specific claims or litigation are not necessarily protected by the first amendment and that in such cases the status of the governmental body is more analogous to that of a corporation, partnership, association or other private organization. Reasonable notice, rather than consent, is required under subdivision (C)(2). However, consent of the government attorney must still be obtained with respect to communications with employees or representatives who meet the requirements of subdivisions (B)(1) and (B)(2).

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

**REDLINE 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<sup>1</sup> officer, director, partner, or managing agent of a corporation, partnership, association, or other organization;

(2) A current<sup>2</sup> 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.<sup>3</sup>

(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~~

(1) Communications with governmental entities that are protected by the California or U.S. Constitutions, or

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<sup>1/</sup>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.

<sup>2/</sup>See Footnote No. 1.

<sup>3/</sup>Comment [7] of ABA Rule 4.2.

(2) Communications with governmental entities concerning the negotiation or litigation of a specific claim or suit if reasonable advance notice is given to the lawyer for the governmental entity prior to the communication.

~~(2)~~(3) Communications initiated by a person seeking advice or representation from a lawyer who is not already representing another person in the matter; or<sup>4</sup>

~~(3)~~(4) 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.<sup>5</sup>

[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

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<sup>4</sup>Subdivision ~~(C)(2)~~ (C)(3) 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.~~

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

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.

[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.~~

[7] This Rule does not prohibit communications with respect to subjects that are not related to the representation. Where a lawyer does not know that another lawyer is assisting an unrepresented person, because another lawyer's involvement in the matter is not disclosed to the opposing party or to the opposing attorney, the first lawyer is free to contact the person on all aspects of the matter. If a person is represented by another lawyer on a limited basis, the lawyer may contact the person with respect to matters outside the scope of the limited 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).<sup>6</sup>

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<sup>6</sup>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

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

| [10] "Other organization" as used in Subdivisions (B) includes governmental entities, as well as other forms of business organizations, including Limited Liability Companies, Limited Liability Partnerships and unincorporated associations.

| ~~[10]~~ [11] 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.)<sup>8</sup>

| ~~[11]~~ [12] 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

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order to determine the propriety of the communication.

<sup>7</sup>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.

<sup>8</sup>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.)

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).<sup>9</sup>

~~[12]~~ [13] 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.<sup>10</sup>

~~[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.<sup>11</sup> 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.~~

[14] The exception under subdivision (C)(1) refers to persons with whom a communication would be constitutionally protected by the First Amendment right to petition the government. Subdivision (C)(2) permits communications with governmental employees and representatives concerning the negotiation or litigation of a specific claim or suit where the attorney for the governmental agency or body is given reasonable advance notice prior to the communication. Subdivision (C)(2) recognizes that communications regarding specific claims or litigation are not necessarily protected by the first amendment and that in such cases the status of the governmental body is more analogous to that of a corporation, partnership, association or other private organization. Reasonable notice, rather than consent, is required under subdivision (C)(2). However, consent of the government

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<sup>9</sup>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.

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

<sup>11</sup>~~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."~~

attorney must still be obtained with respect to communications with employees or representatives who meet the requirements of subdivisions (B)(1) and (B)(2).

~~[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] [15] 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.



**CASEY GWINN**  
SAN DIEGO CITY ATTORNEY

November 15, 2004

Randall Difuntorum  
Director, Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Dear Mr. Difuntorum:

Our office has had an opportunity to review the Commission for the Revision of the Rules of Professional Conduct's proposed amendments to Rule 2-100, "Communication with a Represented Party," and wish to offer our support for language being proposed for subsection (C)(1). The proposed language would prohibit lawyers from communicating with public officials regarding specific claims without the consent of the official's legal counsel. We are well aware of the problems that arise when members of our City Council are approached by opposing counsel in an attempt to circumvent negotiations in which our office is participating.

Although we support the proposed language, we also recognize that the problem being addressed often exists during the negotiation of City contracts. We therefore offer the following language for your consideration:

(C) This rule shall not prohibit:

(1) Communication with a public officer, board, committee, or body, except a communication in connection with the negotiation of a specific contract or the settlement of a specific claim or lawsuit; or

We appreciate the Commission's consideration of an amendment to Rule 2-100, and offer our support for an amendment that would significantly limit the ability of opposing counsel to contact our public officials without our consent on contract and litigation matters.

Thank you for your consideration of the comments set forth above.

Sincerely yours,

CASEY GWINN

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