

## McCurdy, Lauren

---

**From:** Raul Martinez [MARTINEZ@lbbslaw.com]  
**Sent:** Wednesday, September 30, 2009 10:28 AM  
**To:** Kevin Mohr  
**Cc:** McCurdy, Lauren; Difuntorum, Randall; Mark Tuft; Kevin Mohr G; Anthonie Voogd; Harry Sondheim  
**Subject:** Re: RRC - 2-100 [4.2] -October Agenda Item III.QQ

Thanks, Kevin. I wonder if we should soften the statement that we "work[ed] closely with representatives from these interested parties,"...and "the Commission crafted what it believes is a reasonable compromise between the interests of the government and lawyers representing persons who are petitioning the government.and came up with what we think is a reasonable compromise." The sentence makes it appear as if the stakeholders agree with our Rule. Some of the stakeholders may think we virtually ignored their concerns on the party to person issue, rather than "working closely" with them as we state, and that, in the end, we solicited their input in order to co-opt them by making such a statement. In fairness, I think we carefully considered their views and comments both in writing and via their participation at meetings. But we did not accept their hardened position on the "party" issue.

On the public commenter chart, I too wondered if their was a later version since it seems someone had taken a stab at it.

Raul

>>> On 9/30/2009 at 7:55 AM, in message <[4AC37174.7020009@charter.net](mailto:4AC37174.7020009@charter.net)>, Kevin Mohr <[kemohr@charter.net](mailto:kemohr@charter.net)> wrote:

Greetings Raul & all:

I've attached the following.

**Lauren:** The PDF's are for review by the drafters. If my revisions are OK by them, then please circulate only items 2, 4 and 5, below. Item #6 must be revised before it can be circulated.

1. Dashboard, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the dashboard Raul circulated yesterday. In PDF. Please review. I believe Raul was working off the old dashboard template that does not have a summary or MR Comment Comparison column. I simply copied and pasted what he had written in the dashboard he circulated into the new template, added a summary and marked the comment column, and slightly revised the stakeholder box. Please review to see if you agree. I've also attached a clean version in Word for inclusion in the agenda materials. See #2.
2. Dashboard, Draft 2 (9/30/09)RM-KEM, clean, in Word.
3. Introduction, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the Introduction Raul circulated yesterday. In PDF. I've made some stylistic revisions to Raul's introduction and also added two paragraphs on the public comment/stakeholders who have made the drafting of this Rule particularly

interesting. We've done this in other rules to call BOG's and the S.Ct.'s attention to potentially controversial matters (1.7 comes to mind; we added a paragraph in the Intro on advance waivers and the public comment received). I've also added a placeholder for Variations in other Jurisdictions. I have to update the chart; I'll do that before the October meeting.

4. Introduction, Draft 2 (9/30/09)RM-KEM, clean, in Word.

5. Rule & Comment Comparison Chart, Draft 2 (9/30/09)RM-KEM, clean, in Word. No substantive changes, though I may have some additions later. No time now. I've only made some formatting adjustments. In Word.

6. **Question to all**: Is there an updated public commenter chart that includes reasons for why we rejected certain of the suggestions that were submitted? I've attached a Draft 1.1, which sorts the public comment alphabetically but does not provide explanations for not making the requested changes. In other words, the drafters still have to fill in the last column.

Please let me know if you have any questions. Thanks,

Kevin

Raul Martinez wrote:

Attached are the rule comparison, introduction and dashboard for Rule 4.2. I don't have a good answer for why we did not keep portions of Comment 7 of the ABA rule, especially the exception for former constituents. Comment 7 of the ABA rule says: "Consent of the organization's lawyer is not required for communication with a former constituent."

Our current Rule 2-100 comment says the rule "is intended to apply only to persons employed at the time of the communication." But there is no similar comment in our proposed Rule carving out former constituents. Do we want to recommend inclusion of ABA Comment 7 or parts of it?

Raul

--

Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831  
714-459-1147  
714-738-1000 x1147  
714-525-2786 (FAX)  
[kevin\\_e\\_mohr@compuserve.com](mailto:kevin_e_mohr@compuserve.com)  
[kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu)

## McCurdy, Lauren

---

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Wednesday, September 30, 2009 7:56 AM  
**To:** Raul Martinez  
**Cc:** Mark Tuft; Anthonie Voogd; Kevin Mohr G; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr G; Harry Sondheim  
**Subject:** RRC - 2-100 [4.2] -October Agenda Item III.QQ  
**Attachments:** RRC - 2-100 [4-2] - Dashboard - ADOPT - DFT2 (09-30-09)RM-KEM.doc; RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - DFT1.1 (09-28-09)KEM.doc; RRC - 2-100 [4-2] - Compare - Introduction - DFT2 (09-30-09)RM-KEM - Cf. toDFT1.pdf; RRC - 2-100 [4-2] - Dashboard - ADOPT - DFT2 (09-30-09)RM-KEM - Cf. to DFT1.pdf; RRC - 2-100 [4-2] - Compare - Rule & Comment Explanation - DFT2 (09-30-09)RM-KEM.doc; RRC - 2-100 [4-2] - Compare - Introduction - DFT2 (09-30-09)RM-KEM.doc

Greetings Raul & all:

I've attached the following.

**Lauren:** The PDF's are for review by the drafters. If my revisions are OK by them, then please circulate only items 2, 4 and 5, below. Item #6 must be revised before it can be circulated.

1. Dashboard, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the dashboard Raul circulated yesterday. In PDF. Please review. I believe Raul was working off the old dashboard template that does not have a summary or MR Comment Comparison column. I simply copied and pasted what he had written in the dashboard he circulated into the new template, added a summary and marked the comment column, and slightly revised the stakeholder box. Please review to see if you agree. I've also attached a clean version in Word for inclusion in the agenda materials. See #2.
2. Dashboard, Draft 2 (9/30/09)RM-KEM, clean, in Word.
3. Introduction, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the Introduction Raul circulated yesterday. In PDF. I've made some stylistic revisions to Raul's introduction and also added two paragraphs on the public comment/stakeholders who have made the drafting of this Rule particularly interesting. We've done this in other rules to call BOG's and the S.Ct.'s attention to potentially controversial matters (1.7 comes to mind; we added a paragraph in the Intro on advance waivers and the public comment received). I've also added a placeholder for Variations in other Jurisdictions. I have to update the chart; I'll do that before the October meeting.
4. Introduction, Draft 2 (9/30/09)RM-KEM, clean, in Word.
5. Rule & Comment Comparison Chart, Draft 2 (9/30/09)RM-KEM, clean, in Word. No substantive changes, though I may have some additions later. No time now. I've only made some formatting adjustments. In Word.
6. **Question to all:** Is there an updated public commenter chart that includes reasons for why we rejected certain of the suggestions that were submitted? I've attached a Draft 1.1, which sorts the

public comment alphabetically but does not provide explanations for not making the requested changes. In other words, the drafters still have to fill in the last column.

Please let me know if you have any questions. Thanks,

Kevin

Raul Martinez wrote:

Attached are the rule comparison, introduction and dashboard for Rule 4.2. I don't have a good answer for why we did not keep portions of Comment 7 of the ABA rule, especially the exception for former constituents. Comment 7 of the ABA rule says: "Consent of the organization's lawyer is not required for communication with a former constituent."

Our current Rule 2-100 comment says the rule "is intended to apply only to persons employed at the time of the communication." But there is no similar comment in our proposed Rule carving out former constituents. Do we want to recommend inclusion of ABA Comment 7 or parts of it?

Raul

--

Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831  
714-459-1147  
714-738-1000 x1147  
714-525-2786 (FAX)  
[kevin\\_e\\_mohr@compuserve.com](mailto:kevin_e_mohr@compuserve.com)  
[kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu)

# Proposed Rule 4.2 [2-100]

## “Communication with a Person Represented by Counsel”

(Draft # 17.4, 1/5/09)

**Summary:** Proposed Rule 4.2, which regulates a lawyer’s communications with persons – regardless of whether they are parties or witnesses in a matter, tracks the language of Model Rule 4.2. However, similar to current rule 2-100, it detailed guidance as to how the rule is intended to apply in certain contexts. Further, it should be noted that representatives from the California Attorney General, Public Defenders and District Attorneys have criticized the Commission’s recommendation to follow the Model Rule and nearly every other jurisdiction in expressly applying the Rule to a lawyer’s communications with “persons,” not just “parties,” See Introduction and Public Comment Chart.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

Existing California Law

Rule

RPC 2-100.

Statute

Case law

*Matter of Dale* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

---

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

---

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart:  Yes  No

---

## Stakeholders and Level of Controversy

---

No Known Stakeholders

The Following Stakeholders Are Known:

California Attorney General, California Public Defenders Assoc., CA Attorneys for Criminal Justice, Los Angeles Co. Pub. Defender, Orange Co. Pub. Defender, Nat. Assoc. of Criminal Defense Lawyers, SD Criminal Defense Bar Assoc., and various District Attorney offices in California. See Public Comment Chart for complete list.

Very Controversial – Explanation:

Prosecutors and defense attorneys complain that the change from “party” to “person” will inhibit ability to investigate cases and contact witnesses. Others complain that the prohibition against contacting public officials is too broad.

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 4.2\* – “Communication with a Person Represented by Counsel”

October 2009

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

The basic language of proposed Rule 4.2 tracks the language of Model Rule 4.2. However, the proposed Rule goes beyond its Model Rule counterpart by providing more detailed guidance as to how the Rule is intended to apply in certain contexts. For example, while the Model Rule expresses the general prohibition against communications with persons represented by counsel, it does not attempt to resolve the difficult challenges that the Rule has engendered historically and in practice. Unlike the Model Rule, the proposed Rule defines which individuals within an organization qualify as a “person” when the communication is with an agent or employee of the organizational entity. The Rule also sets forth exceptions for communications with public officials, and government boards and committees, as well as communications from a person involved in the matter who is seeking independent legal advice. In keeping with California’s traditional policy of protecting a client’s confidential information and the attorney-client relationship, the proposed Rule also provides that even where a communication is permitted under the Rule, a lawyer may not seek to obtain privileged or confidential information. Additionally, the Rule provides that a lawyer representing an organizational client may not falsely represent that he or she represents all employees or constituents of the organization.

*Public Comment: “Person”.* During the Commission’s deliberations, as well as the official public comment period, the Commission received a substantial amount of input from representatives of the California Attorney General; Public Defender and District Attorney offices in California, and their representative organizations; and representative organizations of California criminal defense bar concerning the substitution of “person,” which is the term used in Model Rule 4.2 and nearly every other jurisdiction in the country, for “party” in current rule 2-100. The Commission carefully considered the concerns that these commenters expressed at meetings and in writing, but ultimately retained “person” in the Rule. The Commission drafted several comments to accommodate these concerns, but the interested parties

---

\* Proposed Rule 4.2, [Draft 17.4 \(1/5/09\)](#).

ultimately rejected them. Nevertheless, the Commission believes that the comments it drafted are a reasonable compromise between protecting attorney-client relationships of *all* persons involved in a matter and permitting law enforcement agencies and the criminal defense bar to conduct their investigations. See Explanation of Changes for paragraph (c)(3) and Comments [18]-[21].

*Public Comment: “Public Official”*. During the Commission’s deliberations, the Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, concerning the exception for communications with a “public official” stated in paragraph (c)(1). The Commission carefully considered the concerns that these commenters expressed at meetings and in writing. The Commission believes that the rule provision and comment it drafted are a reasonable compromise between the interests of the government and lawyers representing persons who are petitioning the government. See Explanation of Changes for paragraph (c)(1) and Comment [16].

*Variations in Other Jurisdictions*. [KEM: I’ll update the chart on 4.2 adoptions to clarify how many states have adopted “person”.]

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 4.2 Communication With a Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.</p>	<p>(a) In representing a client, a lawyer shall not communicate <u>directly or indirectly</u> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer <del>or is authorized to do so by law or a court order.</del></p>	<p>Paragraph (a) tracks the language of the ABA Rule, but adds the words “directly or indirectly” to make clear that the Rule applies to communications through an intermediary such as an investigator. It also moves the exception for communications authorized by law or court order to paragraph (c).</p>
	<p>(b) <u>For purposes of this Rule, a “person” includes:</u></p> <p>(1) <u>A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or</u></p>	<p>Since the ABA Rule does not define who a “person” is in an organizational or corporate setting, Paragraph (b) describes the types of individuals who fall within the proscription of the Rule. The ABA Rule in contrast makes no attempt to define which constituents of a corporation or other association are subject to the Rule. As result, the proposed changes provide greater guidance to lawyers seeking to communicate with a represented organization.</p>
	<p>(2) <u>A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.</u></p>	<p>Paragraph (b)(2) clarifies that the Rule applies to certain constituents of an organization and provides greater guidance and specificity than the ABA Rule.</p>

\* Proposed Rule 4.2, Draft 17.4 (1/5/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 4.2 Communication With a Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) <u>This Rule shall not prohibit:</u></p> <p>(1) <u>Communications with a public official, board, committee or body; or</u></p>	<p>This paragraph expresses the exception to the Rule that communications with public officers, board committees, etc. are permitted under the First Amendment and the right to petition government. This concept is found in a comment to the ABA Rule. The proposed paragraph places the exception in the black letter of the Rule for greater clarity.</p>
	<p>(2) <u>Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or</u></p>	<p>This subparagraph reflects the exception found in current Rule 2-100.</p>
	<p>(3) <u>Communications <i>authorized by law or a court order.</i></u></p>	<p>This exception is found in the first paragraph of the ABA Rule. The only difference is the location of the exception.</p>
	<p>(d) <u>When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.</u></p>	<p>This paragraph adds an important public protection not found in the ABA rule. It is designed to prevent misleading a person with whom communication is permitted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(e) <u>In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.</u></p>	<p>This paragraph adds protections not found in the ABA Rule against unwarranted intrusions into the attorney-client or other privilege. Thus, even where a communication is permitted by the Rule, the lawyer may not seek to obtain privileged or confidential information that the lawyer is not entitled to receive.</p>
	<p>(f) <u>A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.</u></p>	<p>This paragraph is designed to prevent an attorney for an organization from thwarting legitimate inquiries and investigations by falsely representing that he or she represents all of the employees or other constituents of the organization. As such, it adds more public protection by preventing misuse of the Rule.</p>
	<p>(g) <u>As used in this Rule, "public official" means 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).</u></p>	<p>This paragraph defines the term "public official" as used in paragraph (c)1. The ABA rule recognizes that there is a constitutional right by a lawyer on behalf of a client to communicate with the government. However, this exception is found in a comment to the ABA rule, whereas the proposed Rule herein includes the exception in the black letter for greater clarity, specificity, and guidance.</p>

<p align="center"><u>ABA Model Rule</u>  <b>Rule 4.2 Communication With Person  Represented By Counsel</b>  Comment</p>	<p align="center"><u>Commission's Proposed Rule</u>  <b>Rule 4.2 Communication With a Person  Represented By Counsel</b>  Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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 uncounselled disclosure of information relating to the representation.</p> <p>[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.</p> <p>[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.</p>	<p><b><u>Overview and Purpose</u></b></p> <p>[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 <del>uncounselled</del><u>uncounseled</u> disclosure of information relating to the representation.</p> <p>[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.</p> <p>[3] <del>The</del><u>This</u> Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.</p>	<p>No substantive changes.</p>
	<p>[4] <u>As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel</u></p>	<p>This comment explains use of the terms "person" and "matter" as used in the Rule. The proposed Rule uses the term "person" rather than "party" as in present Rule 2-100 to clarify that the Rule is not limited to litigation contexts and does not refer only to parties to litigation. (Cf. Matter of Dale (Rev.Dept. 2005) 4 Cal. State Bar Ct.Rptr. 798, 804-807.)</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">concerning the matter to which the communication relates.</a></p>	
	<p><a href="#">[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.</a></p>	<p>This comment is necessary to explain the use of the words "directly or indirectly" in Paragraph (a).</p>
<p>[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having</p>	<p><a href="#">[46]</a> This Rule does not prohibit <del>communication</del><a href="#">communications</a> with a represented person, or an employee <del>of</del>, <a href="#">member</a>, agent, <del>or other constituent of such a person represented organization</del>, concerning matters outside the representation. For example, the existence of a controversy, <a href="#">investigation or other matter</a> between <del>at the government agency</del> and a private <del>party</del><a href="#">person</a>, or between two organizations, does not prohibit a lawyer for either from communicating with <a href="#">the other, or with</a> nonlawyer representatives of the other, regarding a separate matter. <del>Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly</del></p>	<p>The ABA version of this comment has been modified to conform to the terminology used in paragraph (b) which defines "person" in an organizational context. The revisions also clarify the language of the ABA comment. The last four sentences of the comment have not been adopted because they do not materially add to an understanding of the Rule, are covered by other comments or are self-evident from a reading of the black letter of the Rule itself. The point stated in the stricken sentence--that parties to a matter may communicate directly with each other-- is already addressed in Comment [6] below.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.2 Communication With Person Represented By Counsel</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 4.2 Communication With a Person Represented By Counsel</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>independent justification or legal authorization for communicating with a represented person is permitted to do so.</p>	<p><del>with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.</del></p>	
<p>[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.</p>	<p align="center"><u><b>Communications Between Represented Persons</b></u></p> <p><del>[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.</del></p>	<p>These concepts are covered in more detail in Comments [16] and [19].</p>
	<p><u>[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A</u></p>	<p>This gist of this comment –that parties may communicate with each other--is found in Comment [4] of the ABA Rule. The second sentence of the proposed comment that a lawyer may advise a client on what to say or not to say to the represented person is designed to address the issue of whether giving a client</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).</a></p>	<p>instructions or directions on what to say to the represented person amounts to an "indirect communication" with the represented person. (Cf. COPRAC Opn. 1993-131.) The proposed comment thus seeks to clarify that a lawyer can advise or edit a client's communications with the represented party without the communication being deemed an indirect communication. The ABA rule, moreover, does not address the concept of indirect communications with represented persons; hence the need for this comment.</p>
	<p><a href="#">[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (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.</a></p>	<p>While parties to a matter may communicate directly with each other, Comment [8] clarifies that the Rule does not preclude a lawyer who is a party from communicating with the represented person. The second sentence provides cautionary advise on how to avoid abuses.</p>
	<p><b><a href="#">Knowledge of Representation and Limited Scope Representation</a></b></p> <p><a href="#">[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1.)</a></p>	<p>The substance of this comment is comparable to the language in Comment [8] of the ABA Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[10]When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.</a></p>	<p>California authorizes limited scope representation in civil cases and family law cases. (CRC Rules 3.35-3.37; 5.70 &amp; 5.71) Limited scope representation occurs where a lawyer may be hired to represent a person only for limited tasks, which renders the person to be contacted, at the same time, both represented and unrepresented. ABA Rule 1.2 recognizes limited scope representation, but neither that Rule nor ABA Rule 4.2 provide guidance on how to handle communications with partially represented persons. The proposed comment attempts to fill this void.</p>
	<p><b><a href="#">Represented Organizations and Constituents of Organizations</a></b></p> <p><a href="#">[11]"Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.</a></p>	<p>Comments [11] to [15] are explanatory to Paragraph (b), a provision not found in the ABA counterpart. ABA Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted where the organization is represented by counsel.</p>
	<p><a href="#">[12]As used in paragraph (b)(1) "managing agent" 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</a></p>	<p>Comments [11] to [15] are explanatory to Paragraph (b), a provision not found in the ABA counterpart. ABA Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.</a></p>	
	<p><a href="#">[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)</a></p>	<p>Comments [11] to [15] are explanatory to Paragraph (b), a provision not found in the ABA counterpart. ABA Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted.</p>
	<p><a href="#">[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.</a></p>	<p>Comments [11] to [15] are explanatory to Paragraph (b), a provision not found in the ABA counterpart. ABA Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted.</p>
	<p><a href="#">[15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.</a></p>	<p>Comments [11] to [15] are explanatory to Paragraph (b), a provision not found in the ABA counterpart. ABA Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><b><u>Represented Governmental Organizations</u></b></p> <p><u>[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.</u></p>	<p>Comment [16] is explanatory of Paragraph (c)(1) which is not found in the ABA Rule. (See discussion above regarding Paragraph (c)(1).) The proposed Comment also provides parameters on permissible communications.</p>
	<p><b><u>Represented Person Seeking Second Opinion</u></b></p> <p><u>[17] Paragraph (c)(2) is intended to permit a lawyer</u></p>	<p>This comment is explanatory of Paragraph (c)(1) which is not</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">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 where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3 and 1.7.)</a></p>	<p>found in the ABA counterpart.</p>
	<p><b><u>Communications Authorized by Law or Court Order</u></b></p> <p><a href="#">[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that 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.</a></p>	<p>This comment explains what is meant by the “authorized by law exception.” It expands on Comment [5] of the ABA Rule.</p>
	<p><a href="#">[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities.</a></p>	<p>This comment recognizes that law enforcement agencies, as permitted by the “authorized by law” exception in Paragraph c(3), may engage in investigative activities which involve communications with persons represented by counsel and which are necessary to promote legitimate law enforcement functions. The comment provides additional considerations not raised in ABA Comment [5].</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this 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 5th and 6th 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. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.</u></p>	
	<p><u>[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not</u></p>	<p>This comment explains that the change from "party" in Rule 2-100 to "person" in the proposed Rule is not intended to alter existing investigative communications that were recognized under Rule 2-100. The comment has no ABA counterpart since ABA Rule 4.2 does not use the word "party."</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.2 Communication With Person Represented By Counsel Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 4.2 Communication With a Person Represented By Counsel Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.</a></p>	
<p>[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.</p>	<p>[621] A lawyer who is uncertain whether a communication with a represented person is permissible <del>may</del><a href="#">might be able to</a> seek a court order. A lawyer <del>may</del> also <a href="#">might be able to</a> seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.</p>	<p>This comment addresses the “authorized by court order” exception in paragraph c(3). Except for minor changes, this comment is identical to Comment [6] of the ABA rule.</p>
<p>[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use</p>	<p><del>[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use</del></p>	

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.</p>	<p><del>methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.</del></p>	
<p>[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.</p>	<p><u>Prohibited Objectives of Communications Permitted Under This Rule</u></p> <p><del>[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.</del></p>	<p>This ABA comment, although stricken here, is found in the black letter of the Rule itself and in Comment [9] of this proposed Rule (see above).</p>
	<p><u>[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).</u></p>	<p>This comment serves as a reminder that even if a communication is permitted by the Rule a lawyer must not abuse this privilege by disregarding the obligations under paragraphs (d) and (e). There is no counterpart to paragraphs (d) and (e) in the ABA Rule.</p>
	<p><u>[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or</u></p>	<p>This comment clarification of paragraphs (d) and (e) which are not found in the ABA rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.] Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).</u></p>	
<p>[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.</p>	<p>[924] <del>In the event the person</del>When a lawyer's <del>communications</del> with <del>whom</del>a person are not subject to this Rule because the lawyer <del>communicates</del>does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not <del>known to be</del>represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.</p>	<p>This comment is a cross-reference to Rule 4.3 and makes clear that the obligations of Rule 4.3 apply whether or not the lawyer knows the person is represented by counsel.</p>



## McCurdy, Lauren

---

**From:** Difuntorum, Randall  
**Sent:** Wednesday, September 30, 2009 11:24 AM  
**To:** Kevin Mohr; Raul Martinez  
**Cc:** Mark Tuft; Anthonie Voogd; Kevin Mohr G; McCurdy, Lauren; Kevin Mohr G; Harry Sondheim  
**Subject:** RE: RRC - 2-100 [4.2] -October Agenda Item III.QQ  
**Attachments:** RRC - 2-100 4-2 - Public Comment Chart - By Commenter - DFT2 (09-30-09)KEM\_RD.doc

All:

Attached is a revised draft of the public commenter chart. The last column has been filled with language for the codrafters to review and edit. –Randy D.

\*\*\*\*\*

Randall Difuntorum  
Director, Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
(415) 538-2161  
[randall.difuntorum@calbar.ca.gov](mailto:randall.difuntorum@calbar.ca.gov)

This E-Mail message may contain confidential information and/or privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient) , please contact the sender by reply E-Mail and delete all copies of this message.

---

**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Wednesday, September 30, 2009 7:56 AM  
**To:** Raul Martinez  
**Cc:** Mark Tuft; Anthonie Voogd; Kevin Mohr G; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr G; Harry Sondheim  
**Subject:** RRC - 2-100 [4.2] -October Agenda Item III.QQ

Greetings Raul & all:

I've attached the following.

**Lauren:** The PDF's are for review by the drafters. If my revisions are OK by them, then please circulate only items 2, 4 and 5, below. Item #6 must be revised before it can be circulated.

1. Dashboard, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the dashboard Raul circulated yesterday. In PDF. Please review. I believe Raul was working off the old dashboard template that does not have a summary or MR Comment Comparison column. I simply copied and pasted what he had written in the dashboard he circulated into the new template, added a summary and marked the comment column, and slightly revised the stakeholder box. Please review to see if you agree. I've also attached a clean version in Word for inclusion in the

agenda materials. See #2.

2. Dashboard, Draft 2 (9/30/09)RM-KEM, clean, in Word.
3. Introduction, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the Introduction Raul circulated yesterday. In PDF. I've made some stylistic revisions to Raul's introduction and also added two paragraphs on the public comment/stakeholders who have made the drafting of this Rule particularly interesting. We've done this in other rules to call BOG's and the S.Ct.'s attention to potentially controversial matters (1.7 comes to mind; we added a paragraph in the Intro on advance waivers and the public comment received). I've also added a placeholder for Variations in other Jurisdictions. I have to update the chart; I'll do that before the October meeting.
4. Introduction, Draft 2 (9/30/09)RM-KEM, clean, in Word.
5. Rule & Comment Comparison Chart, Draft 2 (9/30/09)RM-KEM, clean, in Word. No substantive changes, though I may have some additions later. No time now. I've only made some formatting adjustments. In Word.
6. **Question to all:** Is there an updated public commenter chart that includes reasons for why we rejected certain of the suggestions that were submitted? I've attached a Draft 1.1, which sorts the public comment alphabetically but does not provide explanations for not making the requested changes. In other words, the drafters still have to fill in the last column.

Please let me know if you have any questions. Thanks,

Kevin

Raul Martinez wrote:

Attached are the rule comparison, introduction and dashboard for Rule 4.2. I don't have a good answer for why we did not keep portions of Comment 7 of the ABA rule, especially the exception for former constituents. Comment 7 of the ABA rule says: "Consent of the organization's lawyer is not required for communication with a former constituent."

Our current Rule 2-100 comment says the rule "is intended to apply only to persons employed at the time of the communication." But there is no similar comment in our proposed Rule carving out former constituents. Do we want to recommend inclusion of ABA Comment 7 or parts of it?

Raul

--

Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831  
714-459-1147  
714-738-1000 x1147

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alameda County District Attorney's Office (Thomas J. Orloff)	D			Substituting "person" for "party" is unnecessary and inhibits law enforcement.  Commission should preserve current legitimate law enforcement techniques by including an exception that says that the rule will not apply to public prosecutors except to the extent that a represented person has become a party in a civil or criminal case filed by the prosecutor.	Paragraph (c)(3) states an exception for "communications authorized by law or a court order" and Comment [18] and [19] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
2	Attorney General's Office, Department of Justice (Thomas Greene)	D			Substituting "person" for "party" will yield challenges to ordinary practices that will take years of appellate work to provide finality as to the meaning of the new rule.  Exception for contact with any "public official" is overly broad and should be limited to "officer" as defined in Gov Code sec. 87200.	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the majority of jurisdictions.  Paragraph (g) now states that "As used in this Rule, "public official" means 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)." See also Comment [16] which provides more guidance on this definitional issue than what is present in the Model Rule.

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Add exception to 4.2(c) to include consensual conversations between a represented party and law enforcement to report illegal conduct.</p> <p>Exception for law enforcement should be in the text of the rule.</p> <p>Comment [20] should be amended to read: "Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to extend this prohibition, or change existing law, in regard to communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations and actions."</p>	<p>Paragraph (c)(3) states an exception for "communications authorized by law or a court order" and to that extent consensual conversations might be permissible.</p> <p>The rule includes paragraph (c)(3) which states an exception for "communications authorized by law or a court order" and Comment [18] and [19] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.</p> <p>Commission did not make the requested revision but Comment [20] is similar to the commenter's proposed language.</p>
3	California Attorneys for Criminal Justice	D			Contrary to claim of Commission, it has always been the understanding of the legal	The discussion section to current Rule 2-100, in part, states that "matter" and "party" are "not limited

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					community that “party” did not mean “person” (Dale).  Current rule is clear and should not be changed.	to a litigation context” and the Commission believes that many lawyers have construed the rule’s use of “party” as a term of art.  Substituting “person” for “party” adopts the Model Rule language and brings California in line with the majority of jurisdictions.
4	California Public Defender’s Association (Leslie McMillan)	D			Change from “party” to “person” will substantially impair the ability of prosecutors to investigate criminal offenses and the ability of defense counsel from defending persons charged with criminal offenses.	The rule includes paragraph (c)(3) which states an exception for “communications authorized by law or a court order” and Comment [18] and [19] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
6	COPRAC	M			Exception for “duly appointed public officer[s]” is overbroad and places public agencies at a disadvantage; change to “elected public officials and executive managers of a public agency, boards, committees or bodies.”	The concept of this policy exception exists in the current rule and the Model Rule. Comment [16] provides additional guidance beyond what is present in the Model Rule.
8	Gang, Tyre, Ramer and Brown, Inc. (Bruce M. Ramer)	D			Concerned that “agent” as used in Comment [5] would unintentionally include talent or literary agents in the entertainment industry.	The language of the comment is focused on explicating “indirect” communications.
22	Greene, Tom				Rule should not change “party” to “person”.	Substituting “person” for “party” adopts the Model Rule language and brings California in line with the majority of jurisdictions.

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

**TOTAL =** \_\_    **Agree =** \_\_  
**Disagree =** \_\_  
**Modify =** \_\_  
**NI =** \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Unclear what term "authorized by law" means in Comment [20].  "Public official" is too broad a term.	The "authorized by law" concept is explained in Comment [18] and [19] which, in part, recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.  The concept of this policy exception exists in the current rule and the Model Rule. Comment [16] provides additional guidance beyond the commentary present in the Model Rule.
20	Hazen, Steven K.	D			Poorly considered proposal which will encounter broad objections as the process moves through later stages.	The primary change is the substitution of "person" for "party" and this action adopts the Model Rule language and brings California in line with the majority of jurisdictions.
7	Jenness, Evan	D			Impacts investigation of criminal matters by expanding the class of persons with whom an attorney may not have ex parte communications.  Comment [19] and [20] exemptions for prosecutors encourages misconduct by placing prosecutors above the law and undermines Congressional intent (McDade Amendment).	The rule includes paragraph (c)(3) which states an exception for "communications authorized by law or a court order" and Comment [18] and [19] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

**TOTAL =** \_\_    **Agree =** \_\_  
**Disagree =** \_\_  
**Modify =** \_\_  
**NI =** \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
12	Kelly, David (Kern County Deputy Public Defender)	D			See Janice Fukai's Comments.	See response to Janice Fukai's Comments.
14	Kern County Public Defender (Mark A. Arnold)	D			Change from "party" to "person" will substantially impair the ability of prosecutors to investigate criminal offenses and the ability of defense counsel from defending persons charged with criminal offenses.	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the majority of jurisdictions.  In addition, the rule includes paragraph (c)(3) which states an exception for "communications authorized by law or a court order" and Comment [18] and [19] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
10	Los Angeles County Alternate Public Defender (Janie Y. Fukai)	D			Commission's position that "party" has historically been interpreted to mean "person" is unsupported and undermined by the Dale decision.  "in the matter" is vague and needs clarification.  Rule will affect criminal defendant's lawyer's ability to interview potential witnesses who are	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the majority of jurisdictions. The discussion section to current Rule 2-100, in part, states that "matter" and "party" are "not limited to a litigation context" and the Commission believes that many lawyers have construed the rule's use of "party" as a term of art.  Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term "matter" as used in the rule.  Comment [6] explains that the rule does not prohibit communications concerning matters outside the

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>represented in other criminal matters.</p> <p>Exception for prosecution creates lack of reciprocity, precluding defendants' access to witnesses who may only be available to the prosecution under the new rule. Exception should apply to both sides in a criminal case.</p> <p>Defense counsel will argue that exclusion for "communications authorized by law or a court order" includes interviews of witnesses represented by counsel because of Sixth Amendment duties to the client.</p>	<p>person's representation and includes an illustrative example.</p> <p>Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.</p>
9	Los Angeles County Bar Association				See CACJ Comments.	See response to CACJ comments.
11	Los Angeles County Public Defender (Michael P. Judge)	D			See Janice Fukai's Comments.	See response to Janice Fukai's comments.
16	National Association of Criminal Defense Lawyers (John Wesley Hall)	D			<p>Reject Comments [19] and [20]. They are not included in the ABA Model Rules, undermine confidentiality in the attorney client relationship between criminal defense attorneys and their clients, encourage prosecutors to violate the Sixth Amendment right to counsel, and give prosecutors carte blanche to take advantage of uncounseled disclosures by the other lawyer's clients.</p> <p>Life and liberty interests at stake in criminal matters warrant the highest level of protection</p>	<p>These comments attempt to address concerns raised by commenters who believe that legitimate law enforcement investigative activities are lawful and necessary for public protection. If certain activities are found to be unlawful, then the rule's exception would not be applicable.</p>

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of the attorney client relationship. Exemptions for government in litigation not granted to the defense are unconstitutional.	
17	Orange County Bar Association (Trudy Levindofske)	M			Substitution of "person" for "party" could be construed as broadening the scope of the Rule without reasonable proffered justification for change and should be deleted.	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the majority of jurisdictions.
13	Orange County Public Defender (Deborah Kwast)	D			Exception for prosecutors creates an imbalance and possible constitutional infirmity because prosecutors, their investigators, and police would presumably operate as they are allowed to under the current rule, while the defense is denied access to the very same people in the absence of permission from their lawyers (unlikely to be given), or a court order.	Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.
21	Pyle, Walter K.	D			Rule would unfairly allow prosecutors to interview witnesses represented by counsel, but criminal defense lawyers could not.	Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.
18	San Diego County Bar Association (Heather L. Rosing)	D			Change from "party" to "person" is not a clarifying change as Commission has asserted. (Dale, 4 Cal. State. Bar. Rptr. 798)  Proposed rule would expand a lawyer's duties to non-clients, increase risk of discipline, and	The discussion section to current Rule 2-100, in part, states that "matter" and "party" are "not limited to a litigation context" and the Commission believes that many lawyers have construed the rule's use of "party" as a term of art.  The primary change is the substitution of "person"

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

**TOTAL =** \_\_ **Agree =** \_\_  
**Disagree =** \_\_  
**Modify =** \_\_  
**NI =** \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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.</p> <p>Keep existing rule 2-100 but modify to add a new subsection (C)(4) for communications with an investigative officer in civil or criminal case.</p>	<p>for "party" and this action adopts the Model Rule language and brings California in line with the majority of jurisdictions. Other additions codify case law and other developments in this area of lawyer conduct (see, i.e., paragraph (e)).</p> <p>The Commission believes that the decision in the Dale case requires that the existing rule be modified.</p>
19	San Diego Criminal Defense Bar Association (Michael L. Crowley)	D			<p>New rule impedes criminal defense counsel's constitutional duty to investigate a case while not similarly restricting prosecutors.</p> <p>Forces defense counsel to choose between interviewing percipient witness who is represented and risk State Bar discipline or fulfilling the constitutional duty to one's client and investigate the case. In light of duty to investigate, defense counsel should be added to commentary about (c)(3) exception for</p>	<p>Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.</p> <p>See above. Commission is not aware of explicit authority for defense counsel communications that is comparable to the case law that address law enforcement investigative activities.</p>

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					communications authorized by law or court order.  Unclear what "in the matter" means.	Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term "matter as used in the rule. Comment [6] explains that the rule does not prohibit communications concerning matters outside the person's representation and includes an illustrative example.
5	Sevilla, Charles	D			Under the current rule, one can know who a party is, but there is no way to know whether someone is represented "in the matter."  Exception for prosecutors unfairly allows unfettered access to witnesses that would be off limits for defense	Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term "matter as used in the rule. Comment [6] explains that the rule does not prohibit communications concerning matters outside the person's representation and includes an illustrative example.  Commission is not aware of explicit authority for defense counsel communications that is comparable to the case law that address law enforcement investigative activities.
15	Talia, M. Sue	A			Strongly supports the addition of Comment [10] to underscore fact that rule does not	No response necessary.

**Rule 4.2 Communication with a Person Represented by Counsel.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
 Disagree = \_\_  
 Modify = \_\_  
 NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prohibit a lawyer from contacting a limited scope client on matters outside the scope of the representation.	

## Rule 4.2: Communication with a Person Represented by Counsel

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Arizona:** Rule 4.2 restricts communication with a “party” rather than a “person” and omits the phrase “or a court order.”

**California:** Rule 2-100 (Communication with a Represented Party), provides as follows:

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

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

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or

(3) Communications otherwise authorized by law.

**Colorado:** Rule 1.2(c) permits “limited representation of a pro se party” as provided by specified Colorado Rules of Civil Procedure. Rule 5 of the Colorado Rules of Civil Procedure provides that such limited representation of a pro se party “shall not constitute an entry of appearance by the attorney... and does not authorize or require the service of papers upon the attorney.”

**District of Columbia** adds the following three paragraphs to Rule 4.2:

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization’s lawyer. If the organization is an adverse

party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

**Florida:** Rule 4.2 deletes the phrase "or is authorized to do so by law or a court order" and substitutes the following new language:

[A]n attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute, court rule, or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

In addition, Florida adds a new paragraph (b) stating as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of; or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida's version of Rule 1.2(c) provides, in part, that "a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.")

**Georgia** replaces the phrase "authorized to do so by law" with the phrase "authorized to do so by constitutional law or statute." Georgia also adds a new paragraph (b) that provides: "Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State."

**Illinois** provides that a lawyer shall not communicate "or cause another to communicate" with a represented "party."

**Louisiana** adds a new paragraph (b) that prohibits communication with:

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder, or other constituent of a represented organization and

(1) Who supervises, directs or regularly consults with the organization's lawyer concerning the matter;

(2) Who has the authority to obligate the organization with respect to the matter; or

(3) Whose act or omission in connection with the matter may be imputed to the organization for purpose of civil or criminal liability.

**Maryland** adds the following paragraphs to Rule 4.2 and limits the reach of paragraph (a), which is the same as ABA Model Rule 4.2, by reference to paragraph (c):

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

**Michigan** currently retains the pre-2002 version of ABA Model Rule 4.2 (which lacks an express "court order" exception).

**New Jersey:** Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Rule 4.2 must be read in conjunction with New Jersey's Rule 1.13, which defines the phrase "litigation control group" as follows:

For the purposes of RPC 4.2 and 4.3... the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organizations legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be

represented in the matter by the organization's lawyer but may at any time disavow said representation.

**New Mexico** adds the following sentence to Rule 4.2: "Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel."

**New York:** DR 7-104(A)(1) generally tracks ABA Model Rule 4.2 but requires the "prior" consent of the other lawyer and does not mention "a court order." New York also adds the following unique DR 7-104(B):

(B) Notwithstanding the prohibitions of DR 7-104(A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

**North Carolina:** Rule 4.2(a) adds: "It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy." North Carolina also adds a new Rule 4.2(b) that provides as follows:

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the

government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

- (1) in writing, if a copy of the writing is promptly delivered to opposing counsel;
- (2) orally, upon adequate notice to opposing counsel; or
- (3) in the course of official proceedings.

**Oregon:** Rule 4.2 provides as follows:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

**Texas:** Rule 4.02 provides:

(a) In representing a client; a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding

that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, “organization or entity of government” includes:

(1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or

(2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the, first lawyer.

**Utah:** Rule 4.2 contains 17 separate paragraphs and subparagraphs. Rule 4.2(a) begins by tracking ABA Model Rule 4.2, but omits “or is authorized to do so by law or court order” and adds that an attorney may, without prior consent, communicate with another lawyer’s client “if authorized to do

so by any law, rule, or court order... or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.” Paragraphs (b) and (d) cover “Rules Relating to Unbundling of Legal Services” and “Organizations as Represented Persons.” Paragraph (c), which is highly unusual, provides as follows:

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

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

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

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

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

Paragraph (e), which covers “Limitations on Communications,” provides that when communicating with a represented person pursuant to this Rule, no lawyer may:

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

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

**Wyoming:** Wyoming, makes clear that Rule 4.2 applies to communications with a person “or entity” represented by another lawyer.

**RRC – Rule 4.2 [2-100]  
E-mails, etc. – Revised (10/13/2009)**

October 27, 2008 KEM E-mail to RRC: .....	282
October 29, 2008 George Cardona E-mail to Difuntorum & KEM (forwarded to RRC on 10/29/08 by Difuntorum): .....	282
<i>Proposed Paragraph (c)(4) (Cardona)</i> .....	283
January 2, 2009 KEM E-mail to Drafters, cc Chair & Staff: .....	285
January 4, 2009 Martinez E-mail to Drafters, cc Chair & Staff: .....	285
January 4, 2009 Voogd E-mail to Drafters, cc Chair & Staff:.....	286
January 4, 2009 Sondheim E-mail to Voogd, cc Drafters & Staff: .....	286
January 4, 2009 Sapiro E-mail to KEM, cc Drafters, Chair & Staff:.....	286
January 4, 2009 Martinez E-mail to Sapiro, cc Drafters, Chair & Staff:.....	287
January 5, 2009 Kehr E-mail to Drafters, cc Chair & Staff: .....	287
January 5, 2009 KEM E-mail to Drafters, cc Chair & Staff: .....	288
January 5, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:.....	290
January 6, 2009 KEM E-mail to Staff:.....	290
January 6, 2009 McCurdy E-mail to RRC re 10-day Ballot: .....	290
January 6, 2009 Difuntorum 10-Day Ballot Memo:.....	291
10-DAY BALLOT E-MAILS: .....	291
<i>January 7, 2009 Peck E-mail to RRC:</i> .....	291
<i>January 12, 2009 Melchior E-mail to RRC:</i> .....	291
<i>January 12, 2009 Julien E-mail to RRC:</i> .....	291
<i>January 12, 2009 Sondheim E-mail to RRC:</i> .....	292
<i>January 15, 2009 Sapiro E-mail to RRC List:</i> .....	292
<i>January 15, 2009 Voogd E-mail to RRC:</i> .....	293
March 31, 2009 Sheryl Bratton E-mail to KEM: .....	294
March 31, 2009 KEM E-mail to Sheryl Bratton: .....	294
April 1, 2009 KEM E-mail to Sheryl Bratton: .....	294
August 27, 2009 McCurdy E-mail to Martinez, cc Chair, Vapnek, Tuft & Staff:.....	295
August 27, 2009 McCurdy E-mail to Tuft, cc Chair, Vapnek, Tuft & Staff: .....	296
September 18, 2009 McCurdy E-mail to Drafters (Martinez, Tuft & Voogd), cc RRC:.....	300
September 19, 2009 KEM E-mail to Drafters, cc RRC: .....	300
September 29, 2009 Martinez E-mail to Drafters, cc KEM: .....	300
September 29, 2009 Tuft E-mail to Drafters, cc KEM:.....	300
September 30, 2009 KEM E-mail to Drafters, cc Chair & Staff: .....	301
September 30, 2009 Difuntorum E-mail to Drafters, Chair & Staff: .....	302
September 30, 2009 KEM E-mail to Martinez, cc Drafters, Chair & Staff: .....	302
October 1, 2009 McCurdy E-mail to KEM:.....	302
October 1, 2009 KEM E-mail to McCurdy:.....	302
October 9, 2009 Difuntorum E-mail to Kate Flaherty (S.D. County D.A. Office), cc Chris Ames (Cal. A.G.'s Office), McCurdy & KEM: .....	302
October 9, 2009 Sondheim E-mail to RRC:.....	303
October 9, 2009 Kehr E-mail to RRC:.....	304
October 11, 2009 Tuft E-mail to RRC List: .....	305
October 11, 2009 Martinez E-mail to RRC List:.....	305
October 11, 2009 Tuft E-mail to RRC List: .....	305
October 11, 2009 Sapiro E-mail to RRC List: .....	305

**August 27, 2009 McCurdy E-mail to Martinez, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR OCTOBER MEETING

**October 16 & 17, 2009 Meeting**

**Assignments Due: Wed., 9/30/09**

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR NOVEMBER MEETING

**November 6 & 7, 2009 Meeting**

**Assignments Due: Wed., 11/28/09**

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100] (Post Public Comment Draft #17.4 dated 1/5/09) Codrafters: Tuft (Co-lead), Voogd**  
**Assignment:** (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a] (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e)) Codrafters: Tuft (Co-lead), Voogd**  
**Assignment:** (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
3. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**  
**Assignment:** (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
4. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**  
**Assignment:** (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
5. **IV.M. Possible Rule re: Law Firm Discipline (no counterpart rules) (possible rule last considered at the April 2006 meeting; see also New Jersey and New York rules) Codrafters: Mohr; Peck; Ruvolo; Tuft**  
**Assignment:** (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

**August 27, 2009 McCurdy E-mail to Tuft, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission’s upcoming September, October and November meetings. A “rolling assignments agenda” is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered “rolling” because, for example, any rule that is not completed at the

September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

1. **III.A. Rule 1.0 Purpose and Scope of the Rules [1-100]** (Post Public Comment Rule Draft #7 dated 6/18/07)

**Codrafters:** Julien, Lamport, Melchior, Ruvolo

**Assignment:** (1) a chart comparing proposed Rule 1.0 to relevant parts of the MR Preamble and Scope; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.M. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers [N/A]** (June 2009 Comparison Chart - Post Public Comment Rule Draft #9 dated 6/1/09)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.1 to MR 5.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.N. Rule 5.2 Responsibilities of a Subordinate Lawyer [N/A]** (Post Public Comment Rule Draft #5.2 dated 6/16/07)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.2 to MR 5.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.O. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants [N/A]** (Post Public Comment Rule Draft #9.1 dated 6/16/07)  
**Codrafters:** Martinez, Peck  
**Assignment:** (1) a chart comparing proposed Rule 5.3 to MR 5.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

**October 16 & 17, 2009 Meeting**

**Assignments Due: Wed., 9/30/09**

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

**November 6 & 7, 2009 Meeting**

**Assignments Due: Wed., 11/28/09**

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100]** (Post Public Comment Draft #17.4 dated 1/5/09)  
**Codrafters:** MARTINEZ (Co-lead), Voogd  
**Assignment:** (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a]** (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e))  
**Codrafters:** MARTINEZ (co-lead), Voogd  
**Assignment:** (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
3. **III.SS. Rule 5.4 Professional Independence [1-310][1-320][1-600]** (Post Public Comment Draft #13.2 dated 1/8/09 to be revised following the January 2009 meeting)  
**Codrafters:** Martinez, Peck  
**Assignment:** (1) a chart comparing proposed Rule 5.4 to MR 5.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
4. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)  
**Codrafters:** MARTINEZ, Voogd

**RRC – Rule 4.2 [2-100]  
E-mails, etc. – Revised (10/13/2009)**

**Assignment:** (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

5. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

**Codrafters:** MARTINEZ (co-lead), Voogd

**Assignment:** (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

6. **IV.R. Rule 3-410 Insurance Disclosure** [adopted by the Sup. Ct. operative 1/1/10)

**Codrafters:** Foy, Julien, Kehr, Martinez

**Assignment:** (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

**September 18, 2009 McCurdy E-mail to Drafters (Martinez, Tuft & Voogd), cc RRC:**

Raul & Codrafters (Mark & Tony):

This message provides the assignment background materials for Rule 4.2 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

***Attachments:***

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

**September 19, 2009 KEM E-mail to Drafters, cc RRC:**

I've attached a revised Introduction template for Rule 4.2 (all I did was add the rule title and draft number & date in the footnote on the first page).

**September 29, 2009 Martinez E-mail to Drafters, cc KEM:**

Attached are the rule comparison, introduction and dashboard for Rule 4.2. I don't have a good answer for why we did not keep portions of Comment 7 of the ABA rule, especially the exception for former constituents. Comment 7 of the ABA rule says: "Consent of the organization's lawyer is not required for communication with a former constituent."

Our current Rule 2-100 comment says the rule "is intended to apply only to persons employed at the time of the communication." But there is no similar comment in our proposed Rule carving out former constituents. Do we want to recommend inclusion of ABA Comment 7 or parts of it?

***Attachments:***

Dashboard, Draft 1 (9/29/09)RM  
Introduction, Draft 1 (9/29/09)RM  
Rule & Comment Comparison Chart, Draft 1 (9/29/09)RM

**September 29, 2009 Tuft E-mail to Drafters, cc KEM:**

Having just completed my second assignment for this meeting, I will not have a chance to review these materials before the Noon deadline tomorrow.

**September 30, 2009 KEM E-mail to Drafters, cc Chair & Staff:**

I've attached the following.

**Lauren:** The PDF's are for review by the drafters. If my revisions are OK by them, then please circulate only items 2, 4 and 5, below. Item #6 must be revised before it can be circulated.

1. Dashboard, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the dashboard Raul circulated yesterday. In PDF. Please review. I believe Raul was working off the old dashboard template that does not have a summary or MR Comment Comparison column. I simply copied and pasted what he had written in the dashboard he circulated into the new template, added a summary and marked the comment column, and slightly revised the stakeholder box. Please review to see if you agree. I've also attached a clean version in Word for inclusion in the agenda materials. See #2.
2. Dashboard, Draft 2 (9/30/09)RM-KEM, clean, in Word.
3. Introduction, Draft 2 (9/30/09)RM-KEM, redline, compared to Draft 1 (9/29/09)RM, the Introduction Raul circulated yesterday. In PDF. I've made some stylistic revisions to Raul's introduction and also added two paragraphs on the public comment/stakeholders who have made the drafting of this Rule particularly interesting. We've done this in other rules to call BOG's and the S.Ct.'s attention to potentially controversial matters (1.7 comes to mind; we added a paragraph in the Intro on advance waivers and the public comment received). I've also added a placeholder for Variations in other Jurisdictions. I have to update the chart; I'll do that before the October meeting.
4. Introduction, Draft 2 (9/30/09)RM-KEM, clean, in Word.
5. Rule & Comment Comparison Chart, Draft 2 (9/30/09)RM-KEM, clean, in Word. No substantive changes, though I may have some additions later. No time now. I've only made some formatting adjustments. In Word.
6. **Question to all:** Is there an updated public commenter chart that includes reasons for why we rejected certain of the suggestions that were submitted? I've attached a Draft 1.1, which sorts the public comment alphabetically but does not provide explanations for not making the requested changes. In other words, the drafters still have to fill in the last column.

Please let me know if you have any questions.

Thanks, Kevin. I wonder if we should soften the statement that we "work[ed] closely with representatives from these interested parties,"...and "the Commission crafted what it believes is a reasonable compromise between the interests of the government and lawyers representing persons who are petitioning the government.and came up with what we think is a reasonable compromise." The sentence makes it appear as if the stakeholders agree with our Rule. Some of the stakeholders may think we virtually ignored their concerns on the party to person issue, rather than "working closely" with them as we state, and that, in the end, we solicited their input in order to co-opt them by making such a statement. In fairness, I think we carefully considered their views and comments both in writing and via their participation at meetings. But we did not accept their hardened position on the "party" issue.

On the public commenter chart, I too wondered if there was a later version since it seems someone had taken a stab at it.

**September 30, 2009 Difuntorum E-mail to Drafters, Chair & Staff:**

Attached is a revised draft of the public commenter chart. The last column has been filled with language for the codrafters to review and edit.

**September 30, 2009 KEM E-mail to Martinez, cc Drafters, Chair & Staff:**

Please see attached Introduction, Draft 2.1. Does this more accurately reflect what occurred?

Lauren, if Raul is OK w/ it, will you please include it in the Agenda materials.

**October 1, 2009 McCurdy E-mail to KEM:**

On this one, there are two versions of the Introduction, a clean and a comparison. (I did pick up on your revised clean intro. From your 9/30/09 1:45 pm e-mail ) Should I also include the comparison version of the intro. found in this set of attachments?

Also, the PDF version of the Dashboard in the attached is a redline (in green) version. The Word version is a clean version of the dashboard. At the moment, I have only included the “clean” version of the Dashboard. Let me know if both should go in, or if not, which one of the two should be included.

**October 1, 2009 KEM E-mail to McCurdy:**

I've attached the most recent version of the Introduction and Dashboard, clean, in Word and PDF.

Please just include the clean versions.

**Attached:**

- Dashboard, Draft 2 (9/29/09)RM-KEM
- Introduction, Draft 2.1 (9/29/09)RM-KEM

**October 9, 2009 Difuntorum E-mail to Kate Flaherty (S.D. County D.A. Office), cc Chris Ames (Cal. A.G.'s Office), McCurdy & KEM:**

The Rules Revision Commission is being assigned to complete its project by next year. The new schedule of Commission meetings includes monthly two-day meetings to accelerate productivity. The information below indicates the goals and objectives for completing the project, including the dates for Board of Governor meetings when action will be taken on the Commission's work. I am also copying Chris Ames with this information.

The next Commission meeting is on October 16 & 17, 2009 (agenda document attached) by video-conference between the SF and LA Bar offices. The materials for the meeting are online at:

[http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10129&id=12041](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=12041)

For your convenient reference, I am attaching the October meeting materials for Rule 2-100 (Model Rule 4.2). At the October meeting, the Commission will consider the submission of this rule to the Board for adoption, subject to a final comprehensive public comment distribution of the entire rules. The Board will then meet to consider the Commission's recommendation at its meetings on November 12 & 13, 2009 in Los Angeles. –Randy D.

\* \* \* \* \*

**IMPORTANT NEW INFORMATION CONCERNING THE RULES REVISION COMMISSION:** A revised 2009-2010 schedule of meetings for the Commission is attached. Note that the Commission is working under a new expedited plan, with the goal of completing its work by the Summer or Fall of next year. Below is a schedule of the upcoming goals and Board meeting dates. You will see that the schedule includes shorter public comment periods.

**LIST OF BOARD DELIVERABLES & BOARD MEETING DATES**

Batch 5 issued for 60-day public comment = Sept. 12, 2009

Batches 1, 2 & 3 considered for adoption = Nov. 12-13, 2009

Batch 6 issued for 60-day public comment = Jan. 7, 2010

Batch 4 considered for adoption = Jan. 7-8, 2010

Batch 5 considered for adoption = March 4-5, 2010

Batch 6 considered for adoption = May 13-14, 2010

Final Report issued for 45-day public comment = May 13, 2010 (if no changes to Batch 6) or July 23, 2010 (if there are changes to Batch 6)

Final Report considered for adoption = July 23-24, 2010 (if no changes to Final Report) or Sept. 24, 2010 (if there are changes to the Final Report)

**October 9, 2009 Sondheim E-mail to RRC:**

I suggest that all the references on pp.435-439 which currently state "Comment [18] and [19] should be changed to Comments [18] to [21].

I suggest that the reference to "majority of jurisdictions" on pp.435, 437-439, 441 and 442 be changed to overwhelming majority of jurisdictions. It is my understanding Only Arizona and Illinois are listed in the State Variations as retaining "party."

**October 9, 2009 Kehr E-mail to RRC:**

Here are my comments on these materials:

1. In the first sentence of the explanation of paragraph (g), “(c)(1)” is missing the second set of parentheses.
2. In the second sentence of the explanation of paragraph (g), I don’t think it is correct to say the MR Comment (it is Comment [5]) recognizes “a constitutional right by a lawyer ... to communicate”. I think the Comment speaks of communications by a lawyer on behalf of a client who is exercising [the client’s] constitutional right to communicate with government. I would change the sentence to say: “The ABA rule recognizes that lawyers are authorized by law to communicate with government on behalf of clients who are exercising their constitutional rights.”
3. The last line of the Comment [6] explanation refers to Comment [6], which I think instead should refer to Comment [7].
4. There is a parenthetical in the Comment [7] explanation that is not set off by commas. I would insert them after “comment” in the third line and after “person” in the fourth line.
5. In the last full line of the Comment [10] explanation, do we really want to say “attempts”? I would change this to say: “The proposed Comment fills this void.”
6. No explanation is provided for the recommended deletion of MR Comment [7]. I think one should be given, and I suggest: “Model Rule Comment [7] discusses the application of the Rule in the organizational context. The Commission has rejected this Comment because it instead has recommended that the principles be included in Rule paragraph (b), which is explained in detail in recommended Comments [11] to [15].”
7. I don’t think that the inclusion of the actual knowledge standard in the Rule is an explanation for the recommended deletion of MR Comment [8] because the MR also has true a standard of actual knowledge. I suggest revising the sentence to say: “This ABA Comment has been moved to proposed Comment [9] and edited for brevity.”
8. The Comment [24] explanation is not quite correct. Rule 4.3 does not apply when a lawyer communicates with a person the lawyer knows to be represented by counsel. I suggest replacing the explanation with: “This revision to Model Comment [9] corrects an error in it. Rule 4.3 applies when a lawyer is communicating with a person the lawyer knows to be unrepresented by counsel, and it also applies when the lawyer doesn’t know if the person is unrepresented. Rule 4.2 in both the Model Rule and recommended versions apply when the lawyer is communicating with a person the lawyer knows to be represented by counsel.”
9. In the first paragraph of the reply to the A.G. comment, I suggest adding: “Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any.” The same sentence is repeated elsewhere in the chart, and I would add this sentence at each place.

10. In the second paragraph of the response to the Janie Fukai comment, I suggest adding: “There are five jurisdictions that have included a definition of “matter” in their terminology sections, and the Commission will consider that possibility as part of the drafting of Rule 1.0.1.” This comes up again twice on p. 443 (and perhaps elsewhere – I didn’t search).
11. I wonder about the meaning of “explicit” in the first line of the second paragraph of the response to the Michael Crowley comment. Is there any implicit authority?

**October 11, 2009 Tuft E-mail to RRC List:**

My comments on proposed rule 4.2:

1. Introduction:
  - a. The first sentence should refer to proposed Rule 4.2(a). The rest of the proposed rule does not track the Model Rule.
  - b. The first sentence should be changed to read: "Proposed Rule 4.2(a) follows the basic "no-contact" rule in Model Rule 4.2 except that the proposed rule prohibits a lawyer from communicating indirectly as well as directly with a person known to be represented in the matter.

**October 11, 2009 Martinez E-mail to RRC List:**

I agree with point b, Mark, except the first sentence should probably say it "makes clear" that the prohibition applies when a lawyer communicates indirectly as well as directly, since it would otherwise suggest that the ABA rule doesn't cover indirect communications, which is not the intent of the model rule.

**October 11, 2009 Tuft E-mail to RRC List:**

I am ok with that.

**October 11, 2009 Sapiro E-mail to RRC List:**

1. In the Introduction, the second paragraph is far too defensive. I recommend that we add a statement about why we changed “party” to “person” and discuss why we disagree with *Matter of Dale*.
2. I still disagree with the use of the word “imply” in paragraph (d). Whether a lawyer “implies” disinterest is too subjective a concept to be a valid disciplinary standard. If, in the discussion with a non-client, a lawyer makes a casual comment, such as, if I were you . . . ,” the lawyer could be disciplined, regardless of how innocent the rest of the sentence may be. I would prefer to delete the phrase “or imply.” In its place, I would require the lawyer to disclose the identity of his or her client, unless that disclosure is protected by duties of

confidentiality. If the identity is confidential, the lawyer could be required to disclose that he or she does not represent the interviewee. I realize that I have lost this issue before, I request that we consider.

3. At page 10 of 15, I found the third sentence of proposed Comment [16] difficult to read. However, I have not been able to come up with a way to revise it that does not make the concept too long. I suggest that we discuss this and get the benefit of suggestions from other members of the Commission.
4. In the first line of Comment [17], I would change "is intended to permit" to just the word "permits."
5. I would add to the explanation of changes column a statement to the effect that Comment [7] from the Model Rule has been deleted and its subject revised and expanded into Comments [11] to [15].

**October 12, 2009 Melchior E-mail to RRC List:**

**Rule 4.2:** p. 417, (b)(2): It also reflects current CA law. No need to apologize.

p. 418, (c)(1): I suggest changing "shall not" to "does not."

p. 419, (f) and (g): both also reflect current CA law and we should say so.

same page, (g) again: why the recital of various governmental organizations, which is surely incomplete? this could be simplified to state "of the United States government or of any state, local or other governmental organization . . ."

By the way, should (or does) this include world or foreign government organizations?

p. 420, comment 1: this could be deleted since it is purely throat-clearing and (to quote explanation on next page 421, re comment 4, does "not materially add to an understanding of the Rule."

p 423, comment 8, part (2): this is stated in absolute terms which I think overstates the point. I suggest adding the word "perhaps" or "possibly" right after the number (2).

P.425, comment 15 is very dense and unclear

p 426, nit: @ line 8: should be singular; "a government official . . ."

***And by the way, the number of comments to this rule boggles the mind. Are we writing a treatise?***

p. 429: I agree with deletion of comment 7; but the explanation is missing

p. 430: comment 22 can readily be wrapped into 23 by having the latter read: "In communicating with a represented person or a current employee, member [etc] . . ."