

E-mails, e

**August 4, 2010 McCurdy E-mail to RRC:**

To date, we have received 3 public comments for the rules currently circulating for public comment. Given the extremely short turn-around time between now and the next meeting, it is important that all members read all comments as they are received. I have attached copies of the following comments on the following rules, along with public commenter charts providing a synopsis of these comments:

- Rule 1.0.1 – Peter Liederman
- Rule 3.8 – Ventura DA – Michael Schwartz
- Rule 5.4 – Thomas Quinn

The public comments will be sent out to the entire Commission as they are received, and will also be available at the Google site under the heading “COMMENTS BATCH Y”:

<http://Sites.google.com>

**IMPORTANT:** Please be advised that the assignments deadline is Thursday, August 26th at 9:00 am, due to the August 25th public comment deadline. This means that the usual opportunity for sending e-mail comments after receipt of the agenda materials will not be possible. Instead, all Commission members are asked to send e-mails responding to the public comment letters as they are distributed. Please send e-mail comments to the entire Commission to assure that leadership and the drafting teams can account for e-mail comments in preparing assignments.

Below is a list of the drafting teams assigned to each rule under consideration at the August meeting. Folders for each rule with the assignment background materials are available at the Google site under the heading “RULES BATCH Y.” As updated public commenter charts become available we will send them to you by e-mail and post them at the Google site.

- III.A. Rule 1.0.1 - Terminology [1-100(B)] – KEHR, Julien, Sapiro
- III.B. Rule 2.1 - Advisor [N/A] – LAMPORT, Vapnek
- III.C. Rule 3.3 - Candor Toward the Tribunal [5-200] – TUFT, Peck, Ruvolo, Sapiro
- III.D. Rule 3.8 - Special Responsibilities of a Prosecutor [5-110] (At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d).) – FOY, Peck, Tuft
- III.E. Rule 4.2 - Communications with a Represented Person [2-100] – MARTINEZ/TUFT
- III.F. Rule 5.4 - Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600] – MOHR, Martinez, Peck, Tuft
- III.G. Rule 8.4 - Misconduct [1-120] – VAPNEK/PECK, Tuft

We're in the home stretch!

**Attached:**

- RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - [3-8] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [5-4] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [1-0-1] - Public Comment Complete - REV (08-04-10).pdf

**August 17, 2010 Sondheim E-mail to RRC:**

Here are my thoughts regarding the COPRAC comment for 4.2:

The newest changes to this rule relate to adding a sentence to comment 20. COPRAC has commented on Comment 15. Thus the approach I previously suggested for 1.0.1 and 5.4 might also be utilized for this comment. However, I cannot recall that we ever discussed the point being made by COPRAC and it seems to me that it has some merit. Nevertheless, if we make the change suggested by COPRAC or something comparable thereto, we may be opening up this rule for further public comment since we would be adding something just as we added to comment 20 which caused the rule to be sent out again for public comment. If either the drafting team, staff or any other Commission member has a solution which would not require the need to send the rule out for further public comment (heaven forbid), I would appreciate your thoughts.

**August 18, 2010 Difuntorum E-mail to Yen, cc McCurdy, Lee & KEM:**

Please see Harry's message below. Harry is concerned that if the Commission decides to implement a recommended COPRAC revision to Rule 4.2, then further public comment would be required. Attached is the COPRAC comment received on Rule 4.2 and a redline draft of Rule 4.2 showing COPRAC's addition to Comment [15]. If possible, please review COPRAC's revision and let me know if you believe that further public comment would be required.

My initial thought is that Comment [15] generally addresses the applicability of the ex parte contact prohibition to in-house lawyers and that the nuance that COPRAC recommends might be categorized as reasonably implicit in this general topic. However, because COPRAC's change effectively narrows the non-applicability of the rule to in-house counsel, one could argue that the change should be the subject of further public comment.

**August 19, 2010 McCurdy E-mail to RRC re 3.8 & 4.2:**

Commission Members:

As mentioned earlier, given the short turn-around time between the end of the public comment period (8/25/10) and the date of the meeting (8/27-28/10), it is important that all Commission members lodge their e-mail comments addressing public comments received, as soon as possible upon e-mail distribution by staff. If you agree with the recommendations made by a public commenter, then you should send an e-mail. Likewise, if you disagree with the recommendations made by a public commenter, you should send an e-mail. Most importantly, if you anticipate recommending revisions to a rule based upon public comment received or otherwise, then you should send an e-mail. The more advance Commission member input we have on the public comments received going into the meeting, the more focused and productive the meeting will be.

In particular, it would be especially helpful for Commission members to send e-mails responding to the public comments already received on proposed rules 3.8 (comments from COPRAC, Santa Cruz County DA, and Ventura County DA) and 4.2 (COPRAC). For convenient reference, these public comments are attached.

**RRC – Rule 4.2 [2-100]  
E-mails, etc. – Revised (8/24/2010)**

We will continue to circulate public comments by e-mail as they are received and also upload them to the Google site <http://sites.google.com/site/commentsrrc/home> .

On August 25th, the comment deadline, we will attempt to circulate all comments received on the night of Wednesday, August 25th. We ask that all members do your best to review the comments that evening and morning and promptly submit any remaining e-mail comments. The lead drafters need to submit any final recommendations for revisions to the rules in light of the e-mails received, and updated public commenter charts, if possible, **no later than Thursday, August 26th at 9:00 am** in order for staff to compile the materials and have copies of the materials available on the day of the meeting.

Thanks for your help pulling this together on such short order.

***Attached:***

RRC - [3-8] - Public Comment - Y-2010-533 Michael Schwartz Ventura DA.pdf  
RRC - [3-8] - Public Comment - Y-2010-535 Bob Lee Santa Cruz DA.pdf  
RRC - [3-8] - Public Comment - Y-2010-534c COPRAC.pdf  
RRC - [4-2] - Public Comment - Y-2010-534d COPRAC.pdf

**August 19, 2010 Difuntorum E-mail to RRC re 4.2:**

Commission Members:

To facilitate your response to the Lauren's message below as it pertains to proposed Rule 4.2, if you **agree** with COPRAC's recommendation to revise Comment [15] as set forth below, then you may use this message to REPLY TO ALL.

Of course, you are free to send your own personal e-mail (with "Rule 4.2" in the subject line) analyzing COPRAC's recommendation, but I am providing this as a convenient option for those members who simply wish to express their support for the recommended change. (COPRAC's comment letter and a redline draft of Rule 4.2 implementing COPRAC's revision is attached.) – Randy D.

**COPRAC's Recommended Revision of Comment [15] to Proposed Rule 4.2:**

[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, **unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication.**

***Attached:***

RRC - 2-100 [4-2] - Rule - YDFT19.1 (06-30-10) - REDLINE with COPRAC edit.pdf  
RRC - [4-2] - Public Comment - Y-2010-534d COPRAC.pdf

**August 19, 2010 Difuntorum E-mail to RRC re 4.2:**

Commission Members:

To facilitate your response to the Lauren's message below as it pertains to proposed Rule 4.2, if you **do not agree** with COPRAC's recommendation to revise Comment [15] as set forth below, then you may use this message to REPLY TO ALL.

Of course, you are free to send your own personal e-mail (with "Rule 4.2" in the subject line) analyzing COPRAC's recommendation, but I am providing this as a convenient option for those members who simply wish to express their opposition to COPRAC's recommended change. (COPRAC's comment letter and a redline draft of Rule 4.2 implementing COPRAC's revision is attached.) –Randy D.

**COPRAC's Recommended Revision of Comment [15] to Proposed Rule 4.2:**

[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, unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication.

**August 19, 2010 McCurdy E-mail to RRC re 3.8 & 4.2:**

Commission Members:

Please review the attached comment from Santa Cruz County District Attorney Bob Lee on Rules 3.8(d) and 4.2. Updated public commenter charts adding a synopsis for each rule comment is also attached.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

**Attached:**

RRC - [4-2] - Public Comment - Y-2010-535b Bob Lee Santa Cruz DA.pdf  
RRC - [3-8] - Public Comment - Y-2010-535a Bob Lee Santa Cruz DA.pdf  
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.1 (08-19-10).doc  
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.1 (08-19-10).doc

**August 19, 2010 Melchior E-mail to RRC re 4.2:**

As I understand this, the comment now provides that a lawyer may communicate with an opposing in house lawyer in a case where outside lawyers are also representing the opposing party, except where the in house lawyer is an actor whose operational conduct (not in his/her function as counsel in the matter) can bind the client. The change would eliminate the "binding through operational conduct" exclusion. This strikes me as bad policy since it would allow the

first lawyer to obtain direct, binding admissions from the lawyer/actor. The point of having to go through counsel in dealing with the adversary's witnesses is exactly to prevent such access.

I would vote No.

**August 19, 2010 Sondheim E-mail to RRC re 4.2:**

Contrary to Kurt's view of what is at issue from COPRAC's concern is not the question of talking to in-house counsel when there is representation by outside counsel. Rather COPRAC's concern is talking to in-house counsel when there is no representation by outside counsel, i.e. in-house counsel represents the entity and comes also within the prohibition of (b)(2). Putting to one side the possible conflict of in-house counsel (which may have been waived by the entity), there would be no attorney to talk to other than in-house counsel.

Therefore I support COPRAC's suggestion or some modification thereof unless its adoption would require that the rule be sent out for further public comment.

**August 19, 2010 Lamport E-mail to RRC re 4.2:**

I agree with Harry. There is a problem to be fixed here. We are trying to say that when an in-house lawyer represents the entity in the matter, the Rule does not apply even if there is also outside counsel. If the in-house lawyer does not represent the entity in the matter and is a represented person under the Rule, the Rule applies. I am not comfortable with the COPRAC formulation. At the same time, I think we can simplify the Comment. I suggest the following:

"[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 in the matter that is this subject of the communication even if the organization is also represented by outside legal counsel in the matter. However, this Rule applies to communication with an organization's in-house lawyer when the in-house lawyer is not acting as the organization's legal representative in the matter and the in-house lawyer is a "person" under paragraph (b)(2)."

**August 19, 2010 Martinez E-mail to RRC:**

The problem with the COPRAC language is that it refers to "legal representation" regarding the "subject matter of the communication," whereas the rule applies to communications regarding the "subject of the representation." So the issue is whether the lawyer is acting in a representative capacity in the matter, not whether there is a relationship between the legal representation and the subject matter of the communication. I prefer Stan's version.

**August 20, 2010 Difuntorum E-mail to RRC:**

The attached comment letter from the Santa Cruz County DA states an objection to the RPC 2-100 change from "party" to "person" in the Commission's proposed Rule 4.2. This issue has been previously discussed by the Commission and previously presented to the Board as a "very

controversial” issue. So far, the Board has voted in support of the change from “party” to “person.”

If any member of the Commission believes that reconsideration of the change from “party” to “person” is warranted based upon the Santa Cruz County DA comment letter, then please send an e-mail REPLY TO ALL as soon as possible, as this will enable the Commission leaders and staff to have a sense of whether there is any consensus to revisit this issue at the upcoming meeting.

***Attached:***

RRC - [4-2] - Public Comment - Y-2010-535b Bob Lee Santa Cruz DA.pdf

**August 20, 2010 Julien E-mail to RRC:**

I think I may not be reading COPRAC's comment correctly based on Kurt's reply. If the communication is between two lawyers on the same side, then there should be no objection to the communication. If, however,, they are two lawyers on opposite side of the case (as I read the comment); then, of course, they may not communicate. Therefore, I think I support COPRAC's addition.

**August 20, 2010 Sondheim E-mail to Difuntorum:**

Even though JoElla used the subject line "Oppose," I think she appears to "Support." I must say her response is a little confusing to me.

**August 20, 2010 Difuntorum E-mail to Sondheim, cc McCurdy & KEM:**

I agree. I think JoElla supports COPRAC's concept that that the applicability of Rule 4.2 to in-house counsel is not as clear as it could be.

**August 20, 2010 Julien E-mail to RRC re Santa Cruz DA's Comment re 3.8 and 4.2:**

I can see why each side might view materiality of the case differently. Then, I ask, why not get the necessary court order/permission to make clean moves in terms of the investigation. Therefore I oppose the suggested changes.

**August 20, 2010 Sondheim E-mail to RRC:**

Like Raul, I like Stan's version, but there may be a need to discuss it further depending upon the reaction of other Commission members.

**August 20, 2010 Foy E-mail to RRC:**

I agree that Stan's version is cleaner. Let's discuss at next week's meeting.

**August 21, 2010 Kehr E-mail to RRC:**

COPRAC has caught an interesting gap in our proposed rule, but I do not favor making its suggested addition or Stan's variation of it. My reason is that both versions omit a variable – is the organization also represented by outside or other in-house counsel with whom the lawyer could communicate about the matter? COPRAC's suggestion, in overlooking the possibility that there is another proper means of communication with the organization, would permit the lawyer to choose to communicate through the conflicted in-house lawyer. This arguably should not be permitted, but that question seems to me to be substantive. I would suggest to COPRAC that it consider this for an advisory ethics opinion.

In addition, I think that COPRAC's suggestion amounts not to an explanation of the Rule but an amendment to it. It effectively would alter paragraph (b)(2) to say: "... ,unless the employee is an in-house lawyer."

The gap that COPRAC found in our proposal also is a gap in our current rule and in the Model Rule, and I am not aware that the situation ever has arisen. Although not impossible, it would be a rare thing for an in-house lawyer to have engaged in conduct binding on the organization or imputable to it for purposes of civil or criminal liability, and rarer still, almost to the point of vanishing, for the organization then to select that lawyer to be the one to represent it with respect to the matter. I would not make any new substantive decisions at this point, and certainly not on a topic that seems largely theoretical.

**August 21, 2010 Martinez E-mail to Kehr, cc RRC:**

With respect to your last paragraph, it's not a rare thing for an in-house lawyer to have engaged in conduct binding on the organization or imputable to it. The in house lawyer may have worn two hats--e.g., vice president and general counsel. Another example would be where an in house lawyer was involved in case management decisions to withhold documents or evidence where the organization might be subject to civil or criminal penalties for doing so. If the lawyer was also acting in a representative capacity the communication would be permitted. It doesn't matter if the organization has outside counsel--the key is that the lawyer is acting in a representative capacity. The lawyer is therefore fair game.

**August 21, 2010 Kehr E-mail to Martinez, cc RRC:**

I don't doubt that an officer/lawyer might do any number innocuous things that have meaning for the organization but don't call into question the integrity of his or her work. I have understood the first sentence of Comment [15] to mean, for example, that an outside lawyer is entitled to negotiate a contract or contract amendment with house counsel even if the house counsel might or did sign the contract on behalf of the organization. And in those negotiations, whether or not the house counsel will sign the contract, the house counsel's statements during negotiations might be imputable to the organization (I am involved in a major transaction with a public company that has both house counsel and outside counsel, and both are involved). It also means that an outside lawyer may speak with the house counsel who negotiated or signed the contract when the contract becomes the subject of potential or actual litigation. None of that causes any problem.

I have understood that the second sentence of Comment [15] does not refer to those common situations, but rather when the house counsel's conduct is in question. If this were to occur, I think there is a legitimate question as to whether the outside lawyer should be permitted to communicate with the in-house lawyer, particular when the organization also has outside counsel in the matter or other in-house counsel.

If the Commission wants to go forward in the direction recommended by COPRAC, I have two alternative versions to suggest. Both suggestions begin with what now is the second sentence:

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, ...  
unless the lawyer is acting as the only legal representative of the organization with respect to the subject of the communication.

or

unless the lawyer is acting as a legal representative of the organization with respect to the subject of the communication.

**August 22, 2010 Snyder E-mail to RRC (response to 8/21/10 Kehr E-mail to RRC):**

I agree.

**August 22, 2010 Peck E-mail to RRC (response to 8/21/10 Kehr E-mail to RRC):**

I agree with Bob Kehr's recommendation too.

**August 23, 2010 McCurdy E-mail to RRC (re Tarlow comment):**

Please review the attached comment from Barry Tarlow on proposed Rule 4.2. In his letter, Mr. Tarlow objects to the communications “authorized by law” exception as explained in Comments [19] & [20]. An updated public commenter chart adding a synopsis for Mr. Tarlow’s comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - Tarlow.pdf

**August 23, 2010 Lamport E-mail to RRC:**

I read the Comment as saying that when an in-house lawyer is representing the organization in the matter, it is not a violation of the Rule to communicate with that lawyer even if there is also outside counsel representing the organization in the matter; but communication with the in-

house lawyer would be a violation if the in-house lawyer is not representing the organization in the matter and the in-house lawyer is a person (in the Rule 4.2 sense of the word). My proposed language follows this formulation.

I see this situation frequently. Bob's example is consistent with my experience; although my experience is a bit more wide ranging. For example, I represent a large well known company that has in-house counsel who handles land use and environmental issues. Because that company operates throughout the United States, that lawyer brings in local counsel. The in-house lawyer and I work together. I am essentially his co-counsel. We are not just negotiating and drafting agreements. We are handling the full spectrum of the company's affairs with respect to its sites. Under the circumstances, it would be silly for me to suggest that opposing lawyers must obtain my consent to communicate with him. I also have seen this arrangement in litigation and pre-litigation situations.

The key is whether the in-house lawyer is representing the organization in the matter. If the in-house lawyer is representing the organization in the matter, we should not be limiting the in-house lawyer's ability to operate in that role by requiring consent. If the in-house lawyer is not representing the organization in the matter, then it would make sense for the Rule to apply if the in-house lawyer is a represented person.

I don't think it is for us to decide whether it is appropriate or a good idea for an in-house lawyer to be representing an organization when there is also outside counsel. That is for the in-house and outside lawyers to decide. They can control the situation by deciding whether the in-house lawyer is representing the organization in the matter or not. It is a lot easier for everybody if the application of the Rule turns on whether the in-house lawyer represents the organization in the matter than to make an opposing lawyers have to figure out with each turn of events whether an in-house lawyer who works with outside counsel is a lawyer or a person. (Of course, if the in-house lawyer is an officer, director or managing agent, that lawyer is a person regardless of whether their conduct is in question, which I do not see accounted for in the analysis.)

I am concerned that Bob's construction of Comment [15] is a trap for the unwary. I don't think most lawyers will understand that an in-house lawyer can represent an organization alone, but does not represent the organization when working with outside counsel even though the in-house lawyer is still conducting himself or herself as a lawyer representing the organization in the matter. Most people seeing the in-house lawyer acting as a lawyer for the organization in that situation are going to treat the in-house lawyer as representing the organization in the matter and, consistent with other rules, the in-house lawyer who conducts himself or herself as a lawyer for the organization in the matter should expect to be considered as such by those with whom the in-house lawyer is dealing. People dealing with the in-house lawyer in that situation are not going to view him or her as a person (in the Rule 4.2 sense of the word). We should not be adopting an approach that is inconsistent with the way things are going to be perceived in practice, particularly when in-house lawyers can protect themselves by declaring whether they represent the organization in the matter and the opposing lawyers can protect themselves by inquiring whether the in-house lawyer represents the organization in the matter.

If the Commission wants to go with Bob's view, we need a much more explicit Comment that spells out Bob's thought process in much more detail than is expressed in the Comment now. I, for one, do not want to go there.

**August 23, 2010 Lee E-mail to RRC re 3.8 & 4.2:**

Attached you will find updated Public Commenter Tables for Rules 3.8 and 4.2.

**Attached:**

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.2 (08-23-10).doc

RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.2 (08-23-10).doc

**August 23, 2010 KEM E-mail to RRC:**

We've spent quite a bit of time on the in-house counsel comment which was an afterthought at the end of our consideration of the Rule, just before it was sent out for the first round of public comment in February 2008. A little history:

1. At the 8/24-25/07 meeting, the RRC discussed whether to include a comment that would permit a lawyer to communicate with in-house counsel of an organization even when the organization is represented by outside counsel. See 8/24 & 8/25/07 KEM Meeting Notes, at ¶¶ III.C.39-40. Although a motion was made to include a comment on this issue, *id.* at ¶.40, no vote was taken. Instead, the Chair directed the drafting team to flag the issue in the public comment draft. *Id.* at ¶. 40.f.

2. To ensure we received the public's attention on this issue, I recommended that we include a draft comment developed by the codrafters and loosely based on comment [5] to D.C. Rule of Prof. Conduct 4.2, as a placeholder. Here is what was proposed to the drafters:

[X] Because this rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization. If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.

3. And we were off to the races. See the attached e-mail compilation excerpt in PDF that includes the exchange between Raul and Bob concerning the comment. It shows the evolution of the Comment that we now have. I've highlighted in yellow the various proposals of Bob and Raul.

4. As you can tell from a review of that exchange, this comment is not easily susceptible to pithy resolution. Bob has suggested that we do nothing further with the comment. A few days ago Stan suggested substitute language for COPRAC's amendment of the comment, which as near as I can tell from his e-mail below, he still favors. Here is what Stan has recommended:

"[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 in the matter that is this subject of the communication even if the organization is also represented by outside legal counsel in the matter. However, this Rule applies to communication with an organization's in-house lawyer when the in-house lawyer is not acting as the organization's legal representative in the matter and the in-house lawyer is a "person" under paragraph (b)(2)."

5. Yet another solution would be to simply not include any comment on this concept, an approach that I favor.
6. Whatever we do, I urge that we not spend a lot of time trying to draft a comment at the meeting. We have three options. Let's go with one of them and move on.

***Attached:***

RRC - 2-100 [4-2] - E-mails, Etc. - REV (08-24-10)\_230-235.pdf

**August 24, 2010 Difuntorum E-mail to RRC:**

Please review the attached comment from Kay Otani (a lawyer in the Riverside Office of the Federal Public Defender) on proposed Rule 4.2. The commenter objects to the proposed rule, asserting that it diminishes the protections of criminal defendants as compared to civil parties. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - Y-2010-539 Kay Otani.pdf

**August 24, 2010 Difuntorum E-mail to RRC:**

Please review the attached comment from Becky Walker James (a former federal prosecutor who now practices criminal defense) on proposed Rule 4.2. The commenter objects to comments [19] and [20] insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - Y-2010-541 Becky Walker James.pdf

**August 24, 2010 Difuntorum E-mail to RRC:**

Please review the attached comment from John Vandavelde (a former federal prosecutor who now practices criminal defense) on proposed Rule 4.2. The commenter objects to comments [19] and [20] asserting that prosecutors should be held to a higher standard of professional responsibility, rather than one which authorizes a prosecutor to bypass the counsel for a represented person. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - John Vandavelde Rule.pdf

**August 24, 2010 McCurdy E-mail to RRC:**

Over the past two days Randy and I have circulated the comments as we have received them. As promised, I've attached a copy of updated commenter charts including a synopsis of those comments received on the following rules:

- Rule 1.0.1
- Rule 3.3
- Rule 3.8
- Rule 4.2

***Attached:***

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc  
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc  
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc

**August 24, 2010 Tuft E-mail to RRC:**

Kevin has cogently defined the issue.

I vote in favor of Kevin's solution in his paragraph 5.

We are trying to micro managing what in most jurisdictions is a basic anti-contact rule. It is real simple - if a lawyer representing a client knows that another person is represented by counsel with respect to the subject of the lawyer's communication, the lawyer needs the other counsel's consent to communicate directly or indirectly with that lawyer's client. It does not matter if the lawyer is in house or outside counsel. Nor does matter if the lawyer represents a party or a witness in a civil or in a criminal matter.

If the fact that a person is represented by counsel creates a legitimate problem for prosecutors in a criminal investigation or for defense counsel in preparing a defense, the rule provides remedies under the authorized by law or court order exceptions. Lawyers need to respect the client-lawyer relationship of all persons and employ these exceptions in appropriate cases. That is what effective lawyering is all about. California is not different than any other jurisdiction when it comes to addressing these issues and there is no empirical proof that the basic anti contact rule articulated under Model Rue 4.2 has caused a miscarriage of justice when properly applied by competent prosecutors or defense counsel.

Let's join the rest of the country and move on.

**August 24, 2010 Peck E-mail to RRC:**

I agree.

**August 25, 2010 Snyder E-mail to RRC:**

I agree with Mark and Ellen and would favor Kevin's solution.

**August 25, 2010 Difuntorum E-mail to RRC:**

Please review the attached comment from Evan Jenness (LACBA Chair writing in a personal capacity as a criminal defense practitioner) on proposed Rule 4.2. The commenter objects to comments [19] and [20] insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - Evan Jenness re Rule (8-24-10).pdf

**August 25, 2010 Difuntorum E-mail to RRC re CPDA Comment:**

Please review the attached comment from CPDA on proposed Rule 4.2. While the commenter supports the new sentence in Comment [20] that offers some criminal defense “parity,” more is requested and language is provided by the commenter. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - Y-2010-545a CPDA.pdf

**August 25, 2010 Difuntorum E-mail to Cardona, cc Sondheim, McCurdy, Lee & KEM:**

At Harry's request, I am providing copies of some of the public comments that have been received on proposed Rule 4.2. The public comment deadline is today and it is likely that more public comments will be received. However, the comments received to date include multiple comments from criminal defense practitioners who do not support Comments [19] and [20] which address the exception in Rule 4.2 for “communications authorized by law” as it pertains to prosecutorial investigations. Attached is the discussion draft materials for Rule 4.2 that are posted for public comment. Also, the link below is to the entire public comment proposal (seven proposed rules, including Rule 4.2).

<http://www.calbar.ca.gov/AboutUs/PublicComment/201019.aspx>

Due to the short turnaround time between today's public comment deadline and the Commission's meeting on this Friday and Saturday, we do not yet have a recommendation from the Rule 4.2 drafters addressing the public comments received. While this may not be available until just before the meeting, we thought that sharing the actual public comments received would be of interest to you.

***Attached:***

RRC - 2-100 [4-2] - Dash, Intro, Rule, Comm, Red, Clean - COMBO - END (08-26-10).pdf  
RRC - [4-2] - Public Comment - John Vandeveld.pdf  
RRC - [4-2] - Public Comment - Evan Jenness re Rule (8-24-10).pdf  
RRC - [4-2] - Public Comment - Y-2010-541 Becky Walker James.pdf  
RRC - [4-2] - Public Comment - Y-2010-539 Kay Otani.pdf  
RRC - [4-2] - Public Comment - Tarlow.pdf  
RRC - [4-2] - Public Comment - Y-2010-545a CPDA.pdf

**August 25, 2010 Difuntorum E-mail to RRC:**

Please review the attached comment from Carlton Gunn (a lawyer in the Federal Public Defender Office) on proposed Rule 4.2. The commenter objects to comments [19] and [20] insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Y-2010-546 Carlton Gunn.pdf

**August 25, 2010 Difuntorum E-mail to RRC re CDAA Comment:**

Please review the attached comment from CDAA on proposed Rule 4.2. The commenter objects to the "party" to "person" change. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

***Attached:***

RRC - [4-2] - Public Comment - California DA Association.pdf

**August 25, 2010 Sondheim E-mail to Cardona, cc Difuntorum, McCurdy, Lee & KEM:**

George--

We look forward to seeing you in San Francisco on Friday. I will make sure we discuss 4.2 on Friday. You may also be interested in 3.8 and, if so, let me know at the meeting and I will also arrange to discuss this rule on Friday.

Randy--

Would you also arrange to send George the comments received so far, including my emails and yours, on 3.8. So far as I can tell, no other Commission member has commented on this rule, although comments have been received from Commission members on other rules.

**August 25, 2010 Difuntorum E-mail to Cardona, cc Sondheim, McCurdy, Lee & KEM:**

Here is a link to a website where you can find the full text of the public comments that have been received:

<http://sites.google.com/site/commentsrrc/comments-batch-y-1>

Here is a link to a website where you can find the Commission member e-mails that have been exchanged about the comments received:

<http://sites.google.com/site/commentsrrc/home/batchyemails>

When accessing documents at the site, use the “download” button. All documents should be in

**August 25, 2010 Cardona E-mail to Sondheim, cc Difuntorum, McCurdy, Lee & KEM:**

Yes, I have interest in 3.8 as well and will be prepared to discuss 3.8(d) in particular.

**August 25, 2010 McCurdy E-mail to RRC:**

Lead Drafters:

Thanks to those of you who have found time to promptly send e-mails addressing the public comments that have been distributed.

As you know, we will also need completed public commenter charts for each of the rules on the agenda. An updated draft of each public commenter chart including a synopsis of all of the comments received by the end of the comment period is attached. You may already have the most recent version of those charts which did not require a recent update, however we are sending all of them with this e-mail for ease of reference.

For the RRC Response column, we encourage you to fill in a tentative response based on your own individual view or the views that you find in the Commission member e-mails that have

been sent concerning the comments. This would be preferable to leaving the RRC Response column blank pending final resolution at the meeting.

We request that you submit your draft public commenter charts, and any other rule agenda materials you wish to provide **no later than tomorrow morning, Thursday, August 26th, at 9:00 am.**

Many thanks for your work on this. You're almost there!

***Attached:***

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM.doc  
RRC - [2-1] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.2 (08-25-10)LM.doc  
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc  
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc  
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc  
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc

**August 25, 2010 Tuft E-mail to RRC re CDAA Comment:**

I oppose the change recommended by the CA District Attorneys Association to retain "party" rather than "person." There is no empirical evidence in the jurisdictions that have adopted the Model Rule that the change from "party" to "person" has significantly impeded lawful investigations or prosecutions. Other states has laws comparable to California and the policy of protecting the client-lawyer relationship even in criminal matters should not give way to the expediency of prosecutorial investigations or defense counsel expect as authorized by law or by court order in a particular case.

**August 25, 2010 Kehr E-mail to RRC re CDAA Comment:**

I couldn't agree more strongly.

I only would add that, for the reasons well expressed in 75 Opn. Atty. Gen. 223 (1992), I don't believe the change from "person" to "party" effects any change in the application of the no-contact rule in the context criminal and quasi-criminal matters. I think it is key in replying to the prosecutorial criticisms that proposed Rule 4.2 will interfere with their work, and the contrary defense criticisms that Rule 4.2 would give prosecutors a free pass, that we make clear that both are wrong because, as expressed in the A.G.'s opinion, the limit of the no-contact rule is whatever prosecutors are permitted to do without violating the 5th or 6th Amendments. Thus, the proposed Rule respects the discretion of the state and federal courts to interpret their constitutions.

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

**TOTAL = 12**    Agree = \_  
Disagree = 7  
Modify = 5  
NI = \_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	California District Attorneys Association	M	Yes	4.2(c)(3)  Comment [19] & [20]	<p>Use of the term “person” rather than “party” creates significant potential issues under Marsy’s Law, specifically California Constitution Article I, Section 28(c)(1). Under that provision, a victim may retain an attorney to enforce Marsy’s Law rights. However, since the victim is not a party in a criminal case, under the previous California rule the prosecutor would not be barred from contacting a victim represented by counsel and dealing with such a victim in the preparation and presentation of the case. By expanding the rule to cover and “person” represented by counsel, the Proposed Rule puts the prosecutor in the position of first having to seek permission of an attorney to deal with the chief witness in a criminal prosecution.</p> <p>The Proposed Rule states that communications are not prohibited when “authorized by law or court order.” Newly added Comments [19] and [20] specify that appropriate law enforcement investigative contacts and communications are not meant to be covered by the rule. It appears that the Commission has sought to address the</p>	

<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]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					concerns of the criminal bar by writing exceptions into the Comments. It would seem a better practice to make the scope of the exception for criminal matters specific and detailed in the Proposed Rule itself. The alternative will likely be years of litigation over the meaning and application of this rule.	
8	California Public Defenders Association	M	Yes	Comment [4]	<p>CPDA requests an additional new sentence be added to Comment [4], using the term “reasonably believe[d]” as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:</p> <p>“A criminal defense lawyer is not subject to discipline for communicating with a represented person on the subject of that representation without the consent of the other lawyer under paragraph (a) if the criminal defense lawyer reasonably believed that the lawyer was not communicating on the subject of the representation, or if the criminal defense lawyer reasonably believed that he or she was not required to obtain the consent of the other lawyer by controlling constitutional principles, even if that belief later is shown to have been wrong.”</p>	
1	COPRAC	M	Yes	Comment [15]	We believe the language of the two sentences in Comment [15] may be contradictory and may not be easily reconciled. The language in the second sentence of the Comment	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>appears to bar communications with in-house lawyers if: (1) outside counsel has been engaged; (2) the in-house lawyer is not an officer of the organization; and (3) either (a) the in-house lawyer's acts or omission relate to the subject of the communication or (b) the in-house lawyer's statements may constitute an admission on behalf of the entity. We are generally in agreement that that formulation is acceptable as long as such in-house lawyer is not involved in a representative capacity in the matter. However, where such in-house lawyer is acting in a representative capacity in the matter, there's no reason to bar communications with such lawyer.</p> <p>As a result, we propose that the Comment be modified by adding the following to the end of the second sentence of Comment [15]: “, unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication.”</p>	
2	County of Santa Cruz District Attorney's Office	D	Yes		<p>In criminal cases, existing Rule 2-100 has worked well for many years. To now change the term “party” to “person” will create a plethora of new problems for prosecutors and defense attorneys alike. Victims and witnesses who have an interest in a civil recovery related to the charged criminal</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>conduct may have retained counsel. The fact that a witness has retained counsel will present great practical problems for a prosecutor or defense lawyer who needs to speak with that witness in order to prepare a criminal case if speaking with the represented “person” will subject the lawyer to discipline.</p> <p>Although the Proposed Rule contains an exception in subdivision (c)(3) for communications authorized by law or court order, the scope of what is “authorized by law” is impossible to determine despite the lengthy accompanying Comment [19]. The proposed alternative of obtaining a court order does not appear to exist elsewhere in California law. It does not appear feasible to obtain a court order in the investigatory phase of a criminal prosecution since the court does not have jurisdiction until a case has been filed with a court. It would also be costly and burdensome to have to seek a court order in order to speak with a represented witness. More importantly, it would unconstitutionally grant the judiciary oversight over the prosecutor’s investigations and case preparation in violation of the separation of powers doctrine.</p> <p>The Current Rule is much clearer and more easily applied in criminal cases. If it is decided</p>	



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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>represented person under this Rule must comply with paragraphs (d) and (e).” In particular, compliance with paragraph (d) cannot be reconciled with the broad investigatory activity that Comment [19] suggests subparagraph (c)(3) would allow in the interest of effective law enforcement.</p> <p>The solution to all of these problems is to avoid them in the first place by not including Comments [19] and [20].</p>	
10	Gunn, Carlton F.	D	No	Comment [19] & [20]	<p>Comments [19] and [20] should be deleted from the Proposed Rule because they would have the effect of holding prosecutors and other government lawyers (including those in civil and administrative proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar.</p> <p>Such a special-interest carve-out is unprincipled, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers.</p> <p>The reference at the end of Comment [20] to</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>“lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment . . .” does not remedy these flaws and adds to the interference with attorney-client relationships that is invited by Comments [19] and [20].</p>	
4	James, Becky Walker	M	No	Comment [19] & [20]	<p>I object to Comments [19]-[20] insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. Persons accused of crimes have the greatest need for and the most fundamental right to counsel. Contact by prosecutors or law enforcement represents a serious intrusion on that right.</p> <p>This exception is necessary. Federal prosecutors have long been trained on the rules restricting contacts with represented persons and there is no reason they cannot continue to follow those rules. Moreover, the exemption for criminal defense lawyers does not cure the problem. It does nothing to lessen the intrusion by law enforcement to have other defendants’ lawyers also contact the represented person. And again, criminal defense lawyers have long worked within the confines of ethical rules restricting their access to represented persons and no change in those rules is needed.</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Jenness, Evan A.	D	No	Comment [19] & [20]	<p>These Comments would have the effect of holding prosecutors and other government lawyers (including those in civil proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, may endorse conduct that is prohibited by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers.</p>	
11	McGowan, David	M	No		<p>Proposed Rule 4.2(e) is vague and, taken at face value, changes the law in a way likely to multiply discovery practice and disadvantage one class of clients in favor of another. It is not clear to me the Commission considered these aspects of the rule and endorses such changes, so I write to bring them to the Commission's attention.</p> <p>Many lawyers conduct informal discovery through interviews with former employees or current employees not within the scope of 4.2(b). Many if not most such employees will have signed non-disclosure agreements restricting their ability to discuss their</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>employment. Such agreements are very broad, and in general would restrict employees from discussing most matters of interest to interviewing lawyers. Such NDA's create contractual duties to "another"—the employer.</p> <p>This provision changes the law. The most similar ABA Rule is 4.4(a), which provides that lawyers may not use "methods of obtaining evidence that violate the legal rights of such a person." Proposed Rules 4.2(e) and 4.3 change this rule in three ways. First, the Proposed Rules are not limited to "methods," as is the ABA rule. Second, the ABA rule limits its scope to "legal rights" of third persons. The Restatement (Third) of the Law Governing Lawyers interprets its similar provision to extend to rights granted by law, such as privilege and work product, but not rights granted by contract. So far as I know, case law is consistent with this interpretation. Third, and relatedly, Rule 4.2(e) goes beyond "privileged" information to cover "other confidential information."</p> <p>These changes are significant and tend to impede informal discovery. That change implies greater resort to formal discovery procedures, and possibly to more discovery</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>motion practice. The rules also tilt in favor for one class of clients and against at least two other classes: The favored class includes entities who employ NDA's and are owed duties under them. Disfavored classes include those who litigate against such entities, such as employment discrimination plaintiffs or securities plaintiffs, lawyers for both types of plaintiffs rely on informal interviews in their investigations.</p>	
5	Otani, Kay	D	No		<p>Although the Supreme Court has curtailed the rights of criminal defendants to be free from state intrusion in the form of questioning by agents of the state, that <u>does not mean</u> there should be any change to the ethical duties of attorneys in the criminal law arena.</p> <p>Clients are always free to speak with opposing parties whether in civil or criminal cases. Attorneys are <u>not</u> free to approach or speak to opposing parties in either civil or criminal cases. If anything, there should be <u>stronger</u> protection against contact with criminal defendants because of the constitutional issues involved.</p> <p>This is a <u>terrible</u> rule change and diminished the protections of criminal defendants as compared to civil parties. Furthermore, there is no ethical justification for the change. There</p>	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					is even <u>less</u> ethical justification for an attorney to contact a party in a criminal action than in a civil action. The dangers of convincing a criminal defendant to act against her legal interest are if anything <u>greater</u> than the dangers for a civil party.	
3	Tarlow, Barry	D	No	4.2(c)(3)  Comment [19] & [20]	The “authorized by law” exception for prosecutors and their agents in the Proposed Rule is unprincipled, will endorse conduct that is prohibited in almost every state in the country and by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of prosecutors, defense lawyers, and civil practitioners.	
6	Vandavelde, John D.	D	No	Comment [19] & [20]	These Comments are an ill-advised attempt to eviscerate the right to retain and benefit from the advice of counsel in criminal matters, especially complex white-collar matters. No matter how well-intentioned government counsel may believe themselves to be, counsel and agents will have an unfair advantage over the represented person in eliciting admissions that will be designed to go behind the back of counsel in order further the investigation and prosecution of the person under investigation. This will undermine what	

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					I view as a cornerstone of our legal system, the right to seek and have the benefit of legal counsel.	

# Proposed Rule 4.2 [2-100]

## “Communication with a Represented Person”

(XDraft 19.1, 06/30/10)

**Summary:** Proposed Rule 4.2(a), 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 which is the standard in nearly every jurisdiction. However, similar to current rule 2-100, it provides detailed guidance as to how the rule is intended to apply in certain contexts. 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 in 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	<i>Matter of Dale</i> (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)

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

(13 Members Total – votes recorded may be less than 13 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar

Approved by Consensus

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

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## Stakeholders and Level of Controversy

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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 Represented Person”

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

### *INTRODUCTION:*

Proposed Rule 4.2(a) follows the basic “no-contact” rule in Model Rule 4.2, except that the proposed Rule makes clear that a lawyer is prohibited from communicating indirectly as well as directly with a person known to be represented in the matter. In addition, 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”.* Notwithstanding the fact that the overwhelming majority of jurisdictions have adopted rules governing communications with a represented “person” rather than a represented “party,” and the fact that lawyers who practice in the lawyer discipline area in California have interpreted “party” in current rule 2-100 to encompass any represented person in a matter, the Commission received a

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\* Proposed Rule 4.2, XDraft 19.1 (06/30/10).

*INTRODUCTION (Continued):*

significant amount of input from the public on using “person” in the proposed Rule. Input was received during both the initial and subsequent public comment periods, as well as during the Commission’s open session meetings. In response to the initial public comment distribution of the rule, representatives of the California Attorney General; Public Defender and District Attorney offices in California, and their representative organizations; and representative organizations of the California criminal defense bar raised concerns over the substitution of “person” in the proposed Rule 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 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]. In response to the subsequent public comment distribution of the rule, there were less comments received but among them was a comment from the San Bernardino County Public Defender that similarly objected to the change from “party” to “person” and emphasized an anticipated detrimental impact on the ability of defense counsel to investigate cases and to conduct interviews of witnesses. To address this concern, the Commission added a new sentence to Comment [20] clarifying that the change from “party” to “person” is not intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.

*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.* Every other jurisdiction has adopted a rule that governs communications with a represented “person” rather than a represented “party.” The Commission is aware of only four jurisdictions that still retain “party” in the black letter of its Model Rule 4.2 counterpart: Alabama, Arizona, Connecticut and Mississippi. In each instance, however, the jurisdictions use “Person” in the title of the rule and include a comment that provides: “This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel

concerning the matter in question.” Within the last year and a half, both Illinois, Kentucky, Maine and West Virginia have each rejected rules that formerly prohibited contact only with a “party” in favor of a more expansive rule that prohibits communications with a “person known by the lawyer to be represented.” Other states have rules similar to proposed California Rule 4.2 and current rule 2-100 that expressly address communications with members or constituents of organizations (e.g., District of Columbia, Louisiana, Maryland, New Jersey, New Mexico, and Texas). Also similar to the proposed California Rule, several states also address communications with the government (e.g., District of Columbia, Maryland, and North Carolina). Two other states, Maine and Utah, have rules that expressly address the conduct of prosecutors under the 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 Represented Person</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 single paragraph Model Rule 4.2, but adds the words “directly or indirectly” to make clear that the Rule applies to communications through an intermediary such as an investigator.</p> <p>The exception for communications authorized by law or court order have been moved 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>The Model Rule does not define “person” in an organizational or corporate setting. Therefore, the Commission recommends paragraph (b), which describes the types of organization constituents who fall within the proscription of the Rule. The Model Rule by contrast makes no attempt to define which constituents of a corporation or other association are subject to the protections afforded by the Rule. As result, the proposed changes provide greater guidance to lawyers seeking to communicate with a represented organization.</p>

\* Proposed Rule 4.2, XDraft 19.1 (06/30/10). 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 Represented Person</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 proposed Rule applies to certain other constituents of an organization not within the organization's "control group," and provides greater guidance and specificity than the Model Rule.</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>Subparagraph (c)(1) expresses an exception to the Rule that communications with public officers, board committees, and other similarly situated government employees and entities are permitted under the First Amendment and the right to petition government. This concept is found in a comment to the Model Rule. Paragraph (c) 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>Subparagraph (c)(2) carries forward an exception found in current Rule 2-100.</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 Represented Person</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(3) <u>Communications authorized by law or a court order.</u></p>	<p>This exception stated in subparagraph (c)(3) is identical to the exception found in the Model Rule. It has been placed with the other express exceptions to the proposed Rule for clarity.</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>Paragraph (d) adds an important public protection not found in the Model Rule. It is designed to prevent misleading a person with whom communication is permitted.</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>Paragraph (e) adds protections not found in the Model 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>Paragraph (f) is intended 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 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 Represented Person</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(g) <a href="#">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).</a></p>	<p>Paragraph (g) defines the term "public official" as used in paragraph (c)(1). The Model Rule recognizes that lawyers are authorized by law to communicate with government on behalf of clients who are exercising their constitutional rights. However, this exception is found in a comment to the Model Rule, whereas the proposed Rule 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  Represented Person</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 align="center"><u>Overview and Purpose</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 <del>uncounselled</del><u>uncounseled</u> disclosure of information relating to the representation.</p>	<p>Comment [1] is identical to Model Rule 4.2, cmt. [1], except for the spelling of "uncounseled."</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>[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.</p>	<p>Comment [2] is identical to Model Rule 4.2, cmt. [2].</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>[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>Comment [3] is identical to Model Rule 4.2, cmt. [3], except for the substitution of "This" for "The".</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[4] 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 concerning the matter to which the communication relates.</u></p>	<p>Comment [4] 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. <i>Matter of Dale</i> (Rev.Dept. 2005) 4 Cal. State Bar Ct.Rptr. 798, 804-807.)</p>
	<p><u>[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.</u></p>	<p>Comment [5] clarifies 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</p>	<p><del>[4]</del> This Rule does not prohibit <del>communication</del> <u>communications</u> with a represented person, or an employee <del>of, member,</del> agent, <u>or other constituent</u> of <del>such—a</del> <u>person represented organization</u>, concerning matters outside the representation. For example, the existence of a controversy, <u>investigation or other matter</u> between <del>the</del> government <del>agency</del> and a private <del>party</del> <u>person</u>, or between two organizations, does not prohibit a lawyer for either from communicating with <u>the other, or with</u> nonlawyer representatives of the other, regarding a separate matter. <del>Nor does this Rule preclude communication with a represented person</del></p>	<p>Comment [6] is based on Model Rule 4.2, cmt. [4], which has been modified to conform to the terminology used in paragraph (b). That paragraph defines “person” in an organizational context. The revisions also clarify the language of the Model Rule 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 addressed in Comment [7] below.</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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 independent justification or legal authorization for communicating with a represented person is permitted to do so.</p>	<p><del>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 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>The concepts contained in Model Rule 4.2, cmt. [5] are covered in more detail in Comments [16] and [19], and so the Model Rule comment has been stricken.</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[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 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>The gist of Comment [4] – that represented persons may communicate with each other – is found in Model Rule, cmt. [4]. The second sentence of this comment, which states 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 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.) This 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 Model Rule does not address the concept of indirect communications with represented persons; hence the need to add this comment.</p>
	<p><a href="#">[8] This Rule does not 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>Comment [8] has no counterpart in the Model Rule. As noted in Comment [7], represented persons in 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 advice on how a represented person may avoid abuses.</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#"><u>Knowledge of Representation and Limited Scope Representation</u></a></p> <p><a href="#"><u>[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(f).)</u></a></p>	<p>The substance of Comment [9] is in Model Rule 4.2, cmt. [8].</p>
	<p><a href="#"><u>[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 does not 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.</u></a></p>	<p>Comment [10] has no counterpart in the Model Rule. California authorizes limited scope representation in civil cases and family law cases. (California Rules of Court, 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. Model Rule 1.2 recognizes that a lawyer may limited the scope of representation, but neither that Rule nor Model Rule 4.2 provide guidance on how to handle communications with partially represented persons. Comment [10] is intended to fill this void.</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u><a href="#">Represented Organizations and Constituents of Organizations</a></u></p> <p><u><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></u></p>	<p>Comments [11] to [15] explain paragraph (b), a provision not found in Model Rule 4.2. Model 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 when the organization is represented by counsel.</p>
	<p><u><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 organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.</a></u></p>	<p>See Explanation of Changes for Comment [11].</p>
	<p><u><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></u></p>	<p>See Explanation of Changes for Comment [11].</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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>See Explanation of Changes for Comment [11].</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>See Explanation of Changes for Comment [11].</p>
	<p><b><a href="#">Represented Governmental Organizations</a></b></p> <p><a href="#">[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</a></p>	<p>Comment [16] explains paragraph (c)(1), which has no counterpart in the Model Rule. (See discussion above regarding Paragraph (c)(1).) This Comment also provides parameters on permissible communications.</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">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.</a></p>	
	<p><b><a href="#">Represented Person Seeking Second Opinion</a></b></p> <p><a href="#">[17] Paragraph (c)(2) permits a lawyer 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 1.7 and 7.3.</a></p>	<p>Comment [17] explains paragraph (c)(2), which has no counterpart in the Model Rule.</p>
	<p><b><a href="#">Communications Authorized by Law or Court Order</a></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</a></p>	<p>This comment explains what is meant by the “authorized by law exception.” It expands on Comment [5] of the Model 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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">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><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, 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.</a></p>	<p>Comment [19] 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 guidance not found in Model Rule 4.2, cmt. [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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[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 intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.</a></p>	<p>Comment [20] explains that the change from "party" in current Rule 2-100 to "person" in the proposed Rule is not intended to alter existing investigative communication exceptions that were recognized under current rule 2-100. The comment has no Model Rule counterpart since ABA Rule 4.2 does not use the word "party." Input from public defenders indicated that the rule's proposed change from "party" to "person" would impair an accused's constitutional rights. To respond to this concern the Commission added a new sentence at the end of Comment [20] clarifying that the rule is not intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.</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><del>[6]</del><sup>[21]</sup> A lawyer who is uncertain whether a communication with a represented person is permissible <del>may</del> <b>might be able to</b> seek a court order. A lawyer <del>may</del> <b>might be able to</b> 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>Comment [21] addresses the "authorized by court order" exception in paragraph (c)(3). Except for minor changes, this comment is identical to Comment [6] to the Model Rule.</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 Represented Person</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.</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 methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.</del></p>	<p>The subject matter of Model Rule 4.2, cmt. [7], is addressed more fully in paragraph (b) and Comments [11] to [15] of the proposed Rule. See Explanation of Changes, above.</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><b>Prohibited Objectives of Communications Permitted Under This Rule</b></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>Model Rule 4.2, cmt. [8], although stricken, is found in the black letter and in Comment [9] of the proposed Rule (see above).</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 Represented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).</a></p>	<p>Comment [22] serves as a reminder that even if a communication is permitted by this Rule, a lawyer must not abuse the privilege by disregarding the lawyer's obligations under paragraphs (d) and (e). There is no counterpart to paragraphs (d) and (e) in the ABA Rule.</p>
	<p><a href="#">[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 reasonably should know is subject to an evidentiary or other privilege of the organization. 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 8.4(c) and 8.4(d).</a></p>	<p>Comment [23] clarifies the scope and application of paragraphs (d) and (e), which are not found in the ABA rule. References to Rule 4.4 are in brackets pending the Commission's final consideration of that Rule.</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><del>[924] In the event the person</del> <a href="#">When a lawyer's communications with whom a person are not subject to this Rule because the lawyer communicates does not know the person is represented by counsel in the matter, or because the lawyer knows the person</a> 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>Comment [24] is based on Model Rule 4.2, cmt. [9], but 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. Both Model Rule 4.2 and proposed Rule 4.2 apply when the lawyer is communicating with a person the lawyer knows to be represented by counsel.</p>

**Rule 4.2: Communication with a Represented Person**  
**(Commission's Proposed Rule – XDFT19.1 (6/30/10) – COMPARED TO PCD [#18] (10/19/09))**

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a "person" includes:
  - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
  - (2) 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.
- (c) This Rule shall not prohibit:
  - (1) Communications with a public official, board, committee or body; or
  - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or
  - (3) Communications authorized by law or a court order.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) 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).

## COMMENT

### *Overview and Purpose*

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] 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 concerning the matter to which the communication relates.
- [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.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

### *Communications Between Represented Persons*

- [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 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).
- [8] This Rule does not 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.

### *Knowledge of Representation and Limited Scope Representation*

- [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(f).)~~

- [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 does not 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.

*Represented Organizations and Constituents of Organizations*

- [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.
- [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 organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [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.)

- [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.
- [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.

*Represented Governmental Organizations*

- [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.

*Represented Person Seeking Second Opinion*

- [17] Paragraph (c)(2) permits a lawyer 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 ~~7.3-1.7~~ and ~~7.34-7.~~)

*Communications Authorized by Law or Court Order*

- [18] This Rule controls 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.
- [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, 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.

- [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 intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. [Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.](#)
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to 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.

*Prohibited Objectives of Communications Permitted Under This Rule*

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [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 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).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

## Rule ~~2-1004.2~~ **2-1004.2** Communication With a Person Represented ~~Party~~ **By Counsel**

(Comparison of the Current Proposed Rule to Current California Rule)

- ~~(a)~~ ~~(A)~~ ~~While~~ In representing a client, a ~~member~~ lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~ person the ~~member~~ lawyer knows to be represented by another lawyer in the matter, unless the ~~member~~ lawyer has the consent of the other lawyer.
- ~~(b)~~ ~~(B)~~ For purposes of this ~~rule~~ Rule, a “~~party~~ person” includes:
- ~~(1)~~ ~~An~~ A ~~current~~ officer, director, partner, or managing agent of a corporation ~~or~~ partnership, association, ~~and a partner or managing agent of a partnership~~ other represented organization; or
  - ~~(2)~~ ~~An association member or an~~ A ~~current~~ employee ~~of an association, corporation, member, agent or partnership, other constituent of a represented organization~~ if the subject matter of the communication is any act or omission of ~~such person~~ 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 ~~whose~~ if the statement of such person may constitute an admission on the part of the organization.
- ~~(c)~~ ~~(C)~~ This ~~rule~~ Rule shall not prohibit:
- ~~(1)~~ Communications with a public ~~officer~~ official, board, committee, or body; or
  - ~~(2)~~ Communications initiated by a ~~party~~ person seeking advice or representation from an independent lawyer of the ~~party's~~ person's choice; or
  - ~~(3)~~ Communications ~~otherwise~~ authorized by law or a court order.
- ~~(d)~~ 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.
- ~~(e)~~ 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.
- ~~(f)~~ 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.
- ~~(g)~~ 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).

### ***Discussion:-***

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

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

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

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

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

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

### **COMMENT**

#### **Overview and Purpose**

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

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

learns that the person is one with whom communication is not permitted by this Rule.

[4] 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 concerning the matter to which the communication relates.

[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.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

#### *Communications Between Represented Persons*

[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 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).

[8] This Rule does not 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.

#### *Knowledge of Representation and Limited Scope Representation*

[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(f).

[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 does not 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.

#### *Represented Organizations and Constituents of Organizations*

[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.

[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 organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[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.

[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.

[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.

#### *Represented Governmental Organizations*

[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.

#### *Represented Person Seeking Second Opinion*

[17] Paragraph (c)(2) permits a lawyer 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 1.7 and 7.3.

#### *Communications Authorized by Law or Court Order*

[18] This *Rule* controls *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.*

[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, 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.

[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 intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of

crimes that might be authorized under the Sixth Amendment or other constitutional right.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to 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.

*Prohibited Objectives of Communications Permitted Under This Rule*

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[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 reasonably should know is subject to an evidentiary or other privilege of the organization. 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 8.4(c) and 8.4(d).

[24] When a lawyer’s communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

**Rule 4.2: Communication with a Represented Person**  
**(Commission's Proposed Rule – Clean Version)**

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a "person" includes:
  - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
  - (2) 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.
- (c) This Rule shall not prohibit:
  - (1) Communications with a public official, board, committee or body; or
  - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or
  - (3) Communications authorized by law or a court order.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) 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).

## COMMENT

### *Overview and Purpose*

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] 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 concerning the matter to which the communication relates.
- [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.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

### *Communications Between Represented Persons*

- [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 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).
- [8] This Rule does not 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.

### *Knowledge of Representation and Limited Scope Representation*

- [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(f).

- [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 does not 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.

*Represented Organizations and Constituents of Organizations*

- [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.
- [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 organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [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.

- [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.
- [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.

*Represented Governmental Organizations*

- [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.

*Represented Person Seeking Second Opinion*

- [17] Paragraph (c)(2) permits a lawyer 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 1.7 and 7.3.

*Communications Authorized by Law or Court Order*

- [18] This Rule controls 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.
- [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, 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.

- [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 intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to 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.

*Prohibited Objectives of Communications Permitted Under This Rule*

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [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 reasonably should know is subject to an evidentiary or other privilege of the organization. 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 8.4(c) and 8.4(d).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

## Rule 4.2: Communication with Person Represented by Counsel

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 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:** In the rules effective January 1, 2010, Illinois adopts ABA Model Rule 4.2.

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

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 organization's 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:** In the rules effective April 1, 2009, New York Rule 4.2(a) is the same as Model Rule 4.2 except that New York substitutes "party" for "person," adds "or cause another to communicate" before "about," and deletes "or a court order." New York adds Rule 4.2(b) as follows, which uses "person," not "party."

Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person'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

(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.



## Rule 4.2 – Public Comment – File List

Y-2010-534d COPRAC [4.2]

Y-2010-535b Bob Lee Santa Cruz DA [4.2]

Y-2010-536 Barry Tarlow [4.2]

Y-2010-539 Kay Otani [4.2]

Y-2010-541 Becky Walker James [4.2]

Y-2010-543 John Vandavelde [4.2]

Y-2010-544a Evan Jenness [4.2]

Y-2010-545a CPDA [4.2]

Y-2010-546 Carlton Gunn [4.2]

Y-2010-549 David McGowan [4.2]

Y-2010-550 William Genego [4.2]





**THE STATE BAR  
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

August 9, 2010

Harry B. Sondheim, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 4.2

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 4.2 (as revised on June 30, 2010), and is generally supportive of the rule.

However, COPRAC has the following concern regarding the language of proposed Comment [15]. We believe the language of the two sentences in the comment may be contradictory and may not be easily reconciled. The language in the second sentence of the comment appears to bar communications with in-house lawyers if: (1) outside counsel has been engaged; (2) the in-house lawyer is not an officer of the organization; and (3) either (a) the in-house lawyer's acts or omission relate to the subject of the communication or (b) the in-house lawyer's statements may constitute an admission on behalf of the entity. We are generally in agreement that that formulation is acceptable as long as such in-house lawyer is not involved in a representative capacity in the matter. However, where such in-house lawyer is acting in a representative capacity in the matter, there's no reason to bar communications with such lawyer.

As a result, we propose that the comment be modified by adding the following to the end of the second sentence of Comment [15]: “, unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication.”

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC



# County of Santa Cruz

## District Attorney's Office

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BOB LEE  
DISTRICT ATTORNEY

August 16, 2010

VIA FACSIMILE (415-538-2171) & U.S. MAIL

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

Re: **Proposed Rules 3.8(d) and 4.2 of the Rules of Professional Conduct**

Dear Ms. Hollins:

### Rule 3.8(d)

~~On November 9, 2009, I sent you my comments on proposed Rule 3.8(d) as it then read. I emphasized the importance of the previously proposed language that required prosecutors to comply with all constitutional obligations, as defined by relevant case law. However, in response to a letter from the Los Angeles Public Defender, the Board of Governors has now proposed a new version of subdivision (d) that eliminates this essential language regarding constitutional obligations. If adopted in this form, the rule would no longer be consistent with the constitutional law and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of conceivably favorable evidence.~~

~~In its current form, the proposed rule would also unfairly single out prosecutors for discipline for statutory discovery violations, even though these statutory obligations have been reciprocal in nature under the California Constitution ever since the voters approved Proposition 115 in 1990. (See Cal. Const., art. 1, sec. 30(c).) The statutory scheme for criminal discovery is found in Penal code section 1054 et seq. Due to the constitutional rights and obligations of each party, the items required to be disclosed by the prosecutor and by defense counsel differ. (Cf. Pen. Code §§ 1054.1 & 1054.3.) However, the statutorily mandated timing of the required disclosures is exactly the same for both parties. (See Pen. Code, § 1054.7.)~~

~~This proposed rule appears to unfairly single out prosecutors for discipline for an unintentional or inadvertent delay in complying with the statutory time limit. However, there appears to be no rule which would subject criminal defense counsel to the same disciplinary consequences. Proposed Rule 3.4 (as conditionally adopted by the Board on May 15, 2010) is applicable to all lawyers, including criminal defense attorneys. However, it punishes (1) the unlawful obstruction of another party's access to evidence, (2) the unlawful alteration, destruction or concealment of potential evidence, and (3) the suppression of evidence the lawyer has a legal obligation to reveal or~~

~~produce. It does not appear to punish mere unintentional delay in violation of a statute. In fact, Comment (3) to this proposed rule states that a violation of another rule or statute does not by itself establish a violation of the proposed rule. Moreover, Business and Professions Code section 6068 (e) (3) has long provided that an attorney need not report the imposition of judicial sanctions for failure to make discovery to the State Bar.~~

~~Furthermore, to the extent that the new proposal subjects prosecutors to discipline for inadvertent and unintentional delays in discovery, the rule would be unworkable. It would be particularly unworkable in times like these when government staffing and resources are so limited. Under Penal Code section 1054.1, prosecutors are responsible for disclosing items in the possession of the investigating agencies. Thus, delays may result from the actions of other persons and agencies over which the individual prosecutor has no supervisory control. Sometimes these delays may even be the result of a lack of sufficient staff and resources to keep up with the workload. Although Penal Code section 1054.5 provides a court with discretion to enforce the discovery rules by various measures affecting the case or by means of contempt, contempt generally requires at least a culpable, willful act. The same should be required before a prosecutor is disciplined for a delayed disclosure in violation of section 1054.7. Prosecutors should be governed by the same ethical rules applicable to criminal defense lawyers if they violate a reciprocal discovery time limit applicable to both parties' lawyers.~~

~~Finally, both the former proposal and the new proposal go beyond the prosecutor's constitutional duty to disclose mitigating evidence to the defense. (See Brady v. Maryland (1963) 373 U.S. 83 and progeny.) The proposed rule further requires that the prosecutor then perform defense counsel's job of presenting any such mitigating information "to the tribunal." The language "and to the tribunal" should be deleted from this rule.~~

## Rule 4.2

In criminal cases, Rule 2-100 of the existing California Rules of Professional Conduct has worked well for many years. To now change the term "party" to "person" will create a plethora of new problems for prosecutors and defense attorneys alike. This is particularly true in light of the voters' adoption of the Marsy's Law in 2008. Under Article 1, section 28 (b), of the California Constitution, crime victims have been granted many new rights. Section 28, subdivision (c), provides that a victim's retained attorney may enforce those rights in the trial or appellate court with jurisdiction over the criminal case. Consequently, victims will more frequently have an attorney to represent their interests in criminal cases, even though a victim is not a "party" to the case. In addition, victims and witnesses who have an interest in a civil recovery related to the charged criminal conduct may have retained counsel. The fact that a witness has retained counsel will present great practical problems for a prosecutor or defense lawyer who needs to speak with that witness in order to prepare a criminal case if speaking with the represented "person" will subject the lawyer to discipline.

Although proposed Rule 4.2 contains an exception in subdivision (c)(3) for communications authorized by law or court order, the scope of what is "authorized by law" is impossible to determine despite the lengthy accompanying Comment 19. The proposed alternative of obtaining a court order does not appear to exist elsewhere in California law. It does not appear feasible to obtain a court order in the investigatory phase of a criminal prosecution since the court does not have jurisdiction until a case has been filed with the court. It would also be costly and

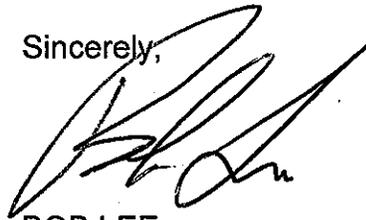
burdensome to have to seek court orders in order to speak with represented witnesses. More importantly, it would unconstitutionally grant the judiciary oversight over the prosecution's investigations and case preparation in violation of the separation of powers doctrine.

In contrast, the current rule is much clearer and more easily applied in criminal cases. If it is decided that there is a compelling need to change the ethical rule in civil cases, the provisions of Rule 2-100 should continue to apply to a lawyer handling a criminal matter.

General Observations

As a general matter, the proposed new rules are overly lengthy, complicated and unclear. When lengthy comments are required in order to clarify the meaning of a rule, the rule is obviously unclear on its face. On the other hand, the current rules are reasonably clear, simpler to remember, and have withstood the test of time.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Lee", written over a white background.

BOB LEE  
DISTRICT ATTORNEY

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August 20, 2010

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BOARD OF LEGAL SPECIALIZATION

**Via Email: [audrey.hollins@calbar.ca.gov](mailto:audrey.hollins@calbar.ca.gov)**  
**and Federal Express**

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Re: Comments Re Proposed Revision California Rules of Professional Conduct - Proposed Rules 4.2, Comments 19-20 [permitting government lawyers and defense lawyers to secretly interview individuals represented by counsel in civil and criminal cases]

Dear Ms. Hollins:

## I. INTRODUCTION

I am a criminal defense lawyer who has represented individuals accused of crimes in federal and state trial and appellate courts throughout the country. Prior to entering private practice, I served as a prosecutor for the Justice Department, as an Assistant United States Attorney for the Central District of California, Criminal Division. I was certified as a specialist in criminal law by the California Board of Legal Specialization in 1975 and have been re-certified every five years since that time. Throughout my time in private practice, I have been extensively involved in writing, lecturing, litigating, and consulting about matters in which rogue prosecutors or their investigators or informers have secretly approached and interviewed individuals represented by counsel, who were charged or not yet charged with criminal offenses.

The following fact pattern illustrates the disturbing consequences of the “authorized by law” exception in Proposed Rule 4.2, the expansive interpretation of that exception in Comments 19-20, and the latest amendment to Comment 20 that essentially authorizes criminal defense lawyers to interview any individual represented by counsel:

Under this novel exemption, defense counsel, in *USA v. Jones*, can visit the jail and interview a potential witness indicted in a separate case. He can do so without informing the witness’s lawyer, who has sent a letter to the prosecutor directing that he or she not contact his client. Jones’s defense lawyer obtains incriminating evidence against the witness and some evidence useful to Jones’s case. The witness/defendant does not advise his own lawyer about this conversation. On the eve of Jones’s criminal trial, the defense lawyer’s surreptitious conversation with the witness surfaces. Some of it is admitted but Jones is convicted. At the witness’s separate trial, the prosecution calls Jones’s defense lawyer to testify about critical evidence, against the witness/defendant originally secretly interviewed in jail, resulting in a conviction and a 20 year non-parolable sentence.

The Board of Governors (“BOG”) should seriously consider whether this disturbing scenario, created by proposed CRPC 4.2, and the conduct of lawyers seeking to take advantage of the Rule, has any appropriate place in our criminal justice system.

Proposed Rule 4.2 is an anti-contact rule, which generally prohibits *ex parte* communications with represented persons. Comments 19-20 are lengthy provisions creating a special exemption for government lawyers, and would have the effect of holding prosecutors and other government lawyers to lower standards of professional conduct than those which apply to other members of the California Bar. In material part, the Comments state that the “authorized by law or a court order” exception in 4.2(c)(3) “recognizes that prosecutors . . . as authorized by relevant . . . law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. . . . [T]he ‘authorized by law’ exception . . . is necessary to promote legitimate law enforcement functions that would otherwise be impeded . . . . [The change from “party” to “person”] is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.” It is important to emphasize that this exemption does not only apply to criminal matters; according to the Comments, government lawyers can also contact represented individuals in civil matters.

Comment 20, in a new provision, also exempts criminal defense attorneys from the Rule, but not attorneys opposing the government in civil matters. The only theoretical limit placed on the new exception for defense lawyers in Comment 20 is the “Sixth Amendment or other constitutional right.” Proposed CRPC Rule 4.2, Comment 20. Since the Fifth and Sixth Amendments control only the government’s conduct, the Comment in essence places no limit on the right of defense lawyers to contact any individual represented by counsel.

The special-interest carve-out for prosecutors and their agents in the proposed ethics Rule is unprincipled, will endorse conduct that is prohibited in almost every state in the country and by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of prosecutors, defense lawyers, and civil practitioners. This analysis of the proposed Rule and Comments is not intended to disparage the work of the many decent and honorable people who have chosen to serve as government lawyers, but to acknowledge that there are government lawyers, as well as defense attorneys, who will certainly take advantage of the conduct that may be permitted by this Rule.

## **II. THORNBURG REDUX**

### **A. The Thornburgh Memo and Rejection by the Federal Courts**

The expansive interpretation of the “authorized by law” exemption for government lawyers in Comments 19-20 is an effort to revive the discredited 1989 Thornburgh Memorandum, and to end-run Congressional intent that government lawyers be held to the same ethical standards as all other members of the bar. The Justice Department has a long history of vigorously arguing that state ethics rules should not be applied to federal prosecutors, despite the fact that government lawyers are expected to abide by higher, not lower, ethical standards.<sup>1</sup> For over 20 years, the federal courts, Congress, and state Bar Associations have consistently and emphatically rejected attempts by government lawyers to create an exception to firmly established ethical principles. Despite this long history, the new proposed Rule would codify the ability of government lawyers to avoid the ethical duties that all attorneys should share.

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<sup>1</sup> See, e.g., *U.S. v. Berger*, 295 U.S. 78, 88 (1935).

In the Thornburgh Memorandum, then-Attorney General Richard Thornburgh directed that Department of Justice prosecutors and their agents were always “authorized by law” to contact represented individuals. The Thornburgh Memorandum was not promulgated by a rogue prosecutor or agent, but by the Attorney General of the United States. It launched one of the most distasteful episodes in the recent history of the federal courts and the Justice Department. The Memorandum permitted all the Assistant United States Attorneys and agents and informers under their supervision to apply the principles in the memo to interview individuals represented by counsel.

The Thornburgh Memorandum declared that the “authorized by law” exception “applies to *all* communications with represented individuals by Department attorneys or by others acting at their direction.”<sup>2</sup> This flew in the face of existing law which assumed without discussion that the “authorized by law” exception did not permit this type of contact. *See U.S. v. Hammad*, 858 F.2d 834, *modifying* 846 F.2d 854 (2nd Cir. 1988) (government prosecutor not permitted to direct pre-indictment contacts between represented targets of a grand jury investigation and an informer).

Federal courts throughout the country consistently rejected the view that government attorneys were “authorized by law,” that is, by the Thornburgh Memorandum, to contact individuals represented by counsel, whether or not they had been charged, if it served a law enforcement interest.<sup>3</sup>

## **B. Prior Proposed and Rejected California Rule**

In the past, California also rejected the expansive interpretation of the “authorized by law” exception in the Rules of Professional Conduct. In 1992, the California Attorney General issued an opinion (which was relied on by supporters of the current proposed exception to the Rule) that would have authorized prosecutors to communicate with represented persons. 75 Ops. Cal. Atty. Gen. 223 (1992). However, an amendment proposed in 1993 to CRPC 2-100 that would have codified the Attorney General’s position, by creating an exception for prosecutors to communicate with represented persons, was soundly rejected, possibly by the BOG, though it is unclear at this time if BOG considered the amendment. “Stealth California Ethics Amendment Intercepted by Defense Bar,” *in* RICO Report, by Barry Tarlow, *The Champion*, Sept./Oct. 1993, at 42.<sup>4</sup>

This amendment was rejected for good reason – like the discredited Thornburgh Memorandum, the California Attorney General’s opinion did not actually cite any law saying that there is a right by prosecutors

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<sup>2</sup> Richard Thornburgh, Memorandum to All Justice Department Litigators Re Communications with Persons Represented by Counsel (“Thornburgh Memorandum”) (unpublished office memorandum, June 8, 1989) at 7 (emphasis added).

<sup>3</sup> *See United States ex rel O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998) (government attorneys not “authorized by law,” despite general enabling statutes, to contact employees of represented firm without consent of the firm’s counsel); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court’s “trenchant analysis of the inefficacy of the” Thornburgh Memorandum [which referred to the Thornburgh Memorandum as “[m]ak[ing] a mockery of the court’s...powers” and involving “tortured logic,” *United States v. Lopez*, 765 F. Supp. 1433, 1463, 1447, (N.D. Cal. 1991)]).

<sup>4</sup> If the prior amendment was submitted to the BOG at that time, it would create a serious problem if the current BOG had not been advised of the prior proposed amendment.

to interview persons represented by counsel during the investigative stage; it merely cited cases saying that the prosecutor has a duty to investigate, and concluding that that duty requires that prosecutors be included under the “authorized by law” exception. Were this reasoning to prevail, it could justify egregious behavior by government lawyers “in civil, criminal, or administrative law enforcement investigations.” Proposed CRPC Rule 4.2, Comment 19. This conclusion clearly cannot and should not stand. The current proposed Rule and Comments 19 and 20 once again attempts to permit government lawyers and their agents to interview individuals represented by counsel and should be rejected.

### **C. State Rejection of the Thornburgh Memo and the Expansive “Authorized By Law” Exception**

What is so troubling about this proposed Rule is that other states also rejected the idea that the expansive interpretation of the “authorized by law” exception would permit prosecutors to contact individuals represented by counsel even after they have been charged with a crime. Shortly after the Thornburgh Memorandum was announced, the Ethics Committee of the Florida Bar rejected it in an advisory opinion. Ethics Committee, Florida Bar, Opinion 90-4 (July 15, 1990). In 1994, “the Conference of Chief Justices for all 50 state supreme courts passed a resolution in which they affirmed their intention to enforce all ethical provisions upon all members of their respective state bars, ‘without regard to’ the DOJ rule.” “Son of Thornburgh Rears Its Ugly Head,” *in* RICO Report, by Barry Tarlow, *The Champion*, Dec. 1994, at 21.

For several years, the State Bar of New Mexico vigorously fought to discipline a Justice Department lawyer who had secretly communicated with a represented defendant, and resisted great pressure and an extraordinary effort by the Justice Department. Ultimately, the State Bar of New Mexico prevailed in the Supreme Court of New Mexico. The prosecutor facing ethical violations, supported by the Justice Department, sought to block discipline by the New Mexico Supreme Court by seeking removal of his case to the federal courts and filing two different federal lawsuits challenging New Mexico’s jurisdiction.<sup>5</sup> Both courts rejected these challenges and ruled that the Supreme Court of New Mexico retained jurisdiction to discipline the prosecutor. The Supreme Court of New Mexico found the prosecutor’s actions, that did not violate the Constitution, were not “authorized by law” by the Thornburgh Memorandum. *In the Matter of G. Paul Howes, Esq.*, 940 P.2d 159 (N.M. Sup. Ct. 1997).

### **D. Congressional Response**

Although the Thornburgh Memorandum had already been thoroughly discredited in the courts, Congress inflicted what should have been a death blow to the principles it embraced and the disgraceful course of conduct that resulted. Congress enacted the 1998 McDade Amendment, 28 U.S.C. 530B.<sup>6</sup> However, the expansive interpretation of the vague term “authorized by law” is yet another attempt to create an exemption to the rules that govern the conduct of all other lawyers. The Comments 19-20 attempt to skirt the McDade Amendment by embedding a special prosecutorial exemption within Rule 4.2. Given that federal courts and state bars throughout the country condemned this special exemption, why should the California Bar implement it once again?

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<sup>5</sup> See *In Re Doe*, 801 F.Supp. 478 (D.C.N.M. 1992); *United States v. Ferrera*, 874 F.Supp. 964 (D.C.D.C. 1993), *aff’d*, 54 F.3d 825 (App. D.C. 1995).

<sup>6</sup> Title 28 U.S.C. § 530B provides: “An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”

### III. VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS AND EROSION OF THE ATTORNEY CLIENT RELATIONSHIP

Proposed Rule 4.2, and the Comments accompanying it, would certainly lead to the systematic violation of the rights of the accused by government lawyers using the expansive 'authorized by law' exception to interrogate clients represented by counsel. Importantly, while Comment 19 recognizes that the exception implicates "a person's right to counsel under the 5<sup>th</sup> and 6<sup>th</sup> 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," it does nothing to clarify that rogue prosecutors' violations of the 5<sup>th</sup> and 6<sup>th</sup> Amendment are ethically reprehensible, as is some conduct that does not rise to the level of a constitutional violation.

The confusing language in the proposed Comments to the Rule does little to clarify what prosecutorial conduct is allowed and what is not. The description in Comment 19 that government lawyers in civil as well as criminal cases may engage in investigative activities vaguely described "as authorized by relevant federal and state, constitutional, decisional and statutory law," Proposed CRPC Rule 4.2, Comment 19, is so broad as to be virtually meaningless. History has demonstrated that rogue prosecutors can be expected to push the boundaries of what is "authorized by law," Proposed CRPC Rule 4.2(c)(3), to the extent that the ethical prohibition of contacting represented parties will not apply, as they did with the Thornburgh Memorandum.

It is necessary for ethics rules to go beyond the bare minimum of requiring government lawyers to comply with the Constitution. There are many situations in which prosecutors may secretly communicate with those suspected of crimes that do not violate the 5<sup>th</sup> and 6<sup>th</sup> Amendments, but that nevertheless take unfair advantage of the individuals involved and their lawyers. Because the 5<sup>th</sup> Amendment right to counsel only attaches during custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), and the 6<sup>th</sup> Amendment only attaches after the initiation of adversarial judicial proceedings, *Kirby v. Illinois*, 406 U.S. 682, 689, there are many situations in which a prosecutor is not constitutionally prohibited from contacting a represented suspect. For example, there is case law establishing that the right to counsel does not attach at the filing of a criminal complaint because the right only attaches with formal proceedings, *U.S. v. Alvarado*, 440 F.3d 191, 199-200 (4th Cir. 2006); *Beck v. Bowersox*, 362 F.3d 1095 (8th Cir. 2004); that it does not attach at arrest or at extradition hearings because these are not the inception of adverse criminal proceedings, *Anderson v. Alameida*, 397 F.3d 1175, 1180 (9th Cir. 2005); and that it does not attach during plea negotiations because negotiations are not formal judicial proceedings. *U.S. v. Moody*, 206 F.3d 609, 613-15 (6th Cir. 2000).

Even where a defendant has been indicted for one offense, prosecutors are permitted to contact him in the absence of counsel about other uncharged related offenses without violating the 6<sup>th</sup> Amendment, so long as those uncharged crimes do not constitute the same offense for double jeopardy purposes. *Tex v. Cobb*, 532 U.S. 162, 168. There is no constitutional violation even when federal prosecutors interview a defendant, without counsel, about his state murder charge, where the right to counsel has not yet been attached to the theoretically separate federal murder charge. *U.S. v. Avants*, 278 F.3d 510, 518 (5th Cir. 2002). In state court as well, the right to counsel does not attach until "formal judicial proceedings, such as a formal charge, preliminary hearing, indictment, information, or arraignment, have been initiated against him." *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984). Additionally, even if the defendant's attorney has requested to be involved in any contact, the prosecution is constitutionally allowed to secretly contact the defendant without counsel if the defendant has not yet been indicted. *U.S. v. Muick*, 167 F.3d 1162, 1165 (7<sup>th</sup> Cir. 1999).

State ethics rules that go beyond the protections granted in the Constitution are necessary precisely because there is so much potential for prosecutors to abuse their position of power over people accused of crimes without violating the Constitution. Even where contact between prosecutors and criminal defendants in the absence of retained counsel does not reach the level of a constitutional violation, it should not be

theoretically permitted by the expansive interpretation of the “authorized by law” exception to the state’s ethics rules.

#### IV. INADEQUACY OF DEFENSE EXCEPTION

The most recent revision to Rule 4.2 modifies Comment 20 to include a single sentence at the end of the Comment which purports to permit criminal defense lawyers to communicate with represented individuals without the permission of their counsel. This additional special interest exemption does not remedy the injustice that would result from Comments 19-20. Since the exemption for government lawyers applies to civil matters as well as criminal matters, it is incomprehensible why criminal defense lawyers have been granted an exemption to this rule, but other lawyers involved in civil cases opposing the government have not.

This minor carve-out for criminal defense lawyers appears to be a response to those who pointed out that Comments 19-20 create a special interest exemption for only a discrete segment of the bar – government attorneys. With all due respect to the competent and experienced criminal defense attorneys that advocated for this exception, their reasoning is misguided.<sup>7</sup> The revision appears to be based on the mistaken assumption that permitting criminal defense lawyers to have *ex parte* communications with represented persons would somehow remedy the injustice of exempting prosecutors from the anti-contact rule. Unfortunately the criminal defense bar would be far less persuasive since, unlike the prosecutors, they cannot offer significant benefits, such as money, immunity, freedom, or green cards, to the interviewees. In fact, if a defense lawyer offers a potential witness benefits for truthful information or testimony, this would amount to at least an ethical violation and is potentially the criminal offense of Obstruction of Justice.

The fact that, as a criminal defense lawyer, I would be permitted to participate in this reprehensible conduct and interview represented persons without their lawyers’ permission does not remedy the disturbing problem of government lawyers or criminal defense lawyers interfering with your attorney-client relationship, or mine, while seeking to extract uncounseled information or confessions from our clients. The ethical rules should not permit or condone this unnecessary interference with the attorney-client relationship in civil or criminal matters, whether it comes from a government lawyer or criminal defense lawyer, seeking to have a secret conversation with a person represented by counsel.

#### V. CONCLUSION

Edwin Meese, while serving as Attorney General of the United States, once observed that the problem with constitutional rulings that permit defense lawyers to be present is that the lawyers make it very difficult to obtain confessions. Fortunately, that is the price we pay for having a criminal justice system in which honorable people battle fiercely but fairly to protect and preserve the rights of those accused of crimes. The “dirty business”<sup>8</sup> that will inevitably result from the proposed Rule and Comments, and the actions of some defense lawyers and prosecutors under this Rule, have no place in our legal system.

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<sup>7</sup> The fact that some supporters of the comment limit their practice primarily to state criminal defense may explain our conflicting opinions. These types of violations have occurred far too often in the federal courts during the time I have practiced. Although I have also practiced extensively in state court, my experience is that that these types of violations occur far less frequently in state court. This may well explain our reasoned difference in perspectives.

<sup>8</sup> *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (Trott, J. author) (citing *On Lee v. United States*, 343 U.S. 747, 757 (1952)).

Sincerely,

TARLOW & BERK PC

  
Barry Tarlow

BT/sew



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

Professional Affiliation  Commenting on behalf of an organization

Yes  
 No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- |                                       |  |                                  |  |
|---------------------------------------|--|----------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100(B)]</a> | <a href="#">Rule 2.1 [n/a]</a>                 | <a href="#">Rule 3.3 [5-200]</a> | <a href="#">Rule 3.8 [5-110]</a>             |
| <a href="#">Rule 4.2 [2-100]</a>      | <a href="#">Rule 5.4 [1-310, 1-320, 1-600]</a> | <a href="#">Rule 8.4 [1-120]</a> | <a href="#">Discussion Draft [All Rules]</a> |

\* Select the Proposed Rule that you would like to comment on from the drop down list.

4.2 Communication with a Person Represented by Counsel [2-100]

\* From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Although the Supreme Court has curtailed the rights of criminal defendants to be free from state intrusion in the form of questioning by agents of the state, that DOES NOT MEAN there should be any change to the ethical duties of attorneys in the criminal law areana.

Clients are always free to speak with opposing parties whether in civil or criminal cases. Attorneys are NOT free to approach or speak to opposing parties in either civil or criminal cases. If anything, there should be STRONGER protections against contact with criminal defendants because of the constitutional issues involved.

This is a TERRIBLE rule change and diminishes the protections of criminal defendants as compared to civil parties. Furthermore, there is no ethical justification for the change. There is even LESS ethical justification for an attorney to contact a party in a criminal action than in a civil action. The dangers of convincing a criminal defendant to act against her legal interest are if anything GREATER than

**ENTER COMMENTS HERE.**

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This is a TERRIBLE rule change and diminishes the protections of criminal defendants as compared to civil parties. Furthermore, there is no ethical justification for the change. There is even LESS ethical justification for an attorney to contact a party in a criminal action than in a civil action. The dangers of convincing a criminal defendant to act against her legal interest are if anything GREATER than the dangers for a civil party.



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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[Rule 4.2 \[2-100\]](#)      [Rule 5.4 \[1-310, 1-320, 1-600\]](#)      [Rule 8.4 \[1-120\]](#)      [Discussion Draft \[All Rules\]](#)

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- AGREE with this proposed Rule  
 DISAGREE with this proposed Rule  
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I'm a former federal prosecutor who now practices criminal defense. I object to comments 19-20 insofar as they create exceptions for contacts with represented persons by government lawyers and law enforcement agents. Persons accused of crimes have the greatest need for and the most fundamental right to counsel. Contact by prosecutors or law enforcement represents the serious intrusion on that right. This exception is also not necessary. In the 12 years I spent as a prosecutor, I never found it necessary to any investigation or prosecution to have contact with a represented person without counsel present or without counsel's consent. Federal prosecutors have long been trained on the rules restricting contacts with represented persons and there is no reason prosecutors cannot continue to follow those rules. Moreover, the exemption for criminal defense lawyers does not cure the problem. It does nothing to lessen the intrusion by law enforcement to have other defendants' lawyers also contact the represented person. And again, criminal defense lawyers have long worked within the confines of ethical rules restricting their access to represented persons and no change in those rules is needed.

August 24, 2010

Ms. Audrey Hollins [email: [audrey.hollins@calbar.ca.gov](mailto:audrey.hollins@calbar.ca.gov)]  
Office of Professional Competence, Planning & Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Disagreement with Comments 19 and 20 to Proposed Rule 4.2  
of the California Rules of Professional Conduct

Dear Ms. Hollins:

I write to express my personal view disagreeing with Comments 19 and 20 to Proposed Rule 4.2 of the California Rules of Professional Conduct. I do so with a background in both prosecution and defense of criminal matters. I was a federal prosecutor in Los Angeles and am currently a criminal defense counsel. I spend much of my time on complex white collar investigations, often with multiple parties involved, usually with retained counsel. I have the benefit of being involved as prosecutor or defense counsel in hundreds of investigations during a career that spans more than 35 years. I have the added benefit of having served on numerous bar and professional committees, including serving as a Vice Chair of the American Bar Association's White Collar Crime Committee and other groups when we dealt with the Thornburgh memorandum. I am a fellow of the American College of Trial Attorneys. I have served as a lawyer delegate to the Ninth Circuit Judicial Conference and on the Attorney Advisory Council to the Ninth Circuit.

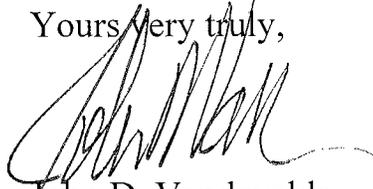
The referenced comments are an ill-advised attempt to eviscerate the right to retain and benefit from the advice of counsel in criminal matters, especially complex white collar matters. The reality is that those matters almost always involve lengthy periods of investigation, often years, in which the subjects or targets of the investigation are represented by counsel. Those matters also often involve substantial factual and legal issues about whether the purported conduct even constitutes a crime. Criminal liability very often turns on issues of knowledge and intent. Enabling government counsel and their agents to

Ms. Audrey Hollins  
Office of Professional Competence, Planning & Development  
State Bar of California  
August 24, 2010  
Page 2

communicate with persons represented by counsel will invite abuse. No matter how well-intentioned government counsel may believe themselves to be, counsel and agents will have an unfair advantage over the represented person in eliciting admissions that will be designed to go behind the back of counsel in order to further the investigation and prosecution of the person under investigation. Especially when combined with case law that permits deception and ruse by investigators, the conduct condoned by these comments would be grossly unfair to the person who is represented. And that could, and in my experience would, occur with the prosecutors and their agents having carefully planned how to take advantage of exactly that kind of unfairness. They will plan and even script out how to direct a conversation without defense counsel present so as to have the client unwittingly give them the evidence they think they are missing. Being able to bypass counsel in that way will undermine what I view as a cornerstone of our legal system, the right to seek and have the benefit of legal counsel. Indeed, it is ironic that these comments would deny such contacts in civil cases, where money is mostly at issue, yet permit it in criminal cases, where a person's very freedom is at stake. If anything, government counsel should be held to a higher standard of ethics than the rest of the bar in carrying out their duties, not a lower standard. These proposed comments to Rule 4.2, and the conduct they condone, should not be permitted.

Thank you for the opportunity to submit my personal view on this issue.

Yours very truly,

A handwritten signature in black ink, appearing to read "John D. Vandavelde", written over the typed name below.

John D. Vandavelde

# LAW OFFICES OF EVAN A. JENNESS

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August 24, 2010

**Via Email ([audrey.hollins@calbar.ca.gov](mailto:audrey.hollins@calbar.ca.gov))**

Ms. Audrey Hollins  
Office of Professional Competence, Planning & Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Comments Regarding Proposed Revision to the California Rules  
of Professional Conduct - Proposed Rule 4.2, Comments 19-20

Dear Ms. Hollins:

I am a criminal defense attorney in private practice, and write in a personal capacity to advise that Comments 19-20 be removed from Proposed Rule 4.2 (CRPC 2-100, Communication With a Person Represented by Counsel). By way of background, I am the current Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee; Co-Chair of the National Association of Criminal Defense Lawyers' (NACDL) Ethics Advisory and a NACDL Board Member; Treasurer of the Federal Bar Association's Los Angeles Chapter; and Co-Chair of the Lawyer Representatives of the Judicial Conference of the U.S. District Court, Central District of California.

Proposed Rule 4.2 is an anti-contact rule, which generally prohibits *ex parte* communications with represented persons. Comments 19-20 are lengthy provisions creating a special exemption for government lawyers. These provisions would have the effect of holding prosecutors and other government lawyers (including those in civil proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, may endorse conduct that is prohibited by

Ms. Audrey Hollins  
August 24, 2010  
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the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers.

Comments 19-20 are novel, and not part of the ABA Model Rules, or the rules of professional conduct of any other jurisdiction as far as I am aware. However, the principle they seek to revive is old. It was thoroughly discredited nationwide in the context of the notorious Thornburgh Memorandum, which purported to exempt federal prosecutors from states' rules of professional conduct, and was rejected by the State Bar Board of Governors in 1993 in the context of a proposed amendment to Rule 2-100 of the Rules of Professional Conduct.

The most recent revision to Rule 4.2 modifies Comment 20 to include a single sentence at the end of the Comment which purports to permit criminal defense lawyers to communicate with represented persons without the permission of such persons' counsel. This additional special interest exemption does not remedy the injustice that would be effected by Comments 19-20. This minor carve-out for criminal defense lawyers appears to be a response to those who previously pointed out that Comments 19-20 create a special interest exemption for only government lawyers. However, the revision appears to be based on the mistaken assumption that permitting criminal defense lawyers to have *ex parte* communications with represented persons would somehow remedy the injustice of exempting government lawyers from the anti-contact rule. The fact that I, as a criminal defense lawyer, would be permitted to interview represented persons without their lawyers' permission does not remedy the iniquity of prosecutors' interfering with my relationships with my clients and seeking to extract uncounseled admissions from them. Additionally, the special interest exemption for criminal defense lawyers references only lawyers representing an "accused," thus suggesting it would apply only *after* a client was charged with a crime, and not during the often lengthy precharging investigation stage of a matter.

Comments 19-20 are challenging to comprehend. However, they are clear in one regard: they describe a special carve-out applicable to government lawyers and those acting at their direction. In material part, they state, that the "authorized by law or a court order" exemption in 4.2(c)(3) "recognizes that prosecutors . . . as authorized by relevant . . . law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. . . [T]he 'authorized by law' exception . . . is necessary to promote legitimate law enforcement functions that would otherwise be impeded . . . [The change from "party" to "person"] is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law."

The special-interest exemption for government lawyers in Comments 19-20 appears to be an effort to revive the (thoroughly) discredited 1989 Thornburgh Memorandum,<sup>1</sup> and to end-run Congressional intent that government lawyers be held to the same ethical standards as all other members of the bar. Specifically, Comments 19-20 would evade the 1998 McDade Amendment, 28 U.S.C. § 530B,<sup>2</sup> by which Congress put an end to the Thornburgh Memorandum. In that document, then-Attorney General Richard Thornburgh had contended that Justice Department attorneys were not required to comply with states' rules of professional conduct where such rules conflicted with the government lawyers' "federal responsibilities, as determined by federal law and the Attorney General," because the Supremacy Clause would "forbid the states from regulating the attorneys' conduct" in such cases. *Matter of Doe*, 801 F. Supp. at 492-93 (quoting Thornburgh Memorandum).<sup>3</sup> In relevant part, the Thornburgh Memorandum purported to authorize DOJ attorneys to communicate with represented individuals behind their lawyers' backs under various circumstances - a view rejected by courts even prior to Congress' intervention via the McDade Amendment. See *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court's "trenchant analysis of the inefficacy of the" Thornburgh Memorandum); *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (Attorney General not authorized by law to exempt federal prosecutors from rules of professional conduct). Comments 19-20 skirt the McDade Amendment by embedding a special exemption within Proposed Rule 4.2.

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<sup>1</sup> See Richard Thornburgh, Memorandum to All Justice Department Litigators Re: Communications with Persons Represented by Counsel (unpublished office memorandum, June 8, 1989), reprinted as an attachment to *Matter of Doe*, 801 F. Supp. 478, 489 (D. N.M. 1992).

<sup>2</sup>

Title 28 U.S.C. § 530B provides: "An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

<sup>3</sup> The Thornburgh Memorandum states: "In sum, it is the Department [of Justice]'s position that contact with a represented individual in the course of authorized law enforcement does not violate DR 7-104. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques."

Ms. Audrey Hollins  
August 24, 2010  
Page 4

In addition to the preceding, a special interest exemption to the anti-contact rule for *any* sub-group of the bar is unnecessary. The general exemption applicable to *all* lawyers with respect to communications that are “authorized by law or court order” (Proposed Rule 4.2(c)(3)) addresses the only reasonable concern expressed by Comments 19-20 – that a lawyer not be subjected to discipline for engaging in conduct that is authorized by law or a court order.

Thank you for considering my views.

Very truly yours,

*Evan A. Jenness*

EVAN A. JENNESS

EAJ:dfm

Enclosure

**Rule 4.2: Communication with a Represented Person**  
(Redline Comparison of the Proposed Rule to Previous Public Comment Draft)

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a “person” includes:
  - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
  - (2) 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.
- (c) This Rule shall not prohibit:
  - (1) Communications with a public official, board, committee or body; or
  - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person’s choice; or
  - (3) Communications authorized by law or a court order.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) 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).

## COMMENT

### *Overview and Purpose*

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] 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 concerning the matter to which the communication relates.
- [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.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

### *Communications Between Represented Persons*

- [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 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).
- [8] This Rule does not 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.

### *Knowledge of Representation and Limited Scope Representation*

- [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(f).)~~

- [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 does not 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.

*Represented Organizations and Constituents of Organizations*

- [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.
- [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 organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [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.)~~

- [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.
- [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.

*Represented Governmental Organizations*

- [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.

*Represented Person Seeking Second Opinion*

- [17] Paragraph (c)(2) permits a lawyer 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 ~~7.3-1.7~~ and ~~7.3+7.~~)

*Communications Authorized by Law or Court Order*

- [18] This Rule controls 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.

- [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, 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.

- [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 intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.

- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to 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.

*Prohibited Objectives of Communications Permitted Under This Rule*

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [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 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).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\(B\)\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 4.2 \[2-100\]](#)

[Rule 5.4 \[1-310, 1-320, 1-600\]](#)

[Rule 8.4 \[1-120\]](#)

[Discussion Draft \[All Rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

4.2 Communication with a Person Represented by Counsel [2-100]

\*

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA is grateful to the Commission for having added the following sentence in Comment [20]: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right."

**ENTER COMMENTS HERE.**

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The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA is grateful to the Commission for having added the following sentence in Comment [20]: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right."

CPDA remains concerned, however, that this does not always provide a bright line, and, in effect, may sometimes require the criminal defense lawyer to "violate" the rule to find out whether it applies in that case.

It has been said of Current Rule 2-100 (although concerning a different aspect of the rule) that "a bright line test is essential.... [A]n attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client." *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198, quoting *Nalian Truck Lines, Inc. v. Nakano Warehouse & International Corp.* (1992) 6 Cal.App.4th 1256, 1264.

Because the added sentence about criminal defense lawyers does not always provide a bright line, CPDA believes it is appropriate to add one more sentence similar to the first sentence of Comment [4] to Proposed Rule 1.16 [Declining or Terminating Representation]. That first sentence reads "A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong."

The additional new sentence that CPDA requests be added to Comment [4] of this Proposed Rule 3.3, uses the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:

"A criminal defense lawyer is not subject to discipline for communicating with a represented person on the subject of that representation without the consent of the other lawyer under paragraph (a) if the criminal defense lawyer reasonably believed that the lawyer was not communicating on the subject of the representation, or if the criminal defense lawyer reasonably believed that he or she was not required to obtain the consent of the other lawyer by controlling constitutional principles, even if that belief later is shown to have been wrong."

Thank you for your consideration,

California Public Defenders Association by  
Garrick Byers, Member, Board of Directors, Chair, Ethics Committee

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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\* Name

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(You will receive a copy of your comment submission.)

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4.2 Communication with a Person Represented by Counsel [2-100]

\*

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I am an attorney who has been practicing with a Federal Public Defender office for over 25 years and have acted as a supervisor for most of those years. I believe Comments 19-20 should be deleted from the proposed rule because they would have the effect of holding prosecutors and other government lawyers (including those in civil and administrative proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers. The reference at the end of Comment 20 to "lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment . . ." does not remedy these flaws and adds to the interference with attorney-client relationships that is invited by Comments 19-20.



# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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August 23, 2010

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

RE: Proposed Revisions of Rules of Professional Conduct  
Discussion Draft of July 2010  
Proposed Rules 3.8(d) and 4.2

Dear Ms. Hollins:

This is provided in response to the invitation for public comment to the proposed revisions of the Rules of Professional Conduct (Discussion Draft of July 2010), Proposed Rules 3.8(d) and 4.2.

The California District Attorneys Association is the statewide professional association of California prosecutors, with a membership of over 2,500 prosecutors throughout the state. The Association presents its views on matters of concern to prosecutors before various bodies, including the legislature, the executive, and the courts through amicus curiae briefs. Proposed Rules 3.8(d) and 4.2 are both matters of concern to California prosecutors.

### ~~I. Proposed Rule 3.8(d) (Special Duties of a Prosecutor)~~

~~This rule deals with the ethical obligation of prosecutors to make known to the defense evidence that is favorable to the defendant. The version originally proposed for California linked the prosecutor's obligations to the constitution and relevant case law. Our organization embraced this proposal in the letter of then CDAА President Gary Lieberstein to the State Bar on November 13, 2009.~~

According to the Bar's invitation for comment of July 2010, the Bar received a letter from the Los Angeles Public Defender's Office which prompted the Bar to put forward a change in Rule 3.8(d). The Bar is now soliciting comment on whether California should adopt a version of Rule 3.8(d) which mirrors the ABA model rule. The difference between the two versions is set out below.

<b>Cal Bar Proposed Rule 3.8(d) [as proposed 9/09]</b>	<b>ABA Model Rule 3.8(d) [now under consideration]</b>
<p>The prosecutor in a criminal case shall... (d) <u>comply with all constitutional obligations, as defined by relevant case law regarding the</u> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>The prosecutor in a criminal case shall: ... (d) <u>make</u> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>

In addition to the language above, in considering the meaning of the ABA Model Rule, that rule was the subject of an ABA Ethics Opinion in July 2009 (ABA Formal Opinion 09-454). As written and as construed by Opinion 09-454, proposed Rule 3.8(d) raises concerns for California prosecutors.

For convenience in the discussion below, I will refer to the proposed California rule put forth in September 2009 (left hand column) as "the original proposed rule," and the ABA Model Rule now being discussed as "the model rule."

Initially, I note that the original proposed rule and the model rule differ in two significant aspects. First, because the original proposed rule was tied to applicable case law (which would be *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny), it covered material evidence favorable to the accused. As both the language of the model rule indicates and Opinion 09-454 makes crystal clear, the model rule has no materiality limitation, but covers any evidence that might be considered favorable or mitigating evidence, whether or not it is material. Hence, the model rule calls on the prosecutor to make more disclosure than the original proposed rule required.

Second, again because the original proposed rule was tied to applicable case law, the timing of the obligation to turn over evidence related to the constitutional obligation, as defined under the *Brady* line of cases. Under those cases, it is clear that the *Brady* right is a due process right to a fair trial. *United States v. Bagley* (1985) 473 U.S. 667, 678; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1068; *People v. Ainsworth*

(1990) 217 Cal.App.3d 247, 256; *United States v. Coppa* (2d Cir. 2001) 267 F.3d 132, 144. Disclosure is timely for *Brady* purposes so long as it is made in time for the defense to make meaningful use of the material at trial. *United States v. Woodley* (9th Cir. 1993) 9 F.3d 774, 776-777; *United States v. Higgins* (7th Cir. 1996) 75 F.3d 332, 335; *United States v. Higgs* (3d Cir. 1983) 713 F.2d 39, 44; *People v. Carter* (2005) 36 Cal.4th 1114, 1161. The model rule on its face does not specify when disclosure must be made, except to say that it must be timely. However, Opinion 09-454 construes that to mean, "as soon as reasonably practical." To the extent that "as soon as reasonably practical" means something earlier than disclosure made in time for meaningful use at trial, the model rule requires disclosure be made at an earlier time than the original proposed rule.

These two differences between the original proposed rule and the model rule (a greater scope of material to be disclosed, and earlier timing for the disclosure), create a conflict with California statutory and constitutional law.

#### **A. Conflict with California Criminal Discovery Law**

For 20 years, California criminal discovery has been governed by a balanced scheme based in constitutional and statutory provisions. California Constitution Article I, section 30(c), provides that criminal discovery shall be reciprocal, as provided by statutes enacted by the legislature, and the people through the initiative process. The statutory provisions are set out in Penal Code § 1054 through 1054.10. Section 1054.1 sets out the disclosures the prosecution is required to make to the defense, including names and addresses of witnesses the prosecutor intends to call, statements of such witnesses, and any exculpatory evidence. Section 1054.7 requires that these disclosures be made at least 30 days before trial. Section 1054 specifically states that no discovery shall occur except as required by express statutory provisions or as required by the U.S. Constitution. See also *In re Littlefield* (1993) 5 Cal.4th 122, 129; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106. The only substantive criminal discovery mandated by the U.S. Constitution is *Brady* discovery. *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 62. The U.S. Constitution does not require any other criminal discovery, either in a general sense, or as to evidence that may be favorable to the accused, but is insignificant. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258; *United States v. Ruiz* (2002) 536 U.S. 622, 628; *United States v. Bagley* (1985) 473 U.S. 667, 676, fn. 7.

To the extent the model rule may require the prosecutor to make greater disclosures than the California statutes or the U.S. Constitution require, and/or make disclosures at an earlier time (since "as soon as reasonably practical" may well be earlier than 30 days before trial), the model rule is directly at odds with the specific provisions of the California criminal discovery statutes. This amounts to the State Bar, through the mechanism of an ethics rule, changing the discovery responsibilities of the prosecutor when the California Constitution decrees that discovery shall be governed by statute. It should not be the role of the State Bar to make this type of change in an area of criminal procedure governed by specific constitutional and statutory provisions.

In this regard, it is worth noting the differences in federal criminal practice. The Jencks Act (18 U.S.C. 3500) affirmatively prohibits the disclosure of the statement of a federal prosecution witness until after the witness has testified on direct examination at trial. If the statement of the witness contains substantial impeaching material, it would certainly be covered by the model rule, and disclosure "as soon as reasonably practical" would be before the witness testified at trial. Assuming federal prosecutors who are members of the California Bar would be excused from the constriction of the model rule as to the timing of their disclosures because of the federal statutory mandate, then they would be disclosing material much later than California state prosecutors (who must disclose their witness statements 30 days before trial). But it is the California prosecutors who would be subject to State Bar discipline if they had the witness statements months before trial, yet failed to disclose them until the 30 days before trial as required by statute.

### **B. Disclosure Before Entry of Plea**

Under United State Supreme Court precedent, a defendant need not be given *Brady* evidence that is merely impeaching of the prosecution evidence before the defendant enters a plea bargain, so long as all evidence of actual innocence has been disclosed. *United States v. Ruiz* (2002) 536 U.S. 622. Opinion 09-454 specifically states that the prosecutor should make all favorable evidence available before a guilty plea. This rule is contrary to the U.S. Supreme Court precedent as to what the constitution requires. Since a guilty plea will often be entered more than 30 days before trial, disclosure of such evidence would not be required under the California criminal discovery statutes (since it would be more than 30 days before trial, and the U.S. Constitution would not compel that the prosecution disclose the evidence before the plea). This would be another instance of the State Bar ethics rule requiring prosecutors to make discovery they are specifically exempted from making under California statutory and U.S. Supreme Court law.

### **C. Defense Waiver of Compelling Disclosure**

Opinion 09-454 specifically states that if the defendant waives any right to receive disclosure of favorable evidence in return for a more favorable plea bargain offer, the prosecutor may not rely on that waiver as relieving the ethical duty under the model rule. The United States Supreme Court has specifically held that, so long as all evidence of factual innocence is disclosed, a defendant may enter such a waiver, and a prosecutor may rely on that waiver in making a plea disposition of the case. *United States v. Ruiz* (2002) 536 U.S. 622. This would be yet another instance of the State Bar ethics rule requiring prosecutors to make discovery that they are exempted from being required to make under California statutory and U.S. Supreme Court law. Further, to the extent that some prosecutors may be willing to make more generous plea bargain dispositions for defendants who enter such waivers, an ethics rule barring such agreements would work to the detriment of those defendants.

### **D. Disclosure of Sentencing Evidence to "the tribunal."**

The model rule also requires the prosecutor to disclose all unprivileged mitigating evidence on sentencing to both the defense and “the tribunal.” With this requirement, the prosecutor would be subject to discipline if he/she had given the information to the defense, but not the court. But whether or not some evidence is mitigating may be a matter of judgment, and may depend on the defense theory of the case. The defense may have an objection to the prosecutor providing evidence directly to the court which the prosecutor is afraid might be considered mitigating, but the defense does not want to present, because it undermines the defense theory of the case. In such situations, a prosecutor will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with this rule.

#### **E. Obligation of Supervisory Prosecutors**

As interpreted in Opinion 09-454, rule 3.8(d) makes it an ethical requirement for supervising prosecutors to ensure that subordinate prosecutors are adequately trained regarding their obligations, and that internal office procedures facilitate such compliance. While it is generally consistent with *Brady* case law to say that the government has an institutional *Brady* obligation (see *Giglio v. United States* (1970) 405 U.S. 150), on pain of sanctions that may be suffered in the criminal litigation (i.e. continuance, prohibiting testimony of a witness, dismissal of the case, etc.), it is both questionable and problematic whether, or to what extent, this can be translated into a personal ethical breach by a supervisory or management prosecutor. In particular, the issue of what supervisory layer the responsibility lies with creates a fundamental dilemma in such an application of the rule. Who does the bar discipline if training and/or discovery procedures are deemed inadequate – the immediate supervisor of the regular prosecuting attorney, a division chief, the office training manager, the chief deputy, or the elected District Attorney? All of the above? Would the Bar be justified in undertaking to discipline an elected District Attorney, the elected Attorney General, and/or that official’s chief deputy, for the failure of an office to have a *Brady* procedure in place? The prospect of such an undertaking raises significant questions as to the authority of the State Bar to interject itself into the discretion of an elected official to allocate resources and administer his or her office, especially if the prosecutor’s office has trained its prosecutors in their obligations under the California statutes and the U.S. Constitution, as discussed above, without training in the model rule obligations that appear at odds with California law. As applied to managing or elected prosecutors, insofar as the State Bar serves as an administrative arm of the judiciary (State Bar Rule 1.2; see also Business and Professions Code § 6008), such application of the rule also raises serious separation of powers concerns.

#### **F. Conclusion as to Proposed Rule 3.8(d)**

The discussion above is not meant to suggest that California prosecutors routinely have been, or will be, anything less than generous in making extensive early discovery disclosure. It is likely that most California prosecutors will voluntarily provide broad discovery in the initial stages of the case, if for no other reason than to promote early case disposition. See California Rule of Court 10.953(a). For reasons particular to individual cases or individual prosecution offices, however, such practices may not be universal.

~~The model rule 3.8(d) now proposed for adoption in California, on its face and as interpreted in ABA Opinion 09-454, is at odds with California criminal discovery law as defined by the California Constitution and California statutes. With all due respect, in an area with such detailed and specific statutory provisions, supported by a California constitutional mandate, which incorporate the discovery requirements of the U.S. Constitution, it is not the place of the State Bar to revise the discovery obligations of the prosecution.~~

## **II. Proposed Rule 4.2 (Communication with a Represented Person)**

This rule changes those covered by prohibited contacts from “party” under the current California rule to “person.” In the letter of then CDAA President Gary Lieberstein to the State Bar on November 13, 2009, we expressed our concern that this language might impede legitimate law enforcement investigations. The criminal defense bar had similar concerns that the proposal would limit defense investigations and contact with witnesses.

The now proposed rule 4.2(c)(3) states that communications are not prohibited when “authorized by law or court order.” Newly added comments 19 and 20 specify that appropriate law enforcement investigative contacts and communications are not meant to be covered by the rule. It appears that the committee has sought to address the concerns of the criminal bar by writing exceptions into the comments. It would seem a better practice to make the scope of the exception for criminal matters specific and detailed in the rule itself. The alternative will likely be years of litigation over the meaning and application of this rule.

Further, use of the term “person” rather than “party” creates significant potential issues under Marsy’s Law, specifically California Constitution Article I, Section 28(c)(1). Under that provision, a victim may retain an attorney to enforce Marsy’s Law rights. However, since the victim is not a party in a criminal case (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *People v. Green* (2004) 125 Cal.App.4th 360, 378), under the previous California rule the prosecutor would not be barred from contacting a victim represented by counsel and dealing with such a victim in the preparation and presentation of the case. By expanding the rule to cover any “person” represented by counsel, the proposed rule puts the prosecutor in the position of first having to seek permission of an attorney to deal with the chief witness in a criminal prosecution.

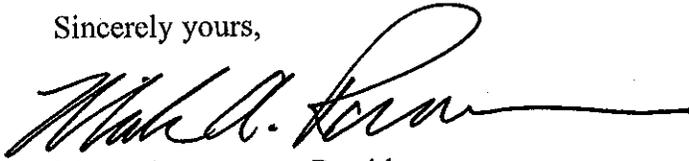
Finally, we note that the division within the Bar Committee itself (this proposal received only seven affirmative votes on a thirteen member committee, and was categorized as “Very Controversial”) suggests there are likely many unanticipated and unintended ramifications of the rule change for both criminal and civil law. That factor alone should counsel against making the change.

## **III. Conclusion**

Based on the foregoing, the California District Attorneys Association, on behalf of California prosecutors, urges that the Bar adopt Rule 3.8(d) as it was originally proposed

for California. We further urge as to Rule 4.2(c)(3) that the scope of the exception permitting communications with represented persons/parties be made clear in the text of the rule itself. In our view, the best means to accomplish this is to use the term "party" (as the current California rule does), rather than the term "person" in a specific rule or exception that addresses the application of this principle to criminal practice.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael A. Ramos", with a long horizontal flourish extending to the right.

Michael A. Ramos, President  
California District Attorneys Association



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\(B\)\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 4.2 \[2-100\]](#)

[Rule 5.4 \[1-310, 1-320, 1-600\]](#)

[Rule 8.4 \[1-120\]](#)

[Discussion Draft \[All Rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

4.2 Communication with a Person Represented by Counsel [2-100]

\*

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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August 25, 2010

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

Re: Proposed Rule 4.2(e)

Dear Ms. Hollins:

This letter offers some comments on proposed Rule 4.2 for the Commission's consideration.

Proposed Rule 4.2(e) is vague and, taken at face value, changes the law in a way likely to multiply discovery practice and disadvantage one class of clients in favor of another. It is not clear to me that the Commission considered these aspects of the rule and endorses such changes, so I write to bring them to the commission's attention.

Rule 4.2 governs contact with represented parties. It excludes from its scope former employees and current employees who do not fall within the class defined by Rule 4.2(b). These persons are covered by Rule 4.3(a), which suffers from the same problems I discuss here.

The proposed rule states:

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.

Many lawyers conduct informal discovery through interviews with former employees or current employees not within the scope of 4.2(b). Many if not most such employees will have signed non-disclosure agreements restricting their ability to discuss their employment. Such agreements are very broad, and in general would restrict

employees from discussing most matters of interest to interviewing lawyers. Such NDAs create contractual duties running to “another”—the employer.

This provision changes the law. The most similar ABA Rule is 4.4(a), which provides that lawyers may not use "methods of obtaining evidence that violate the legal rights of such a person." Proposed Rules 4.2(e) and 4.3 change this rule in three ways. First, the proposed rules are not limited to "methods," as is the ABA rule. Second, the ABA rule limits its scope to "legal rights" of third persons. The Restatement (Third) of the Law Governing Lawyers interprets its similar provision to extend to rights granted by law, such as privilege and work product, but not rights granted by contract. So far as I know, case law is consistent with this interpretation. Third, and relatedly, Rule 4.2(e) goes beyond "privileged" information to cover "other confidential information."

These changes are significant and will tend to impede informal discovery. That change implies greater resort to formal discovery procedures, and possibly to more discovery motion practice. The rules also tilt in favor of one class of clients and against at least two other classes: The favored class includes entities who employ NDAs and are owed duties under them. Disfavored classes include those who litigate against such entities, such as employment discrimination plaintiffs or securities plaintiffs; lawyers for both types of plaintiffs rely on informal interviews in their investigations.

In other jurisdictions relying on the traditional understanding, such informal discovery is permitted and not grounds for discipline. The New York Court of Appeal made that point clear in *Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y. 3d 506 (2007), a decision that conflicts with the text of the proposed rule. The lawyers in that case interviewed a former corporate officer prior to his deposition. The officer not only had privileged information, he had helped manage the very case at issue. The lawyers cautioned the officer against revealing privileged information and proceeded with the interview. The Court of Appeal found the lawyers had acted properly and reversed an order disqualifying them from the case.

Under proposed Rule 4.2(e), however, the lawyers in *Siebert* would seem to be subject to discipline. The officer almost certainly had contractual confidentiality obligations running to his former employer, and while discovery rules trump contractual obligations Rule 4.2(e) seems to signal that lawyers may not seek such information outside discovery.

This impression is strengthened by the language ending both Rule 4.2(e) and Rule 4.3, which subjects lawyers to discipline for seeking information “which the lawyer is not otherwise entitled to receive.” I do not know what this means. Insofar as I know lawyers are not *entitled* to receive any information outside discovery, but traditionally they have been able to seek it. If the language means that lawyers may seek whatever information they could obtain through discovery, then it conflicts with the preceding language, because lawyers may obtain through discovery even trade secret information or other information a person may have a duty not to disclose.

In short, the language of both Rule 4.2(e) and 4.3 seems to change relatively settled law, which the commission has in other cases tried to avoid, and to change it in a way that will have different effects for different lines of practice, which is a change not highlighted by the comments or in any discussion I have seen. If the commission intends to make that change, I encourage it to do so more explicitly and to consider fully comments on the substance of the change. If the commission does not intend to make the change, I urge revision of the language to track the ABA's Rule 4.4(a).

Very truly yours,

/s/

David McGowan

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THE STATE BAR OF CALIFORNIA  
BOARD OF LEGAL SPECIALIZATION

August 25, 2010

## By electronic mail

Audrey Hollins

[audrey.hollins@calbar.ca.gov](mailto:audrey.hollins@calbar.ca.gov)

Office of Professional Competence, Planning & Development  
State Bar of California  
180 Howard Street  
San Francisco, California 94105-1639

Re: Comments on Proposed Revision to Rule 4.2 of the California Rules of Professional Conduct

Dear Ms. Hollins,

I am writing to comment on the Proposed Revision to Rule 4.2 of the California Rules of Professional Conduct, and specifically Comments 19 and 20. Comments 19 and 20 broaden the scope of the actual text of the rule, will encourage government lawyers to interfere with the right to counsel and they conflict with Comment 22.

Subparagraph (c)(3) exempts certain communications from those that are otherwise prohibited by Rule 4.2 - “[c]ommunications authorized by law or a court order.” That provision makes clear that the “communication” must be authorized by law or a court order, *i.e.*, the law must authorized the lawyer to communicate with the represented person. Comment 19, however, seems to say that as long as the investigative activity is “authorized by law,” communications with a person represented by counsel in the course of that investigative activity are not prohibited by the Rule. Indeed, that would seem to be the most plausible reading, given that the sources of law referenced in the comment do not expressly “authorize” government lawyers (or their agents) to communicate with represented persons. If the Comment were read in that manner, as government lawyers will no doubt urge it should be, it will dramatically broaden what the Rule intends.

At a minimum, the Comment creates confusion with the text of the Rule by referencing the federal and state constitutions and decisional law as sources of

Audrey Hollins  
August 25, 2010  
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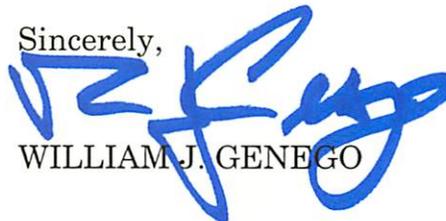
authority for subparagraph (c)(3)'s exemption. Neither the federal or state constitutions authorize government lawyers or their agents to communicate with a person who is represented, nor may decisional law interpreting the federal or state constitutions authorize such conduct. The most a court could say is that, based on the facts before it, a communication by a government lawyer (or his or her agent) with a represented person did not violate the person's constitutional rights. The Comment's specific reference to these sources, however, seem to suggest that what is not prohibited by the constitution is permitted by the Rule. This has the effect of turning subparagraph (c)(3) from an exemption to what the Rule otherwise prohibits, to a positive source of authority for government lawyers to communicate with represented persons, as long as, in their view, it does not violate the constitution, or as long as there is no decision that says it violates the federal or state constitution.

Further, the expansive reading that Comment 19 gives to subparagraph (c)(3) conflicts with Comment 22, which requires that "[a] lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e)."<sup>1</sup> In particular, compliance with paragraph (d) cannot be reconciled with the broad investigatory activity that Comment 19 suggests subparagraph (c)(3) would allow in the interest of effective law enforcement.

The solution to all of these problems is to avoid them in the first place by not including Comments 19 and 20.

Thank you for your time and consideration.

Sincerely,



WILLIAM J. GENEKO

WJG/

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<sup>1</sup> Because the Rule does not itself "authorize" a lawyer to communicate with a represented person, Comment 22 should be modified to state that a lawyer whose communication with a represented person is not prohibited under this Rule must comply with paragraphs (d) and (e).