

Proposed Rule 4.2 [2-100]

“Communication with a Person Represented by Counsel”

(Draft #18, 10/19/09)

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. However, similar to current rule 2-100, it provides detailed guidance as to how the rule is intended to apply in certain contexts. Further, it should be noted that representatives from the California Attorney General, Public Defenders and District Attorneys have criticized the Commission’s recommendation to follow the Model Rule and nearly every other jurisdiction in expressly applying the Rule to a lawyer’s communications with “persons,” not just “parties,” See Introduction and Public Comment Chart.

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

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 2

Abstain 1

Approved on Consent Calendar

Approved by Consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

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

Very Controversial – Explanation:

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

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

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 substantial amount of input from the public on using “person” in the proposed Rule. During the Commission’s deliberations, as well as the

* Proposed Rule 4.2, Draft 18 (10/19/09).

INTRODUCTION (Continued):

official public comment period, 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].

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 Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.</p>	<p>(a) In representing a client, a lawyer shall not communicate <u>directly or indirectly</u> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.</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, Draft 18 (10/19/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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>

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	<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></p> <p align="center">Rule 4.2 Communication With Person Represented By Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.2 Communication With a Person Represented By Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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).</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> Rule 4.2 Communication With Person Represented By Counsel Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 4.2 Communication With a Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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 uncounselled<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] The<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>

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	<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>[4] This Rule does not prohibit communication <u>communications</u> with a represented person, or an employee of, member, agent, <u>or other constituent</u> of such—a <u>person represented organization</u>, concerning matters outside the representation. For example, the existence of a controversy, <u>investigation or other matter</u> between the government agency and a private party <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. Nor does this Rule preclude communication with a represented person</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>

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<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>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.</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><u>Communications Between Represented Persons</u></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>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>

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	<p>[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).</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>[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.</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>

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	<p><u>Knowledge of Representation and Limited Scope Representation</u></p> <p><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></p>	<p>The substance of Comment [9] is in Model Rule 4.2, cmt. [8].</p>
	<p><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></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 & 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>

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	<p><u>Represented Organizations and Constituents of Organizations</u></p> <p><u>[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.</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>[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.</u></p>	<p>See Explanation of Changes for Comment [11].</p>
	<p><u>[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.)</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 Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[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.</p>	<p>See Explanation of Changes for Comment [11].</p>
	<p>[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.</p>	<p>See Explanation of Changes for Comment [11].</p>
	<p>Represented Governmental Organizations</p> <p>[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</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 Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>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.</p>	
	<p>Represented Person Seeking Second Opinion</p> <p>[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 and 1.7.)</p>	<p>Comment [17] explains paragraph (c)(2), which has no counterpart in the Model Rule.</p>
	<p>Communications Authorized by Law or Court Order</p> <p>[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</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 Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>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.</p>	
	<p>[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.</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 Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[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.</p>	<p>Comment [20] explains that the change from “party” in 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.”</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>[6]^[21] A lawyer who is uncertain whether a communication with a represented person is permissible maymight be able to seek a court order. A lawyer may 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.</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">Rule 4.2 Communication With Person Represented By Counsel</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 4.2 Communication With a Person Represented By Counsel</p> <p align="center">Comment</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>[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>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>Prohibited Objectives of Communications Permitted Under This Rule</u></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>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 Person Represented By Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).</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>[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).</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>[924] In the event the person 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 is not known to be 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 Person Represented By Counsel

(Comparison of the Current Proposed Rule to the initial 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 ~~duly-appointed or elected~~ 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 ~~is does not intended to~~ prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

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 ~~is~~does not ~~intended to~~ prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

- [11] "Represented organization" as used in paragraph (b) includes all forms of ~~private and~~ 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 ~~Government~~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) ~~is intended to permit~~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 and 1.7.)

Communications Authorized by Law or Court Order

- [18] This Rule ~~is intended to control~~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 ~~government~~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 ~~government~~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.
- [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 7.3 and 1.7.)

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.

[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 4.2: Communication With a Person Represented By Counsel
(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 7.3 and 1.7.)

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.
- [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 4.2: Communication with a Person Represented by Counsel

STATE VARIATIONS

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

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

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

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

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

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

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

(C) This rule shall not prohibit:

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

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

(3) Communications otherwise authorized by law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Jersey: Rule 4.2 provides as follows:

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

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

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

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

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

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

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

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

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

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

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

Oregon: Rule 4.2 provides as follows:

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

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

Texas: Rule 4.02 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TOTAL = 23 Agree = 1
Disagree = 20
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alameda County District Attorney's Office (Thomas J. Orloff)	D			Substituting "person" for "party" is unnecessary and inhibits law enforcement. Commission should preserve current legitimate law enforcement techniques by including an exception that says that the rule will not apply to public prosecutors except to the extent that a represented person has become a party in a civil or criminal case filed by the prosecutor.	Paragraph (c)(3) states an exception for "communications authorized by law or a court order" and Comments [18] to [21] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
2	Attorney General's Office, Department of Justice (Thomas Greene)	D			Substituting "person" for "party" will yield challenges to ordinary practices that will take years of appellate work to provide finality as to the meaning of the new rule. Exception for contact with any "public official" is overly broad and should be limited to "officer" as defined in Gov Code sec. 87200.	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule's use "person" have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any. Paragraph (g) now states that "As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph

¹ 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 ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Add exception to 4.2(c) to include consensual conversations between a represented party and law enforcement to report illegal conduct.</p> <p>Exception for law enforcement should be in the text of the rule.</p> <p>Comment [20] should be amended to read: "Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to extend this prohibition, or change existing law, in regard to communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law</p>	<p>(b)(1)." See also Comment [16] which provides more guidance on this definitional issue than what is present in the Model Rule.</p> <p>Paragraph (c)(3) states an exception for "communications authorized by law or a court order" and to that extent consensual conversations might be permissible.</p> <p>The rule includes paragraph (c)(3) which states an exception for "communications authorized by law or a court order" and Comment [18] to [21] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.</p> <p>Commission did not make the requested revision but Comment [20] is similar to the commenter's proposed language.</p>

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					enforcement investigations and actions.”	
3	California Attorneys for Criminal Justice	D			<p>Contrary to claim of Commission, it has always been the understanding of the legal community that “party” did not mean “person” (Dale).</p> <p>Current rule is clear and should not be changed.</p>	<p>The discussion section to current Rule 2-100, in part, states that “matter” and “party” are “not limited to a litigation context” and the Commission believes that many lawyers have construed the rule’s use of “party” as a term of art.</p> <p>Substituting “person” for “party” adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any.</p> <p>“person” for “party” adopts the Model Rule language and brings California in line with the majority of jurisdictions.</p>
4	California Public Defender’s Association (Leslie McMillan)	D			Change from “party” to “person” will substantially impair the ability of prosecutors to investigate criminal offenses and the ability of defense counsel from defending persons charged with criminal offenses.	The rule includes paragraph (c)(3) which states an exception for “communications authorized by law or a court order” and Comment [18] to [21] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	COPRAC	M			Exception for “duly appointed public officer[s]” is overbroad and places public agencies at a disadvantage; change to “elected public officials and executive managers of a public agency, boards, committees or bodies.”	The concept of this policy exception exists in the current rule and the Model Rule. Comment [16] provides additional guidance beyond what is present in the Model Rule.
6	Gang, Tyre, Ramer and Brown, Inc. (Bruce M. Ramer)	D			Concerned that “agent” as used in Comment [5] would unintentionally include talent or literary agents in the entertainment industry.	The language of the comment is focused on explicating “indirect” communications.
7	Greene, Tom	D			<p>Rule should not change “party” to “person”.</p> <p>Unclear what term “authorized by law” means in Comment [20].</p> <p>“Public official” is too broad a term.</p>	<p>Substituting “person” for “party” adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any.</p> <p>The “authorized by law” concept is explained in Comment [18] to [21] which, in part, recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.</p> <p>The concept of this policy exception exists in the current rule and the Model Rule. Comment [16] provides additional guidance beyond the commentary present in the Model Rule.</p>

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
8	Hazen, Steven K.	D			Poorly considered proposal which will encounter broad objections as the process moves through later stages.	The primary change is the substitution of “person” for “party” and this action adopts the Model Rule language and brings California in line with the majority of jurisdictions.
9	Jenness, Evan	D			Impacts investigation of criminal matters by expanding the class of persons with whom an attorney may not have ex parte communications. Comment [19] and [20] exemptions for prosecutors encourages misconduct by placing prosecutors above the law and undermines Congressional intent (McDade Amendment).	The rule includes paragraph (c)(3) which states an exception for “communications authorized by law or a court order” and Comment [18] to [21] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
10	Kelly, David (Kern County Deputy Public Defender)	D			See Janice Fukai’s Comments.	See response to Janice Fukai’s Comments.
11	Kern County Public Defender (Mark A. Arnold)	D			Change from “party” to “person” will substantially impair the ability of prosecutors to investigate criminal offenses and the ability of defense counsel from defending persons charged with criminal offenses.	Substituting “person” for “party” adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any. In addition, the rule includes paragraph (c)(3) which

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						states an exception for “communications authorized by law or a court order” and Comment [18] to [21] recognize that law enforcement agencies may engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
12	Los Angeles County Alternate Public Defender (Janie Y. Fukai)	D			<p>Commission’s position that “party” has historically been interpreted to mean “person” is unsupported and undermined by the Dale decision.</p> <p>“in the matter” is vague and needs clarification.</p> <p>Rule will affect criminal defendant’s lawyer’s ability to interview potential witnesses who are</p>	<p>Substituting “person” for “party” adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any.</p> <p>The discussion section to current Rule 2-100, in part, states that “matter” and “party” are “not limited to a litigation context” and the Commission believes that many lawyers have construed the rule’s use of “party” as a term of art. There are five jurisdictions that have included a definition of “matter” in their terminology sections, and the Commission will consider that possibility as part of the drafting of Rule 1.0.1. In addition, Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term “matter as used in the rule.</p> <p>Comment [6] explains that the rule does not prohibit communications concerning matters outside the</p>

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					<p>represented in other criminal matters.</p> <p>Exception for prosecution creates lack of reciprocity, precluding defendants' access to witnesses who may only be available to the prosecution under the new rule. Exception should apply to both sides in a criminal case.</p> <p>Defense counsel will argue that exclusion for "communications authorized by law or a court order" includes interviews of witnesses represented by counsel because of Sixth Amendment duties to the client.</p>	<p>person's representation and includes an illustrative example.</p> <p>Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.</p>
13	Los Angeles County Bar Association	D			See CACJ Comments.	See response to CACJ comments.
14	Los Angeles County Public Defender (Michael P. Judge)	D			See Janice Fukai's Comments.	See response to Janice Fukai's comments.
15	National Association of Criminal Defense Lawyers (John Wesley Hall)	D			<p>Reject Comments [19] and [20]. They are not included in the ABA Model Rules, undermine confidentiality in the attorney client relationship between criminal defense attorneys and their clients, encourage prosecutors to violate the Sixth Amendment right to counsel, and give prosecutors carte blanche to take advantage of uncounseled disclosures by the other lawyer's clients.</p> <p>Life and liberty interests at stake in criminal</p>	These comments attempt to address concerns raised by commenters who believe that legitimate law enforcement investigative activities are lawful and necessary for public protection. If certain activities are found to be unlawful, then the rule's exception would not be applicable.

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					<p>matters warrant the highest level of protection of the attorney client relationship.</p> <p>Exemptions for government in litigation not granted to the defense are unconstitutional.</p>	
16	Orange County Bar Association (Trudy Levindofske)	M			Substitution of “person” for “party” could be construed as broadening the scope of the Rule without reasonable proffered justification for change and should be deleted.	Substituting “person” for “party” adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule’s use “person” have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any.
17	Orange County Public Defender (Deborah Kwast)	D			Exception for prosecutors creates an imbalance and possible constitutional infirmity because prosecutors, their investigators, and police would presumably operate as they are allowed to under the current rule, while the defense is denied access to the very same people in the absence of permission from their lawyers (unlikely to be given), or a court order.	Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.
18	Pyle, Walter K.	D			Rule would unfairly allow prosecutors to interview witnesses represented by counsel, but criminal defense lawyers could not.	Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.
19	San Diego County Bar Association (Heather L. Rosing)	D			Change from “party” to “person” is not a clarifying change as Commission has asserted. (Dale, 4 Cal. State. Bar. Rptr. 798)	The discussion section to current Rule 2-100, in part, states that “matter” and “party” are “not limited to a litigation context” and the Commission believes

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					<p>Proposed rule would expand a lawyer's duties to non-clients, increase risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court.</p> <p>Keep existing rule 2-100 but modify to add a new subsection (C)(4) for communications with an investigative officer in civil or criminal case.</p>	<p>that many lawyers have construed the rule's use of "party" as a term of art.</p> <p>Substituting "person" for "party" adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule's use "person" have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any. Other additions codify case law and other developments in this area of lawyer conduct (see, i.e., paragraph (e)).</p> <p>The Commission believes that the decision in the Dale case requires that the existing rule be modified.</p>
20	San Diego Criminal Defense Bar Association (Michael L.	D			New rule impedes criminal defense counsel's constitutional duty to investigate a case while not similarly restricting prosecutors.	Commission asked stakeholders to provide authority for this proposition and to offer language to add to the rule but did not receive any response.

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	Crowley)				<p>Forces defense counsel to choose between interviewing percipient witness who is represented and risk State Bar discipline or fulfilling the constitutional duty to one's client and investigate the case. In light of duty to investigate, defense counsel should be added to commentary about (c)(3) exception for communications authorized by law or court order.</p> <p>Unclear what "in the matter" means.</p>	<p>See above. Commission is not aware of explicit authority for defense counsel communications that is comparable to the case law that address law enforcement investigative activities.</p> <p>Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term "matter as used in the rule. There are five jurisdictions that have included a definition of "matter" in their terminology sections, and the Commission will consider that possibility as part of the drafting of Rule 1.0.1. Comment [6] explains that the rule does not prohibit communications concerning matters outside the person's representation and includes an illustrative example.</p>
21	State Bar Office of the Chief Trial Counsel (OCTC)	D			<p>The proposed rule does not address the serious issue presented by <i>In the Matter of Dale</i> (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. The language of the rule should specifically prohibit communications on related subject matters with persons who are</p>	<p>Comment [4], in part, addresses this concern. It states: "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</p>

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					known to be represented by counsel in such related matters.	the matter to which the communication relates.”
22	Sevilla, Charles	D			<p>Under the current rule, one can know who a party is, but there is no way to know whether someone is represented “in the matter.”</p> <p>Exception for prosecutors unfairly allows unfettered access to witnesses that would be off limits for defense</p>	<p>Comments [1] through [4] explain the purpose of the rule and provide an explanation of the term “matter” as used in the rule. There are five jurisdictions that have included a definition of “matter” in their terminology sections, and the Commission will consider that possibility as part of the drafting of Rule 1.0.1. Comment [6] explains that the rule does not prohibit communications concerning matters outside the person’s representation and includes an illustrative example.</p> <p>Commission is not aware of explicit authority for defense counsel communications that is comparable to the case law that address law enforcement investigative activities.</p>
23	Talia, M. Sue	A			Strongly supports the addition of Comment [10] to underscore fact that rule does not prohibit a lawyer from contacting a limited scope client on matters outside the scope of the representation.	No response necessary.