

**Rule 4.2 [2-100] Communication with a Represented Person**

- (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) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
  - (1) A current officer, director, partner,\*or managing agent of the organization; or
  - (2) A current employee, member, agent, or other constituent of the organization, 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.
- (c) This Rule shall not prohibit:
  - (1) communications with a public official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- (d) For purposes of this Rule:
  - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

**Comment**

[1] 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.

[2] “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.

[3] The prohibition against communicating “indirectly” 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, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person\* seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person pursuant to paragraph (c) is still subject to other constraints in communicating with the person. See, e.g., Rule 4.3; Bus. & Prof. Code § 6106; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.

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  - (2) A current employee, member, agent, or other constituent of the organization, 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.
- (c) This Rule shall not prohibit:
  - (1) communications with a public official, board, committee, or body; or
  - (2) communications otherwise authorized by law or a court order.
- ~~(d) In any communication with a represented person\* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.<sup>1</sup>~~
- (ed) For purposes of this Rule:
  - (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial\* discretionary authority over decisions that determine organizational policy.
  - (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

**Comment**

[1] 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.

[2] “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.

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<sup>1</sup> Paragraph (d) deleted in response to public comment. See Response to Lamport, X-2016-115a, in Rule 4.2 Public Comment Synopsis Table.

~~[2A]<sup>2</sup> This Rule applies where the lawyer has actual knowledge that the person\* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)~~

[3] The prohibition against communicating “indirectly” 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, investigator or the lawyer’s client. This Rule, however, does not prevent represented persons\* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter.

[4] This Rule does not prohibit communications with a represented person\* concerning matters outside the representation. Similarly, a lawyer who knows\* that a person\* is being provided with limited scope representation is not prohibited from communicating with that person\* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person\* seeking advice or representation from an independent lawyer of the person’s choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (ed)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows\* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person\* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,\* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not

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<sup>2</sup> Comment [2A] has been deleted in response to a public comment from OCTC. The comment was originally included pending the Commission’s consideration of the terminology rule, proposed Rule 1.0.1, which includes a definition of “knowledge.”

intended to preclude communications with represented persons\* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons\* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons\* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person pursuant to paragraph (c) is still subject to other constraints in communicating with the person. See, e.g., Rule 4.3; Bus. & Prof. Code § 6106; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.<sup>3</sup>

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<sup>3</sup> Comment [9] has been added to clarify that a lawyer engaging in communications with a represented person that are not prohibited by paragraph (c) does not have unbridled discretion to engage in overreaching or other misconduct during the communication. See Response to Lamport, X-2016-115a, in Rule 4.2 Public Comment Synopsis Table.

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**Synopsis of Public Comments**

**TOTAL = 16**    **A = 6**  
**D = 3**  
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ad	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A		COPRAC supports the adoption of proposed rule 4.2.	No response required.
X-2016-68t	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Y	A		<p>1. We support this proposed reformulation of current Rule 2-100 and believe that subsection (b), as well as the Comments, add clarity to a lawyer's obligations.</p> <p>2. We struggled with the seeming lack of clarity in Comment [1] and Comment [5].</p> <p>Comment [1] instructs that, even if a person currently represented by a lawyer, takes the initiative and seeks out another lawyer for advice in the same matter—e.g., wanting potentially to change lawyers without the first lawyer knowing—the second lawyer is barred from communicating with that represented person, unless, against the person's wishes, the first lawyer approves the communication.</p> <p>Comment [5], on the other hand, says that a represented person may seek advice or</p>	<p>1. No response required.</p> <p>2. The Commission did not make the suggested change. Comment [5] clearly states that the Rule does not apply to an "<i>independent</i> lawyer." The Commission does not understand how that can cause confusion.</p>

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

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					<p>representation of an “independent” lawyer, which we understand to mean not a lawyer representing a client in the same matter, without falling within the proposed rule’s prohibition.</p> <p>Since it took us considerable time to sort the difference between the circumstances of Comment [1] and Comment [5], we suggest that the Commission give some attention to making the distinction clearer.</p> <p>3. We further recommend that “or family member or designee” be added after “represented person” in Comment [5], since, for many in the criminal defense bar, the initial communication usually comes, not from an incarcerated accused, but from some family member or other designee.</p>	<p>3. The Commission did not make the suggested change. The Commission does not believe that such a clarification is necessary. The Rule is intended to address in part interference by a lawyer <i>involved in the matter</i> with the lawyer-client relationship of the represented person. An independent lawyer is not involved in the matter. The Commission does not understand why it is necessary to clarify that the rule also does not apply when an independent lawyer is contacted by a family member or other designee.</p>

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X-2016-76k	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M	(d)	Paragraph (b) [the Commission believes the commenter means paragraph (d)] of Proposed Rule 4.2 states that any communication with a represented person not prohibited by this rule must comply with Rule 4.3. However, Proposed Rule 4.3 by its own terms is inapplicable to a represented person. As a result, the following clarifying language should be added to the end of paragraph (d) of Proposed Rule 4.2: "as if the person were not represented".	Rather than make the suggested change, the Commission has decided to delete paragraph (d).
X-2016-83b	Garrett, Christopher (09-26-16)	N	D		1. Proposed Rule 4.2 seeks to replace current Rule 2-100 and adds a new subsection (d) that requires compliance with the proposed Rule 4.3. The proposed Rule 4.3 regulates not only what the lawyer "state[s] or impl[ies]" but also requires the lawyer to evaluate what the unrepresented person believes and the interests of the unrepresented person as against the lawyer's own client. Whether the unrepresented person believes the lawyer is "disinterested" is left undefined, and the standards by which the lawyer is supposed to evaluate the unrepresented person's interests and conflicts as against	1. See Response to Lamport, X-2016-115a, below.



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					<p>the lawyer's client is similarly undefined. The vagueness of the proposed rule 4.2 and 4.3 places legal practitioners at special and unreasonable risk for discipline due to an inability to assess an unrepresented person's unstated beliefs and interests.</p> <p>2, In addition, the prohibition against a lawyer's "implications" of "disinterestedness" is a vague restriction that potentially constitutes impermissible infringement on the right to free speech and the right to petition the government guaranteed by the California Constitution.</p>	2. See response to comment re Rule 4.3.
X-2016-87d	Attorneys' Liability Assurance Society (ALAS) (Garland) (09-27-16)	Y	NI		<p>The proposed rule is ambiguous about whether a lawyer may communicate about the subject of the representation with the in-house counsel of a corporation that is also represented in the matter by outside counsel. The question arises often under the current rule and even experienced lawyers are not sure how to answer it. The proposed rule should not perpetuate this confusion. Instead, the Commission should take this opportunity to clear up confusion on a question that arises with some regularity.</p>	<p>The Commission disagrees with the commenter's suggestion that the proposed rule should include an exception for communications with an in-house counsel of a corporation. The Commission believes that given the wide range of legal representation afforded corporations of varying sizes, such an exception should be addressed in an ethics opinion as has been done by the ABA. In that context, the large range of situations could be more adequately addressed and distinguished than in a</p>

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					As explained in ABA Formal Opn. 06-443, the ABA Model Rule counterpart has been interpreted to allow contact with inside counsel of an organization when the organization is also represented by outside counsel. As explained in the Opinion, the protections of the rule are not needed for communications involving an organization's lawyer employees because the rule is intended to prevent lawyers from taking advantage of non-lawyers. We think the Commission should adopt this approach.	disciplinary rule.
X-2016-89a	League of California Cities (Leary) (09-27-16)	Y	M		The League urges the Board to:  1. Substitute the term "public officer" for "public official."	1. The Commission did not make the suggested change. The change from "public officer" to "public official" (as defined in (e)(2) [relettered as (d)(2) in the revised rule draft]) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its

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					<p>2. Either define “public officer” as “an individual who holds a position in government that is created or authorized by law, the tenure of which is continuing and permanent, not occasional or temporary, and in which the individual performs a public function for the public benefit and exercises some of the sovereign powers of the government,” or reference the existing body of law distinguishing between public officers and public employees in a comment to Rule 4.2.</p> <p>3. Modify Rule 4.2’s exception to communications with public clients such that it conforms to the ABA approach, under which: (1) opposing counsel must provide the government attorney with reasonable advance notice of any attempt to communicate with a public client; (2) the communication must be directed to an individual who has authority to take or recommend action in the matter; and (3) the sole purpose of such communication must be to address a policy</p>	<p>constituents. The definition lists “public officer” as within the meaning of the term “public official.”</p> <p>2. The Commission did not make the suggested change. See response to commenter’s point 1, above.</p> <p>3. The Commission did not make the suggested change. It believes that Comment [7] of proposed Rule 4.2 adequately addresses the commenter’s points that are taken from an ethics opinion, ABA Formal Ethics Op. 1997-408. The ABA does not provide the requested guidance in a rule.</p>

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					issue, including potential settlement.	
X-2016-93I	Los Angeles County Public Defender (Brown) (09-23-16)		D		<p>We believe that it is essential that prosecutors and defense lawyers be permitted to investigate and present their cases as completely as possible, to further the goal of “facilitating the ascertainment of truth in connection with legal proceedings.” (<i>Britt v. Superior Court</i> (1978) 20 Cal.3d 844, 857.) We believe that adoption of the Proposed Rule will inject uncertainty into an area where no uncertainty currently exists. If adoption of the Proposed Rule actually does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing “party” to “person” in fact makes not change, then the term should not be changed.</p> <p>Further, we are concerned that Comment [8] authorizes (by not precluding) “communications with represented persons in the course of such legitimate investigative activities as authorized by law.” The two cases cited in the Comment, and the only Attorney General</p>	<p>The Commission has not made the suggested change. It continues to believe that proposed Comment [8] appropriately addresses the concerns raised by the commenter. That comment clarifies the application of the “authorized by law” exception, including in particular the recognized application of the exception to legitimate government investigative activities. The comment provides assurance that the change from “party” to “person” is not intended to change application of the exception. In this regard, the last sentence of the comment has been added to assure lawyers in the criminal justice system concerned with the change from “party” to “person” that the rule is not intended to prohibit current legitimate investigative practices.</p>

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					<p>Opinion of which we are aware, all depend on the distinction between investigation and the filing of criminal charges.</p> <p>Our concern is with the use of the term “investigative activities” in the Comment. It can easily be imagined that a prosecutor might understand “investigative activities” as permitting direct contact with a represented defendant, without consent of counsel, even after the filing of a criminal charge, so long as the contact is viewed as part of the “investigative activities.” Investigation of criminal cases often persists even after the filing of charges.</p> <p>We urge the Commission to cite to the Attorney General Opinion as well as the federal cases, and clarify that permission to conduct interviews is limited to pre-filing time periods. This could be accomplished by adding a sentence in the Comment: “The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law, prior to the filing of criminal charges.”</p>	

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					<p>Although we oppose the adoption of this Rule with the term “person” in lieu of “party,” if this Rule is adopted, the exception in the Comment for criminal defense lawyers conducting investigative activities authorized by law is essential (See, e.g., <i>Grievance Comm. for S. Dist. of N.Y. v. Simels</i> (2d Cir. 1995) 48 F.3d 640.) We therefore proposed the following additional language to paragraph (b):</p> <p>“(b) A lawyer for the defendant in a criminal proceeding or other proceeding that may result in an individual’s liberty being restrained, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established.”</p>	
X-2016-94b	Disability Rights California (Murdyk) (09-27-16)	Y	A		<p>DRC supports Proposed Rule 4.2, which preserves the ability of a lawyer to communicate with a public official, board, committee, or body. As the comments to the Rule recognize, this exception is necessary to preserve the right to petition protected under the First Amendment of the United States Constitution and Article I, Section 3 of the California Constitution.</p>	No response required.

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X-2016-97f	Freedman, Daniel (09-27-16)	N	D		Although the spirit of proposed rules 4.2 and 4.3 are commendable, as drafted, these rules create unacceptable risks to attorneys engaging with administrative agencies and government officials on political issues. Again, in many informal settings, defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear, and a lawyer's profession should not be placed at risk as a result of their personal interests in engaging in the political process. Moreover, in this setting, there is inherent vagueness in the term "disinterested," that would require an investigation into an attorney's subjective intent for engaging an unrepresented party. The same is true with respect to the rule's prohibition on giving "legal advice." In dealing with governmental agencies, the line between "legal advice" and political opinion is almost impossible to define. Accordingly, the rule creates an unacceptable risk that an attorney's engagement and involvement with government agencies may stifle and chill an attorney's constitutionally protected right to	1. See Response to Lamport, X-2016-115a, below.

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					engage in the political process, and will create the unacceptable risk that an attorney's livelihood may be attacked through state bar complaints based on political motivations and interests.	
X-2016-82e	Polish, James (09-27-16)	N	M		<p>1. This rule and the comment to the rule fail to clarify certain issues. The rule appears to contain a blanket exception for "communications with a public official, board, committee, or body." However, some case law has narrowly interpreted this provision in the current rule to apply only to petitioning activity. Compare <i>United States v. County of Los Angeles</i>, 2016 WL 4059712 at *2-3 (C.D. Cal. July 27, 2016) with <i>United States v. Sierra Pacific Industries</i>, 759 F.Supp.2d 1206, 1212-14 (E.D. Cal. 2010) (Magistrate Judge Opinion), reconsideration denied, 759 F.Supp.2d 1215 (E.D. Cal.), amended, 857 F.Supp.2d 975 (E.D. Cal. 2011) (Magistrate Judge Opinion). I think rules should mean what they say, and if the intent was to provide a blanket exception, that should be stated. If not, the rule should be clarified.</p> <p>2. Also, does the phrase "[I]n representing a client" in</p>	<p>1. Proposed Rule 4.2 does not provide a "blanket exception" for communications with public officials, boards, committees or bodies. See Comment [7], which explains the application of the rule in these settings.</p> <p>2. The rule does not apply to an independent lawyer. See</p>



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					<p>subsection (a) mean what it says? Does the rule apply if, for example, a lawyer, on his or her own behalf, contacts a former client now represented by other counsel to find out why the client changed counsel or to collect unpaid fees? Some authorities in other jurisdictions have effectively read the quoted provision out of ABA Model Rule 4.2. See, e.g., N.Y. City Ethics Opinion 2011-1 (2011), and authorities cited; Hawaii Formal Opinion 44 (2003); Disciplinary Board v. Lucas, 2010 ND 187, 789 N.W.2d 73, 76 (2010). Contra Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075, 1079 (1990). Again, I think the rule should mean what it says.</p> <p>3. The comments say that "a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation." The rule should be clarified to specify that a lawyer should be permitted to deal directly with a party appearing in a lawsuit in pro per, even if the party has assistance</p>	<p>response 2 to SDCBA, X-2016-68t, above. However, in the hypothetical posed by the commenter, the lawyer must be cognizant that, depending upon the communication with the former client, the lawyer might violate proposed Rule 7.3(b).</p> <p>3. The Commission has not made the suggested change. The comments are not intended to provide practice guidelines. As noted by the commenter, the ability to communicate with a person appearing in pro per but with assistance from a lawyer who has not made an appearance is addressed in case law and so paragraph (c)(2) would apply. See Comment [8].</p>

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**TOTAL = 16**    **A = 6**  
                         **D = 3**  
                         **M = 6**  
                         **NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					from an attorney who has not made an appearance. See <i>McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.</i> , 165 Cal.App.4th 960, 965-68 (2008), <i>Contra ABA Formal Opinion 472</i> (2015). Prosecution of a lawsuit requires frequent communication with the opposing side. Counsel of record should not be required to identify and try to deal with a lawyer who has elected not to appear in the action. Such a lawyer, by electing not to make an appearance, has effectively given permission for counsel of record to deal directly with the pro se party. If that is not what the lawyer intended in limiting the representation, he or she should have made an appearance in the case.	
X-2016-104at	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. OCTC supports this rule. It is concerned, however, with the use of the term "knows" in subsection (a), as it would appear to allow willful blindness, recklessness, or gross negligence in learning whether the person was represented by counsel. (See also OCTC comments to proposed Rules 1.9 and 1.3, and the General Comments sections of this letter.)	1. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.

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					<p>Further, case law has sanctioned the “knowledge” standard with respect to current rule 2-100. See, e.g., <i>Truitt v. Superior Court</i> (1997) 59 Cal.App.4th 1183 [69 Cal.Rptr.2d 558]; <i>Jorgensen v. Taco Bell Corp.</i> (1996) 50 Cal.App.4th 1398 [58 Cal.Rptr.2d 178].</p> <p>2. OCTC supports Comments 1, 2, 3, 5, 6, 7, and 8.</p> <p>3. OCTC is concerned that Comment 2A merely repeats the rule and its definition of actual knowledge for the same reasons discussed in its comments to subsection (a) of the rule.</p> <p>4. OCTC supports the first sentence of Comment 4. OCTC is, however, concerned with Comment 4’s use of the term “knows” for the same reasons it is concerned with the use of that term in subsection (a) of this proposed rule.</p>	<p>2. No response required.</p> <p>3. Comment [2A] has been deleted. See proposed Rule 1.0.1(f).</p> <p>4. See response OCTC’s comment 1.</p>
X-2016-115a	Lamport, Stanley (09-27-16)	N	M		Proposed Rule 4.2(d) should be deleted as shown on the attached redline. Paragraph 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer’s direct and indirect communications with a represented “public official,	The Commission agrees to delete paragraph (d) for the reasons stated below. The Commission, however, disagrees with the commenter’s statement regarding proposed Rule 4.3’s

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					board, committee, or body” on a client’s behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer’s direct or indirect communications with government on a client’s behalf chills a lawyer’s ability to speak with government on a client’s behalf and runs counter to all of the protections for communications with government under California law.	<p>ambiguities or the commenter’s suggestion that imposing obligations of honesty and fairness on a lawyer who engages in communications with the government “chills” the lawyer’s or the client’s right to free speech.. Rather, the Commission appreciates that paragraph (d) as applied to the to the provisions of paragraph (c) may cause confusion, which is not consistent with the Commission’s Charter that “the proposed rules set forth a clear and enforceable articulation of disciplinary standards,”</p> <p>The Commission recognizes the tension between proposed paragraphs (d) and (c). Paragraph (d) formerly was intended to clarify that the exceptions to Rule 4.2 identified in paragraph (c) do not give a lawyer complete discretion to engage in overreaching or other misconduct in communicating with persons within the purview of paragraph (c). The decision to delete paragraph (d) is intended to remove the confusion the provision has</p>

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						apparently generated and does not mean a lawyer now has such discretion. Communications with a represented person not prohibited under the Rule are still subject to other constraints. See, e.g., Bus. & Prof. Code § 6106; <i>In the Matter of Dale</i> (2005) 4 Cal. State Bar Ct. Rptr. 798.
X-2106-121e	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		The Access Commission is in favor of proposed Rule 4.2, which is particularly important for legal services organizations, because low and moderate income clients are often vulnerable to inappropriate communications. We support the proposed Rule's intent to protect against possible overreaching or interference by prohibited lawyers. We are gratified to see that the proposed Rule specifically addresses limited scope representation and clarifies who to talk to at different points in a limited scope representation.	No response required.
X-2016-126e	Ivester, David (09-27-16)	N	M		Proposed Rule 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and indirect communications with a represented "public official, board, committee, or body" on a client's behalf. Making Proposed	See Response to Lamport, X-2016-115a, above.

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					<p>Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf would chill a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law.</p> <p>These unwarranted extensions of trial rules to sundry administrative processes may not only limit and inhibit lawyers in their efforts to represent their clients, but could lead as well to strategic claims of ethical violations against lawyers with the aim of interfering with the legal representation of a party in such administrative processes.</p> <p>These proposed rules would unnecessarily burden the fundamental and constitutional rights to speak with and petition public agencies and officials by interfering with an individual's right to engage counsel who can effectively represent his or her interests with public agencies and officials.</p>	
X-2016-129e	California Building Industry Association (Cammarota) (09-27-16)	Y	M		1. Proposed Rule 4.2(d) should be deleted. Paragraph 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and	1. See Response to Lamport, X-2016-115a, above.

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					<p>indirect communications with a represented “public official, board, committee, or body” on a client’s behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer’s direct or indirect communications with government on a client’s behalf chills a lawyer’s ability to speak with government on a client’s behalf and runs counter to all of the protections for communications with government under California law.</p> <p>2. The Commission’s tentative adoption of Proposed Rule 3.9 adequately addresses lawyer communications in a representative capacity with legislative bodies and administrative agencies. Since public officials, boards, committees and bodies are all subsets of legislative bodies and administrative agencies, Proposed Rule 3.9 covers the same communications that are covered by Proposed Rule 4.2(c)(1). In light of Proposed Rule 3.9, Proposed Rule 4.2(d) is no longer necessary and should be deleted.</p>	<p>2. The Commission disagrees that Rule 3.9 covers the same communications that are covered by proposed Rule 4.2(c)(1). Rule 3.9 applies “when a lawyer represents a client <i>in connection with an official hearing or meeting</i> of a governmental agency or a legislative body to which the lawyer or the lawyer’s client is presenting evidence or argument.” (Comment [1].) As that comment further clarifies, Rule 3.9 does not apply to the situations envisioned by the commenter, i.e., “negotiations or other bilateral transactions” between the lawyer and a person under paragraph (c).</p>