

**Rule 4.2 [2-100] Communication With a Represented Person  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
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) 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 subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.



**Proposed Rule 4.2 [2-100] Communication with a Represented Person**  
**Synopsis of Public Comments**

**TOTAL = 3**      **A = 1**  
                         **D = 0**  
                         **M = 2**  
                         **NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
Y-2016-3	League of California Cities (Leary) (12-15-16)	Y	M		1. Substitute "Public Officer" for "Public Official" in Proposed Rule 4.2 because "Public Officer" is well defined in California public agency law and its use will clarify the scope of Proposed Rule 4.2's application.	1. The Commission has not made the suggested changes. As it previously noted, the recommended 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 constituents. The definition lists "public officer" as within the meaning of the term "public official." Further, the rule also applies to situations involving the federal government and to incorporate the term, "public officer," would cause unnecessary confusion, as the rule would provide an exception for communications with many federal officers to which the exception is not

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

**Proposed Rule 4.2 [2-100] Communication with a Represented Person**  
**Synopsis of Public Comments**

**TOTAL = 3**  
**A = 1**  
**D = 0**  
**M = 2**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<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. Adopt the ABA’s approach to an opposing counsel’s contacts with public officers, as outlined in ABA Formal Opinion 97-408, in lieu of Proposed Rule 4.2’s wholesale exception. Under this approach, (1) opposing counsel must provide the government attorney with reasonable advance notice of any attempt to</p>	<p>intended to apply. Finally, the Commission notes that the cases and Attorney General opinions cited do not discuss the term “public officer” in the context of the Constitutional right to petition, which is the policy underlying the exception.</p> <p>2. See response at No. 1, above.</p> <p>3. The Commission did not make the suggested change. It continues to believe 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 also does not provide the requested</p>

**Proposed Rule 4.2 [2-100] Communication with a Represented Person**  
**Synopsis of Public Comments**

**TOTAL = 3**  
**A = 1**  
**D = 0**  
**M = 2**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					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 issue, including potential settlement.	guidance in a rule.
Y-2016-21y	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC supports this rule. OCTC is, however, concerned 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 prior comments about “knowing” and “knowingly” in this letter and the General Comments sections of OCTC’s September 27, 2016 letter.)	1. The Commission has not made a change to the Rule. The use of “knows” in paragraph (a) and Comment 4 is consistent with current Rule 2-100, the corresponding rule in every other jurisdiction, and California case law, all of which require knowledge of the representation (using a definition of knowledge equivalent to that contained in Proposed Rule 1.0.1(f)) for the Rule to apply. 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]. As the Commission 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

**Proposed Rule 4.2 [2-100] Communication with a Represented Person**  
**Synopsis of Public Comments**

**TOTAL = 3**  
**A = 1**  
**D = 0**  
**M = 2**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.</p> <p>2. No response required.</p> <p>3. See response to OCTC's comment 1.</p>	
Y-2016-7h	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-21-16)	Y	A		<p>2. OCTC supports Comments 1, 2, 3, 5, 6, 7, 8, and 9.</p> <p>3. 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>COPRAC supports the adoption of proposed Rule 4.2 as revised.</p>	No response required.