

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 4.2 [2-100]

Commission Drafting Team Information

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I. CURRENT CALIFORNIA RULE

Rule 2-100 Communication With a Represented Party

- (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.

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. 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. 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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.2 [2-100]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 4.2 [2-100]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE 4.2 [2-100] (CLEAN)

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 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.

IV. COMMISSION'S PROPOSED RULE 4.2 [2-100] (REDLINE TO CURRENT CALIFORNIA RULE 2-100)

Rule 4.2 [2-100] Communication With a Represented Person

(Aa) ~~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) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:

~~(B) For purposes of this rule, a "party" includes:~~

- (1) ~~An~~A current officer, director, partner,* or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or
- (2) ~~An association member or an employee of an association, corporation, or partnership~~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 ~~or whose statement may constitute an admission on the part of the organization.~~

(Cc) This ~~rule~~Rule shall not prohibit:

- (1) ~~Communications~~communications with a public ~~officer~~official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

~~(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.~~

(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).

DiscussionComment

~~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. 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. 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.)~~

[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.

V. RULE HISTORY

Rule 2-100 had its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 12 provided:

A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board committee or body.

In 1975, Rule 12 was revised and renumbered 7-103. The rule that was adopted differed from the version that appeared in the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. In that report, the special committee had recommended retaining Rule 12's language, "communicate with a party represented by counsel," but the language actually adopted was derived from ABA Code of Professional Responsibility, DR 7-104, which provided "communicate directly or indirectly with a party whom he knows to be represented by counsel."

In 1989, Rule 7-103 was renumbered as 2-100 and was further revised. The rule continued the general prohibition found in rule 7-103 on communication with a represented party but was amended to prohibit communications with a represented party only when the member is already representing a client in the matter. A new paragraph (B) was added to clarify the complicated issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. The State Bar's memorandum to the Supreme Court explained the addition of paragraph (B):

Paragraph (B) is new and is intended to clarify the troubling issue of which employees of an entity may be approached without consent of the attorney for the entity when the entity is the opponent.

The issue has sometimes been analogized to the issue of whether communications between a party's counsel and that party's employees are protected by the attorney work product rule and the attorney-client privilege. Some courts have applied the so called "control group test" in this situation. The test restricts the availability of the privilege to a control group—those employees who play a substantial role in deciding and directing the employee's legal response. In *Upjohn Co. v. United States* (1981) 449 U.S. 391, 392, the Supreme Court rejected that test, noting that it frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation, that such advice will frequently be more significant to noncontrol group members than those who officially sanction the advice, and that the test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

The Los Angeles County Bar Association Ethics Committee, in Formal Opinion 410 (march 24, 1983) opined that the reasoning of *Upjohn* could be logically extended to *ex parte* contacts with a corporate party's employee by opposing counsel because: (1) the corporate employee may be prejudiced either directly or indirectly by the *ex parte* contact; (2) the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel; (3) due to the difficulty of ascertaining whether an employee is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation; and

(4) due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party who he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper. (See also San Diego County Bar Association Ethics Opinion 1984-5.) Both opinions found, after discussion of *Upjohn* and *Chadbourn*, that it is ethically improper for opposing counsel to contact, ex parte, any employee of a corporation or other entity that is a party to a suit, knowing that the information sought from the employee relates to the subject of the controversy.

However, the large number of comments received on this rule as presented in the Red Book, which proposed prohibiting members from communicating directly with the employee of a corporate opponent, stressed the hardship that such a prohibition would create on certain litigants. The employment discrimination bar, both public and private, pointed out that such a prohibition would make it virtually impossible to investigate claims prior to filing a suit, thus requiring more lawsuits to be filed and costly depositions taken. In addition, certain administrative proceedings have no mechanisms for formal discovery at all, thus making it possible that some potential witnesses would never be interviewed at all. As a result of these comments and many others, it is proposed that paragraph (B) utilize the “control group test.”

(See page 24 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

The State Bar’s memorandum also explained that addition of new subparagraphs (C)(2) and (C)(3):

Subparagraph (C)(2) is new and is intended to expressly permit a member to communicate with an individual seeking to hire new counsel or to obtain a “second opinion.” Current rule 7-103 has sometimes been interpreted to prohibit an attorney from responding to such inquiries.

Subparagraph (C)(3) is new and is intended to make clear that where a statutory scheme or case law exits regarding communication with a represented party with respect to the subject matter of the representation, the statute or case overrides the rule.

(*Id.*) In 1988, in response to an inquiry from the Supreme Court concerning subparagraph (B)(2), the State Bar responded:

As to the Court’s comment regarding the “binding” standard in rule 2-100(B)(2) being ambiguous, the language of the proposed rule was not intended to be substantively different from the “liability” test in the Comment to ABA Model Rule 4.2. Indeed, the “liability” test appears to be a clearer formulation of the concept

underlying 2-100(B)(2). In order to clarify the rule, it is recommended that the “liability” test from ABA Model Rule 4.2 be added to 2-100(B)(2) as follows:

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 ~~which may be binding on such entity or which may be the basis of a claim or defense involving that entity 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.~~ which may be binding on such entity or which may be the basis of a claim or defense involving that entity.

In 1992, rule 2-100 was further revised. The fifth paragraph of the Discussion section added case authority in support of the stated proposition that communications with former employees of an organization are exempt from the rule. The sixth paragraph of the Discussion section was revised to conform it to the language used in the rule and the rest of the Discussion section as follows:

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

The 1992 amendments were the last revisions of rule 2-100.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

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.)
2. OCTC supports Comments 1, 2, 3, 5, 6, 7, and 8.
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.
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.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same. See 90-Day and 45-Day Public Comment Synopsis Tables, Attachments _____ and _____.

- **State Bar Court:** No comment was received from the State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above comment from OCTC, were received. One agreed with the proposed rule. Two agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

- **Massachusetts Rule 4.2** is identical to Model Rule 4.2:

Massachusetts Rule 4.2 Communication With Person Represented By Counsel

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.

- **Utah Rule 4.2** has a rule that diverges from Model Rule 4.2 and more closely approximates the California Rule by identifying exceptions and providing specific definitions in the black letter. Utah Rule 4.2 provides:

Utah Rule 4.2. Communication with Persons Represented by Counsel.

(a) General Rule. 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the

matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(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:

(c)(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

(c)(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

(c)(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

(c)(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.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(i) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. 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.¹

The ABA State Adoption Chart for the ABA Model Rule 4.2, which is the counterpart to current rule 2-100, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.authcheckdam.pdf
- 46 jurisdictions have adopted "person" (AL, AR, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MD, MN, MO, MI, MT, NE, NV, NH, ND, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY). Four jurisdictions besides California have retained "party" in their rule (AZ, CT, MI, MS). All four jurisdictions: (i) have a title that states "Communication With A *Person* Represented By Counsel" (Emphasis added), and (ii) include a comment providing the rule applies to a represented person: "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." (Emphasis added).

¹ Utah Rule 4.2 also has 23 comments. See: https://www.utcourts.gov/resources/rules/ucja/ch13/4_2.htm.

- 40 jurisdictions have adopted a rule that includes “or a court order” (AK, CO, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, MA, ME, MD, MN, MO, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); and 11 jurisdictions do not have “or a court order” (AL, AR, AZ, CA, CT, FL, MI, MS, NY, TX, VA).
- Seven jurisdictions include “organizations” and a definition of what is considered an “organization” (CA, DC, LA, MD, NJ, TX, UT); and 1 state includes “organization” but refers to rule 1.13 for the definition (NM).
- Two jurisdictions expressly prohibit indirect as well as direct violations of the rule.²
- Eight jurisdictions have a black letter provision similar to proposed comment [5], which addresses the application of the rule in the context of a limited scope representation.³

IX. **CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. General: There was consensus among Commission members to recommend substituting “person” for “party” in the Rule.
 - Pros: First, this change accords with federal and state law interpreting existing Rule 2-100 as applying outside the litigation context to “persons” represented in connection with a particular matter, even if the “persons” are not “parties” in the matter. Second, this change also accords with ABA Model Rule 4.2 and every other jurisdiction in the country. Only four jurisdictions have retained “party” in the black letter of their rule (Arizona, Connecticut, Michigan, and Mississippi), and: (i) all have a title that states “Communication With A *Person* Represented By Counsel” (Emphasis added), and (ii) all include a comment that provides the rule applies to a represented person: “This Rule also covers *any*

² The two jurisdictions are New York and Texas. See, e.g., New York Rule 4.2(a), which provides:

(a) In representing a client, a lawyer shall not communicate *or cause another to communicate* about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (Emphasis added.)

³ The eight jurisdictions are: Alabama, Alaska, Connecticut, Florida, Maine, Montana, New Hampshire, and Utah. For example, Maine Rule 4.2(b) provides:

(b) An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation attorney provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation attorney.

person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added). Third, changing “party” to “person” will also resolve the limitations inherent in “party” that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule’s objectives to protect any “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 lawyer-client relationship and the uncounseled disclosure of information relating to the representation,” (See Model Rule 4.2, cmt. [1]), there is no reason to limit the protection of the rule to those persons who are parties.⁴ Finally, notwithstanding public comment received at the outset⁵ of the Commission’s project that opposed the change in the belief it will interfere with criminal investigations, , the experience in other jurisdictions has not borne that out. (See also discussion of comment [8] in paragraph 21, below.)

- Cons: Public comment received by the first Commission and this Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of “person” for “party” will inhibit their ability to investigate. However, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. (See discussion of comment [8] in paragraph 21, below.) Moreover, addition of the phrase “or a court order” to (c)(2) in accordance with the ABA Model Rule further ensures that this rule will

⁴ See also *In the Matter of Dale*, *supra*, 4 Cal. State Bar Ct. Rptr. 798. Although the court concluded the word “party” must be construed strictly, it recognized that such an interpretation undermined the purposes of the rule:

We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez*, *supra*, 4 F.3d 1455, 1458-1459: “The rule against communicating with a represented party without the consent of that party’s counsel shields a party’s substantive interests against encroachment by opposing counsel [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition.” Our Supreme Court echoed this same assessment in *Mitton v. State Bar*, *supra*, 71 Cal.2d 524, 534: “[The no contact rule] shields the opposing party not only from an attorney’s approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party’s counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.”

(Footnotes omitted.)

⁵ A 45-day public comment period was held at the beginning of the Rules Revision project to solicit comments on changes that recipients of the solicitation thought were important and should be made.

not unduly limit the ability of lawyers in the criminal justice system to engage in legitimate investigative activities. (See discussion of (c)(2) in paragraph 11, below.)

2. In proposed paragraph (a), substitute “In” for “While”.

- Pros: Although not a substantive change, it clarifies precisely which communications are governed by the rule and removes unnecessary differences between California and every jurisdiction except one (Georgia).⁶
- Cons: None identified.

3. In proposed paragraph (a), retain the phrase “directly or indirectly”.

- Pros: This language prevents a lawyer from attempting to circumvent the rule by directing an agent, e.g., private investigator, to communicate with the represented person. Not carrying forward this language may create a risk that a court or lawyers might conclude that indirect communications are no longer prohibited.
- Cons: Retaining this language would perpetuate an existing difference between the language of the California rule and the rule adopted in a preponderance of other jurisdictions.

4. Retain concept in current rule 2-100(B), which identifies which constituents in an organization are covered by the rule and therefore protected under the Rule’s prohibition against communications with represented persons.

- Pros: Proposed paragraph (b) is necessary to clarify the complicated and recurring issue of which constituents of an opponent entity are protected under the rule from *ex parte* communications by a lawyer representing an opposing party. It provides important guidance that will foster compliance with the Rule. The Commission disagrees with OCTC that drawing such distinctions is not necessary. There is no evidence that current rule 2-100(B) has not provided useful guidance on the application of the rule in the organizational context. Moreover, the definition of the constituents covered by the rule remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
- Cons: Attempting to clarify this point risks being too narrow or overly broad.

5. Change the introductory clause to proposed paragraph (b) from its current form of being a defined term to a statement of the kinds of entities to which paragraph (b)’s prohibition applies. (See also paragraph 6, below.)

⁶ Georgia Rule 4.2 provides in relevant part: “(a) A lawyer who is representing a client in a matter shall not communicate”

- Pros: The proposed new structure more accurately demarcates the kinds of entities to which paragraph (b)'s prohibitions apply while also making clearer that its prohibitions apply based on organizational, as opposed to individual, representation. In particular, unlike the current structure, which could be interpreted as suggesting that its prohibition was based on deemed individual "representation," the proposed structure more accurately describes paragraph (b)'s actual effect, which is to prohibit and prevent communications with the persons identified in subparagraphs (b)(1) and (b)(2) based on the organization's representation; in many instances, this prohibition may apply even before the identified constituents have had an opportunity to consult with an organization lawyer, and at times when they may not even know that the organization is represented in connection with the matter.
 - Cons: Notwithstanding the intent of this change, there may be a risk that a court interpreting the new language might view the new structure as an invitation to abandon existing case law concerning the protection afforded by the rule to represented organizations and their constituents.
6. In the introductory clause to paragraph (b)(1) and (b)(2) add the phrase "or other private or governmental organization" after "corporation, partnership, association".
- Pros: Recognizes that there may be organizations other than corporations, partnerships, or associations to which the rule applies. In addition, explicitly states that the rule applies to governmental organizations, not just private organizations. (See also discussion of (c)(1) in paragraph 9, below.)
 - Cons: The explicit statement that the rule also applies to governmental organizations might cause some confusion given the provision in both the current rule (paragraph (C)(1)) and proposed Rule (paragraph (c)(1)) stating that communications with a public official are not prohibited in recognition of the constitutional right to petition government.
7. In proposed paragraph (b)(1), insert "current" to modify managerial employees of an organization.
- Pros: Clarifies that the rule's prohibitions based on organizational representation apply only to currently-employed constituents. Current rule 2-100 states the same limitation in Discussion ¶. 6. This limitation on the rule's scope should be in the black letter. Although there is case law so holding, including the concept in the black letter should remove ambiguity and facilitate compliance without requiring further clarification by a court. In particular, the clarification helps assure that this application of the current rule will not be disturbed by the recommended change from party to person.
 - Cons: This clarification in the black letter might be unnecessary as case law already addresses this point (see, e.g., *Nalian Truck Lines v. Nakano*

Warehouse and Transportation (1992) 6 Cal.App.4th 1256.) While this clarification may have been important guidance when the rule was revised in 1989, the application of the rule only to currently-employed constituents now appears to be a well-settled point.

8. In proposed paragraph (b)(2), retain the first clause in current rule 2-100(B)(2) (when act or omission “may be binding upon or imputed to the organization”), but delete the second clause in current rule 2-100(B)(2) (“the person’s statement may constitute an admission on the part of the organization.”)
 - Pros: (1) the second clause was dropped from the Model Rule and is not the law in most states that have adopted rule 4.2, (2) the provision is ambiguous and applies even if the statement “may” constitute an admission against interest; (3) the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity; (4) deleting the clause generally will not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that might constitute an admission would have to originate from a constituent who is already off-limits under paragraph (b)(1) (which encompasses any officer, director, partner, or managing agent); only in rare situations would a constituent not already covered under paragraph (b)(1) be able to make an admission that would be binding on the organization. The aforementioned burdens placed on the communicating lawyer by the admissions clause and its potential for interfering with pre-filing investigations outweigh the benefits that might be realized in prohibiting communications that would only rarely result in an admission.
 - Cons: “Statements” are different from acts and omissions. Constituents of an organization whose statements can result in liability being imposed on the organization should therefore be protected by the Rule. The deletion is a change to existing law.
9. Retain as proposed paragraph (c)(1) current rule 2-100(C)(1), which excepts from the rule communications with public officers, boards, committees, or bodies, but substitute “public official” (defined in (f)(2)) for “public officer”.
 - Pros: The exception in current rule 2-100(C)(1) reflects recognition of the important constitutional right to petition the government and is in accord with public comment received from the California Access To Justice Commission. The change from “public officer” to “public official” (as defined in (f)(2)) 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. . (See also

discussion re comment [7] in paragraph 20, below.)

- Cons: None identified.

10. Delete current rule 2-100(C)(2) (represented party seeking second opinion from independent lawyer) but include it as a clarifying comment (Comment [5]).

- Pros: Current (C)(2) is superfluous because an independent lawyer could not be covered by this rule, which applies only to communications *by a lawyer in the course of representing a client*, which would make the lawyer making those communications not independent. In any event, it is properly placed in a paragraph that identifies exception to the rule because the rule does not apply to the described situation in the first instance. Instead, the current rule 2-100(C)(2) concept has been retained as a clarifying comment to assure lawyers that such communications are not prohibited under the Rule. (See Comment [5].)
- Cons: Notwithstanding the intent of this change, a court might interpret the movement of this concept from the black letter to a comment as a signal that the point is rendered less than authoritative in the context of the proposed rule.

11. Retain as proposed paragraph (c)(2) the concept in current rule 2-100(C)(3) (exception for communications otherwise authorized by law) and include a further exception for communications authorized by a court order.

- Pros: Adding the phrase “or a court order” accords with the ABA Model Rule and the rule in 40 jurisdictions. Together with proposed comment [8], which is derived from current rule 2-100, Discussion ¶ 1, the addition of the phrase, “or a court order,” is intended to address concerns over the substitution of “person” that were expressed by lawyers in the criminal justice system that the substitution would interfere with their ability to conduct investigations. In 2002, the ABA encountered similar opposition to its proposed amendments to Model Rule 4.2 and responded:

Although a communication with a represented person pursuant to a court order will ordinarily fall within the “authorized by law” exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4] (renumbered Comment [6]).

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that

Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.⁷

The Commission believes the ABA responded appropriately to the concerns of law enforcement by amending Model Rule 4.2 to include a reference to “a court order.” (See also discussion of the substitution of “person” for “party” in paragraph 1, above, and of comment [8] in paragraph 21, below.)

- Cons: The option of seeking a court order to authorize a communication with a represented person appears to be untested in California in relation to the longstanding legal ethics standard set by current rule 2-100 and its predecessors. Even if such an option is borne out as being technically available as a procedural matter, it might nevertheless be illusory as a practical matter for lawyers who have limitations on time and resources during the investigative phase of a case.

12. In proposed paragraph (d)(1), include definition of “Managing Agent”.

- Pros: Defining managing agent provides an important clarification of when the proposed Rule would apply in organizational settings. Moreover, the definition remains in general terms, leaving application to specific fact patterns for interpretation by ethics opinions and/or the courts.
- Cons: Codifying a definition may render the rule inflexible and inhibit appropriate application to the various factual settings that are confronted by courts, including the State Bar Court.

13. In proposed paragraph (d)(2), include definition of “Public Official”.

- Pros: See discussion of change from “public officer” to “public official” in paragraph 9, above, and of comment [7] in paragraph 20, below.
- Cons: None identified.

COMMENTS

Note on Comments To Proposed Rule 4.2: Principle 5 of the Commission’s Charter provides that comments “should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.” Proposed Rule 4.2 has been the focus of a substantial amount of case law that has clarified how it should be applied. The comments the Commission recommends are an attempt to capture that case law and other authority to clarify how the rule is applied, do not conflict with Principle 5, and also accord with Principle 4 of the Commission’s

⁷ See Reporter’s Explanation of Changes, Rule 4.2, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics/2000_commission/e2k_rule42rem.html [Last visited on June 6, 2015]

Charter by facilitating “compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”

14. Add proposed comment [1], which state that the rule applies even though the represented person initiates or consents to the communication.

- Pros: The comment provides an important clarification that it is not just communications that a lawyer might initiate, but rather *any* communication with a represented person where the person’s lawyer has not consented, even those that the person initiates or consents to.
- Cons: None identified.

15. As proposed comment [2], retain the substance of current rule 2-100, Discussion ¶ 4.

- Pros: The comment importantly clarifies that “matter,” etc., is not limited to litigation contexts. The Commission has added a second sentence that further clarifies the point.
- Cons: If the word “person” is substituted for “party,” there is no longer a need for a clarifying comment re the scope of “matter,” etc.

16. As proposed comment [3], retain the substance of current rule 2-100, Discussion ¶ 2.

- Pros: Current Discussion ¶ 2 identifies kinds of communications that do not violate the policies underlying the rule and therefore are permitted. The Commission has shortened the current Discussion paragraph and added language from Model Rule 4.2, cmt. [4]. This language clarifies the extent to which a lawyer may advise a client who engages in a communication with a represented opponent without the lawyer violating the prohibition on “indirectly” communicating with a represented person.
- Cons: None identified.

17. Add proposed comment [4], which clarifies that the rule prohibits only those communications that relate to the subject of the representation, and also clarifies that when a person is represented on a limited scope basis, only those communications related to that person’s representation are prohibited.

- Pros: The Commission considered comment [4] necessary to address the concerns of access to justice stakeholders that an indiscriminately applied prohibition on *ex parte* communication could function to denigrate and discourage limited scope representation.

- Cons: The topics addressed in this comment might be better suited to an ethics opinion as the application of the rule in these settings would be dependent upon the facts.

18. As proposed comment [5], retain the concept in current rule 2-100(C)(2).

- Pros: See discussion concerning rule 2-100(C)(2) in paragraph.10, above.
- Cons: None identified.

19. Add proposed comment [6], which clarifies that when an organizational constituent is independently represented, the consent of the constituent's lawyer alone will permit communications with the constituent, and consent from the organization's lawyer need not also be obtained.

- Pros: Proposed comment [6] clarifies the term, "consent of the other lawyer" in paragraph (a), when applied to communications with constituents of a represented organization. It recognizes the rule set forth in California case law. See *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773 [17 Cal.Rptr.3d 467].
- Cons: None identified.

20. Add proposed comment [7], which clarifies the scope of the exception for communications with public officials, boards, committees, or bodies..

- Pros: See discussion of the change from "public officer" to "public official" in paragraph 9, above. As noted, paragraph (c)(1) of the rule reflects recognition of the constitutional right to petition the government. Comment [7], however, clarifies that not every constituent of a government organization is subject to that paragraph's exception and that those persons falling outside the exception must be provided with the same protections afforded private organization constituents under paragraph (b)(2).
- Cons: None identified.

21. Include proposed comment [8], which is derived from current rule 2-100 Discussion ¶ 1, concerning the scope of the paragraph (c)(2) exception for communications authorized by law or a court order.

- Pros: This 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 is important to provide reassurance 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. See discussion of the substitution of “person” for “party” in paragraph 1, above.

- Cons: The last sentence of the comment is unnecessary and may raise problems depending upon how it is interpreted. The concerns raised by those practicing in the criminal justice system have not been borne out. There is no legal authority or empirical evidence that criminal defendants have been deprived of due process or the right to a fair trial in the 20 years since the Model Rule 4.2 was amended to substitute “person” for “party.” The purpose of the change is to clarify that represented persons in the matter that is the subject of the communication will receive the same protection whether they are considered parties now or could be named later or are not identified as parties in a particular case or legal matter.

22. Include proposed comment [9], which provides a cross-reference to Bus. & Prof. Code § 6106 and case law applying the rule in an organizational setting.

- Pros: It is appropriate to include a cross reference to § 6106 and the two cases to alert lawyers that even if an exception to proposed rule 4.2 applies, there remain other restrictions to communicating with represented persons. See also Concepts Rejected, paragraph 3, regarding a proposed text provision that would have explicitly required lawyers to comply with proposed rule 4.3 (communications with unrepresented persons) when permitted by this rule to communicate with a represented person.
- Cons: If the comment is intended to require a lawyer must comply with the requirements of proposed rule 4.3, then the comment should so explicitly state.

B. Concepts Rejected (Pros and Cons):

1. Add a provision that would prohibit a lawyer for an organization from claiming the lawyer represents all constituents of the organization unless such representation is true.

- Pros: Adding the provision would clarify that an organization’s lawyer could not inhibit pre-litigation investigations by opposing lawyers by simply claiming to represent all constituents in the organization. (Cf. *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415].)
- Cons: Such misrepresentations are already prohibited under provisions of the State Bar Act.

2. Retain current 2-100(C)(2) in the black letter of the rule.

- Pros: See IX.A.10.
- Cons: See IX.A.10.

3. Add a proposed black letter provision, which would provide that a lawyer must comply with the requirements of proposed rule 4.3 (Communicating with an Unrepresented Person) when the lawyer engages in a communication with a represented person that is not prohibited under the Rule.
 - Pros: This provision would align with the objectives of rule 4.2 (see discussion of the substitution of “person” for “party” in Section IX.A.1, above) and would clarify that even when a communication with a *represented* person is not prohibited (whether because it is made with the consent of the lawyer or because it falls within one of the exceptions in paragraph (c)), the lawyer still must not engage in conduct prohibited by proposed rule 4.3,⁸ which is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be *charged* for engaging in overreaching conduct, their application to situations governed by this rule is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.
 - Cons: Adding this concept might be unnecessary given that OCTC has commented that there are charging bases (i.e., Business and Professions Code sections 6068(a) and 6106) other than the *ex parte* communication rubric for addressing this type of misconduct.
4. Carve out an express exception in the black letter of the rule for government lawyers conducting criminal or civil action investigations.
 - Pros: See IX.A.11 & 21.
 - Cons: See IX.A.11 & 21.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be

⁸ If adopted, proposed Rule 4.3 would provide:

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are or may become in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating on behalf of a client with a person who is not represented by counsel, 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.

found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Substitution of “person” for “party.” (See IX.A.1.) Although rule 2-100, Discussion ¶ 1⁹ and case law¹⁰ suggest that substituting “person” for “party” might be a non-substantive change, the better view, in light of *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, which held that the rule’s protections were limited to “parties” in a matter, is that this is a substantive change.
2. Substitution of “public official” for “public officer.” (See IX.A.9.) Although there is support for the position that this is a non-substantive clarification of which government employees are excepted from the protections of the rule under paragraph (c)(1), the first 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, considering the substitution as working a substantive change. Consequently, this change is listed under substantive changes.
3. Addition of “or a court order” in proposed paragraph (c)(2) [former rule 2-100(C)(3)]. See IX.A.11.
4. Addition in paragraph (d)(1) of a definition of “managing agent.” Although this is intended as a clarification of a term already existing in the rule, as interpreted by existing case law, it is a substantive change to the extent the definition delimits the scope of the term. See IX.A.12.
5. Addition in paragraph (d)(2) of a definition of “public official.” See IX.A.13 and IX.C.2.

D. Non-Substantive Changes to the Current Rule:

1. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction’s rule, thus permitting them more easily to determine whether

⁹ Discussion ¶1.1 provides: “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.” (Emphasis added.)

¹⁰ See *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1167 (although rule 2-100 applies to a *person* represented by counsel, the lawyer had not violated the rule because even assuming the *person* was represented by counsel, the lawyer had no knowledge of the representation.)

California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substituting the term “lawyer” for “member”.

- Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

3. In paragraph (a), substitution of “in” for “while”. See IX.A.2.

4. In paragraph (b)(1), addition of “current” to modify managerial employees of organization. See IX.A.7.

5. In introductory clause to paragraph (b), addition of phrase, “or other private or governmental organization.” See IX.A.6.

6. None of the comments are intended as substantive changes to the current rule that would have an effect on a lawyer’s duties. Several are derived from current Discussion paragraphs to current rule 2-100 (i.e., Comments [2], [3], [5] and [8]). All comments are included to clarify the application of the proposed rule and enhance compliance with it.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Dissent submitted by Ms. Langford and the Commission’s Response. See attached.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

That the Board of Trustees of the State Bar of California adopt proposed Rule 4.2 [2-100] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 4.2 [2-100] in the form attached to this report and recommendation.

Commission Member Dissent to the Recommended Adoption of Proposed Rule 4.2, Submitted by Carol M. Langford

This letter is to provide comments and lodge my dissent to some of the changes being made to old Rule 2-100.

First, I strongly agree that changing the word "party" to "person" is a good change, and long overdue. The State Bar Court should not have to reach for a B&P 6106 violation to punish conduct that should be prohibited by the Rule.

I disagree however, with Comment 2A (what is in the current draft called a "placeholder"). This Comment seems to say that actual knowledge is required before a lawyer can be prosecuted under the Rule. This language is not in the current Rule, and there has been no problem with that lack of inclusion so far (for many, many years). I also think that when we heard from Allen Blumenthal from the Office of Chief Trial Counsel that your language saying "The Rule applies where the lawyer has actual knowledge that the person..(..)" will almost completely impair their ability to prosecute a violation of the Rule, then we must take heed.

It is true that the case law says actual knowledge is needed. And it is true that it also says that knowledge may be inferred from the circumstances. However by saying "This Rule applies where the lawyer has actual knowledge..(..)" you are twisting the meaning in a way that implies that only actual knowledge is sufficient for a prosecution of the Rule. You are also inserting a mens rea element that is not applicable in the State Bar court. As Mr. Blumenthal explained, in the State Bar all a respondent has to do is to, for example, take money from the trust account and that will alone comprise the willfulness element needed to commit a State Bar offense. The State Bar does not look to actual knowledge and/or a Respondent's state of mind unless the discipline phase of the trial is over and the second phase of the trial - mitigation - is being heard.

Moreover, adding the Comment proposed could make it possible for a lawyer to contact a person in, for example, a domestic case when a quick online search would show she is represented. The same is true of a post-arraignment defendant. That completely circumvents the intent of the Rule. The State Bar Court in their case *The Matter of Dale*, wanted to stop exactly this type of over-reaching by lawyers. We should support our Court.

I believe the Comment to the Rule should state "This Rule applies when the member knows or reasonably should know that the person to be contacted is represented by another lawyer in the matter" if you are going to keep that Comment in.

Comment 3 is also problematic. I get that you want lawyers to be able to talk about things outside of the representation with someone represented by counsel since that is not what the Rule wants to sanction. However, the way your draft reads it would allow a DA to ask a defendant about other offenses that may be considered strikes. Or, a lawyer to ask a woman about a custody issue when she is only represented on the dissolution. Your language is far too broad, and there must be boundaries or the purpose of the Rule is thwarted.

I suggest the following language: "This Rule does not prohibit communications with a represented person concerning matters not reasonably related to the representation."

Now let's look at Comments 9 and 10 - particularly the first sentence of Comment 10 and the last sentence of Comment 9 regarding the availability of court orders and investigative activities respectively. Those Comments are a bold attempt to legislate through Rule Comments - something the Supreme Court has already told us they don't want us to do. I do not understand why you would ignore their plain admonishment. They are right in not wanting us - a Commission - to do that. I urge you to listen to them.

Last, I do not recall which Alternative was selected in our Proposed Rule, but if it is Alternative One that includes (ii) - admissions on the part of an organizational constituent - then that is good. Why wouldn't we want to protect organizations from being held to admissions when, for example, the constituent does not understand how statements can hurt him and the organization? And don't we want to protect people who have not been properly "Organizationally Mirandized" that what they say can hurt them, too?

Please consider these comments. I do know that others outside of the Commission will be closely watching this Rule and we might as well get it right - right now.

RESPONSE TO DISSENT REGARDING PROPOSED RULE 4.2

Proposed Comment [2A], which the dissent disagrees with, was originally included in rule 4.2 as a placeholder in the event the Commission did not adopt a general terminology rule defining "know." Although Comment [2A] has been deleted, its concept is now included in proposed Rule 1.0.1(f).¹ Thus the same definition of "know" continues to apply to this rule, warranting a response to the dissent.

Including a requirement that the lawyer "know" the person is represented is intended to reflect current case law, which makes clear that the prohibitions imposed by the rule apply only when a lawyer actually knows that the person being contacted is represented. See, e.g., *Koo v. Rubio's Restaurants, Inc.*, 109 Cal. App. 4th 719, 732 (2003) ("Case law makes clear that Rule 2-100 is only a bar to ex parte contact if the lawyer seeking contact actually *knows* of the representation.") (emphasis in original); *Truitt v. Superior Court*, 59 Cal. App. 4th 1183, 1188 (1997) ("Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge."); *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401-02 [58 Cal.Rptr.2d 178] ((proscription against contact does not apply merely because attorney "should have known" that person would be represented). The Commission does not believe it is "twisting" the rule by including a comment that clarifies the continuing applicability of this limitation on the rule's prohibitions that, as the cases note, is inherent in the rule's use of the word "knows." Nor does the Commission believe that this will impose on OCTC or the State Bar Court any limitation on misconduct prosecutions or findings that does not already exist. Under current law, to prosecute a lawyer for a violation of Rule 2-100 in State Bar Court would require OCTC to prove that the lawyer actually knew the person contacted was represented. For the reasons explained in *Jorgensen*, the Commission

¹ Proposed Rule 1.0.1(f) provides:

"Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

believes that this reflects an appropriate balancing of the need to protect represented persons, while not unduly limiting investigation of claims. The recognition in the proposed comment that actual knowledge may be inferred from the circumstances comports with well-established law, see, e.g., *Gomes v. Byrne*, 51 Cal.2d 418, 421 (1959) (“actual knowledge . . . may be inferred from the circumstances.”) and prevents a lawyer from willfully avoiding knowledge of representation; depending on the facts, this might apply where a lawyer handling a filed case deliberately avoids checking the docket to see if a party to the matter is represented. And, as *Jorgensen* notes, there are a variety of ways for lawyers to ensure that opposing lawyers are put on notice that their clients are in fact represented.

Proposed Comment [4] (which the Commission believes is referenced as Comment 3 in the dissent) is also intended to reflect both the language of the rule and current case law, both of which make clear that contacts are prohibited only to the extent they are “about the subject of the representation.” Limiting the rule’s prohibitions to communications about the actual subject of the representation, as opposed to extending them also to communications about matters “reasonably related” to the actual subject of the representation, is also consistent with an appropriate balancing of the need not to unduly limit investigations of potential legal claims. An example provided in the dissent also makes clear the need to limit the rule to the subject of the representation. If a woman has elected to be represented only in connection with dissolution, and not on custody, extending the rule to prohibit contacts relating to custody as well as dissolution because the two are “reasonably related” would create an untenable situation – opposing counsel could not talk to the woman without going through the woman’s lawyer, but that lawyer would not be in a position to deal with opposing counsel since the lawyer does not represent the woman in connection with custody. Finally, the Commission believes that Comment [4] appropriately addresses concerns of access to justice stakeholders that an overly broad application of the rule’s prohibitions could discourage limited scope representation.

Proposed Comment [8] (which the Commission believes is referenced as Comment 9 in the dissent) discusses application of the “authorized by law” exception. The last sentence of this proposed comment does not reflect an “attempt to legislate through Rule Comments.” To the contrary, this last sentence makes clear that the “authorized by law” exception will apply to legitimate investigative activities engaged in by lawyers representing those accused of crimes only “to the extent those investigative activities are authorized by law.” This last sentence is included to assure criminal defense lawyers that the change from “party” to “person” is not intended to alter any current law authorizing investigative activities, or to preclude the development of future law authorizing such activities. Far from altering the rule’s “authorized by law” exception, this last sentence simply makes clear that interpretation of the “authorized by law” exception as it applies to criminal defense investigations is left to the courts.

The proposed Comment [10] referenced in the dissent was not adopted by the Commission and is not included in the current draft.

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

TOTAL = 5
A = 1
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27f	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	M		<p>We oppose the change from the term “party” to the term “person.”</p> <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.”</p> <p>We are concerned with the use of the term “investigative activities” in Comment [8]. It can easily be imagined that a prosecutor might understand “investigative activities” as permitting direct contact with the 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.”</p> <p>Investigation of criminal cases often persists even after the filing of charges.</p>	
Y-2016-3	League of California Cities (Leary) (12-15-16)	Y	M		<p>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</p>	<p>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)</p>

¹ 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 = 5
A = 1
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					application.	[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 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.

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

TOTAL = 5
A = 1
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	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 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.</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 guidance in a rule.</p>

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

TOTAL = 5
A = 1
D = 0
M = 4
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-28c	Public Defender Los Angeles County (Emling) (01-17-17)		M		<p>We oppose the change from “party” to “person” because this revision would bar both the defense and the prosecution from seeking to interview a victim known to be presented by counsel, without permission of that counsel. As a consequence substantial changes in the handling of criminal cases would be caused.</p> <p>We believe it is essential that prosecutors and defense attorneys be permitted to investigate and present their cases as completely as possible. Adoption of the proposed Rule will inject uncertainty into an area where no uncertainty currently exists.</p> <p>In proposed Comment [8], we express concern with use of the term “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 “investigative activities.” Investigation of criminal cases often continues after the filing of charges.</p> <p>We also urge the Commission to</p>	

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

TOTAL = 5
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M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					adopt the position that permission to conduct interviews is limited to pre-filing time periods.	
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 willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.

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

TOTAL = 5
A = 1
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<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>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		COPRAC supports the adoption of proposed Rule 4.2 as revised.	No response required.