



Rule 4.2 Communication with a Represented Person*
(Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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.

Public Comment
Exhibit 1

[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, section 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. Bus. & Prof. 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.)

NEW RULE OF PROFESSIONAL CONDUCT 4.2
(Former Rule 2-100)
Communication With a Represented Person

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 2-100 (Communication With a Represented Party) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 4.2 (concerning communications with a represented person) and the Restatement of Law Governing Lawyers counterpart, Restatement § 99 (Represented Nonclient – The General Anti-Contact Rule). The result of the Commission's evaluation is proposed rule 4.2 (Communication With a Represented Person).

Rule As Issued For 90-day Public Comment

Proposed rule 4.2 carries forward the substance of current rule 2-100, the "no contact" rule, and prohibits a lawyer who represents a client in a matter from communicating, either directly or indirectly, about the subject matter of the representation with a person represented by a lawyer in the same matter. The rule is intended to protect the represented person against (i) possible overreaching by the prohibited lawyer, (ii) interference by the prohibited lawyer with the client-lawyer relationship, and (iii) the uncounseled disclosure of privileged or other confidential information.

In addition to containing the basic prohibition in paragraph (a), the proposed rule would carry forward, largely intact, the other black letter provisions in current rule 2-100(B) and (C) as paragraphs (b) and (c).

As originally circulated for 90-day public comment, there were also two new paragraphs: paragraph (d), which would have imposed a duty on a lawyer to treat with fairness a represented person with whom communications are permitted under the rule (e.g. a public official), (see Revisions Following 90-Day Public Comment Period, below), and paragraph (e), which included two definitions intended to avoid ambiguity in the application of the rule (now re-lettered paragraph (d).)

Proposed rule 4.2, like current rule 2-100, is substantially more detailed than the corresponding Model Rule, which is comprised of a single blackletter sentence supplemented by nine Comments, many of which expand or provide express exceptions to the rule. The Commission believes that a rule similar to current rule 2-100 is preferred to the Model Rule because it more closely adheres to the Charter's principle that the rule function as a minimal disciplinary standard. Further, the detailed proposed rule enhances compliance and facilitates enforcement, as well as promotes protection for the public and respect for the legal profession and administration of justice.

Paragraph (a), the basic prohibition, presents a key issue: whether to substitute the term "person" for "party" in current rule 2-100. This substitution has been made by every jurisdiction, either by making the substitution in the black letter provision of its rule 4.2 counterpart or by stating in a comment that "party" applies to any person involved in a matter who is represented by a lawyer. Changing "party" to "person" should also resolve the limitations inherent in using the term "party" that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule's aforementioned objectives

to protect any person who has chosen to be represented by a lawyer in a matter against possible overreaching by lawyers who are employed in the matter, interference by those lawyers with the lawyer-client relationship, or the uncounseled disclosure of confidential information, there is no principled reason to limit the protection of the rule to only those persons who are parties. Nevertheless, 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, the experience in other jurisdictions has not borne that out. In any event, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. In light of these contentions, this change in language creates a point of controversy in considering the rule. See also discussion of paragraph (c), below.

Paragraph (b), which carries forward the substance of current rule 2-100(B), is intended to clarify the operation of the proposed rule when the represented "person" is an organization, including a governmental organization.¹ The only substantive change to that paragraph is to no longer view as a "represented person" a constituent of the organization "whose statement may constitute an admission on the part of the organization." That clause was deleted because it is ambiguous and applies even if the statement "may" constitute an admission against interest, and 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. Most states do not include this as the ABA deleted a similar clause as a part of its Ethics 2000 Commission's comprehensive revisions of the Model Rules. In any event, deleting the clause should not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that could constitute an admission would have to originate from a constituent who is already off-limits under subparagraph (b)(1) (which encompasses any officer, director, partner, or managing agent).

Paragraph (c) carries forward most of current rule 2-100(C), which explicitly recognizes several exceptions to application of the rule, including communications with public officials or public entities and communications otherwise authorized by law. Paragraph (c) does not carry forward current paragraph (C)(2), which excepts communications initiated by a represented person seeking advice from an independent lawyer. Current rule 2-100(C)(2) is superfluous because an independent lawyer could not be covered by the rule, which applies only to communications *by a lawyer in the course of representing a client in the matter*, which would make the lawyer making those communications not independent.

A key issue, however, is the addition of the phrase, "or a court order." This is intended to address concerns expressed by lawyers in the criminal justice system to the prior Commission that the substitution of "person" would interfere with the ability to conduct investigations. Including this phrase removes any ambiguity that might otherwise suggest that, for example, a prosecutor could not seek a court order to communicate with a represented witness in conducting a criminal investigation. Most states that have a version of Model Rule 4.2 include the option of seeking a court order. When considered in light of the substitution of "person" for "party," the phrase represents an appropriate balancing between protecting lawyer-client relationships of any person involved in a matter and permitting lawyers, whether on behalf of private or governmental interests, to effectively represent their clients by conducting investigations into the matters for which they had been retained. During the first Commission's process, the provision generated substantial input from

¹ Proposed rule 1.0.1(g-1) defines "person" to mean "a natural person or an organization."

interested stakeholders both in formal public comment and in appearances at Commission meetings and public hearings. This Commission also received communications from interested stakeholders regarding this change. To address the expressed concerns, this Commission has also recommended including proposed Comment [8].

The 90-day public comment version of the rule included paragraph (d), which was new. It required that when lawyers deal with a represented person as permitted by the rule, i.e., pursuant to paragraph (c)(1), the lawyer must comply with the requirements of proposed rule 4.3, which in effect requires lawyers to treat unrepresented persons fairly and 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, e.g., Bus. & Prof. Code §§ 6068(a) and 6106, their application to situations governed by proposed rule 4.2 is not readily apparent. It was believed that including this express provision should eliminate that ambiguity and facilitate compliance.

Paragraph (e) of the 90-day public comment version [now re-lettered paragraph (d)] includes two definitions, one for “managing agent” and another for “public official.” They are intended to clarify the application of the rule in an organizational context and when a lawyer is attempting to exercise the right to petition the government, respectively.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission’s general proposal to use the Model Rule numbering system and the substitution of the term “lawyer” for “member.”

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. The comments also accord with Principle 4 of the Commission’s Charter by facilitating “compliance with and enforcement of the rules by eliminating ambiguities and uncertainties.”

Of particular note is Comment [8] which, as noted above, has been added to clarify that the rule is not intended to preclude communications with represented persons in the course of legitimate investigations as authorized by law. A similar comment was included in the first Commission’s proposed rule to address the concerns of lawyers on both sides in the criminal justice system.

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted paragraph (d). However, the Commission also added Comment [9] to clarify that communications with a represented person not prohibited under the rule are still subject to other restrictions. The Commission also deleted Comment [2A], which had originally been included as a placeholder during the Commission’s deliberations. Former Comment [2A]’s substance is now in proposed rule 1.0.1(f) [definition of “knowledge”].

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule. A member of the Commission submitted a dissent to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 4.2 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. A stylistic change was made in the title of the rule. In paragraph (b)(2), the word "an" was added after "such" and before "person." This addition appears to be an inadvertent copyediting error.

In Comments [4] and [7], citation style was revised to conform to the California Style Manual. Lastly, omitted asterisks for defined terms were added.

Supreme Court Action (September 26, 2018)

Subsequently, the Board adopted staff recommended "clean-up" revisions to various rules, including this rule. All of these changes were non-substantive and, for example, implemented copy editing corrections to style and punctuation. The Supreme Court approved the "clean-up" revisions operative November 1, 2018 by order dated September 26, 2018.

Rule ~~2-100~~4.2 Communication with a Represented ~~Party~~Person*
(Redline Comparison to the California Rule Operative Until October 31, 2018)

(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.~~

~~(C)~~ This 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.

(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].)

~~(2) Communications~~[5] This rule does not prohibit communications initiated by a party represented person* seeking advice or representation from an independent lawyer of the party's person's* choice, or.

~~(3) Communications otherwise authorized by law.~~

[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, section 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. *Bus. & Prof. 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.)

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. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)~~

