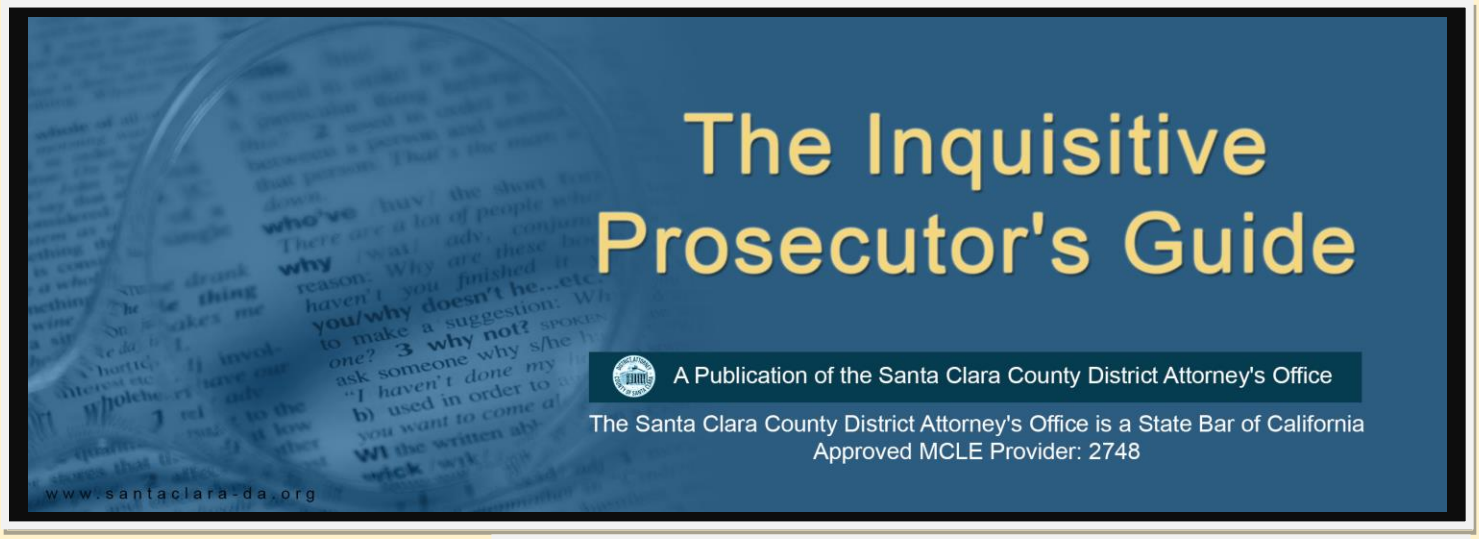

Date: July 12, 2018

2018-IPG-37 (LIMITS ON PROSECUTORIAL CONTACTS WITH REPRESENTED & UNREPRESENTED PERSONS)

In this edition of the Inquisitive Prosecutors Guide, we discuss the barriers the Sixth and Fifth Amendment impose on prosecutorial contact with represented persons as well as the new rules of professional conduct governing contact by attorneys with represented and unrepresented persons (California Rules of Professional Conduct ["CRPC"] 4.2 and 4.3) going into effect in November of this year. Among the questions discussed:

When can prosecutors or law enforcement contact persons whose Sixth Amendment right to counsel has attached?

When can prosecutors or law enforcement re-contact persons whose Fifth Amendment right to counsel has been invoked during custodial interrogation?

Does new CPRC rule 4.2 change the currently existing rule (CPRC 2-100) governing contact with represented persons in any significant way?

Can prosecutors communicate with charged but unrepresented persons and/or negotiate plea bargains with such persons?

The podcast will provide **70 minutes of MCLE ethics credit**. It may be accessed and downloaded listening at: **http://sccdaipg.podbean.com/**

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A. Limitations Imposed by the *Sixth* Amendment Right to Counsel on Prosecutorial Contacts with Persons Suspected of Crimes

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." (***Rothgery* v. *Gillespie County, Tex.*** (2008) 554 U.S. 191, 198.)

The Sixth Amendment right to the assistance of counsel "is limited by its terms: 'it does not attach until a prosecution is commenced.'" (***Rothgery* v. *Gillespie County, Tex.*** (2008) 554 U.S. 191, 198 citing to ***McNeil* v. *Wisconsin*** (1991) 501 U.S. 171, 175; ***Moran* v. *Burbine*** (1986) 475 U.S. 412, 430.)

Commencement of a prosecution is pegged to "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment . . ." (***Rothgery* v. *Gillespie County, Tex***. (2008) 554 U.S. 191, 198; **see also *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 786 [Sixth Amendment right to counsel (whether or not invoked) attaches "once the adversary judicial process has been initiated"]; ***People* v. *Sauceda-Contreras*** (2012) 55 Cal.4th 203, 217, fn. 3 [Sixth Amendment right to counsel "attaches upon the initiation of formal criminal proceedings"]; ***People* v. *Nelson*** (2012) 53 Cal.4th 367, 371, fn. 1 [same].) In California, this means that if an indictment or complaint has issued, the Sixth Amendment right to counsel has attached – regardless of whether the defendant has been arraigned on the indictment or complaint. (**See *People* v. *Viray*** (2005) 134 Cal.App.4th 1186.)

Thus, in general, if a person *has not yet been charged* with a crime, the *Sixth Amendment* of the federal Constitution does not prohibit the government (either prosecutors or any members of law enforcement) from speaking with that person about the crime.

1. The Sixth Amendment and Uncharged but "Represented" Persons

Law enforcement is **not** precluded by the ***Sixth Amendment*** from contacting and interviewing ***uncharged*** persons (even those who have been arrested) notwithstanding the fact the person may have "retained" counsel. (**See *Moran* v. *Burbine*** (1986) 475 U.S. 412, 430 [noting "it makes little

sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation" and finding police had not duty to inform suspect his sister had retained counsel for him before continuing interrogation]; ***People* v. *Carter*** (2003) 30 Cal.4th 1166, 1209-1210 [rejecting as unworkable any rule that would require "that counsel previously appointed or retained in an unrelated case be notified whenever jail authorities seek to question an inmate about possible criminal acts committed while in custody"]; ***People* v. *Avila*** (1999) 75 Cal.App.4th 416, 422–424 [rejecting claim that defendant could invoke his Fifth or Sixth Amendment right to counsel on "any future crime" where defense counsel sought to anticipatorily invoke defendant's right to counsel at time of defendant's arraignment on several charged offenses]; ***Clements* v. *State*** (Ga. 2017) 800 S.E.2d 552, 556 [rejecting defendant's argument that "because he had already invoked his Sixth Amendment right to counsel by hiring an attorney before the call took place, the police were not allowed to speak with him without his counsel being present."].)

This rule clearly applies when a defendant is in custody, is represented, and is charged on one offense (so long as the defendant has not invoked his Fifth Amendment right to counsel during an earlier custodial interrogation - **see** this IPG memo, section I-B at pp. 8-9) but members of law enforcement seek only to speak with the suspect about *a different* offense. (**See *Texas* v. *Cobb*** (2001) 532 U.S. 162, 173 [after re-Mirandizing an in-custody burglary suspect who was represented by an attorney on the burglary charge, the police could properly interrogate the suspect about an uncharged murder that was committed in the course of that burglary]; ***McNeil* v. *Wisconsin*** (1991) 501 U.S. 171, 180-181 [noting if the rule were otherwise, "most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid ***Miranda*** waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"]; ***United States* v. *Taylor*** (E.D.N.Y. 2014) 17 F.Supp.3d 162, 172.)

Thus, when the suspect has already retained an attorney, the only reason *a prosecutor* (or investigator or officer acting as the prosecutor's agent) would be precluded from speaking with an *uncharged* suspect who is "represented" by an attorney would have to stem from circumstances in which the Fifth Amendment right to counsel would apply (this IPG memo, section I-B at pp. 8-9) or from an ethical rule barring such contact (**see** this IPG memo, section II at pp. 22-55.)

2. The Sixth Amendment and Persons Who are Charged and Represented

Even when the Sixth Amendment right to counsel *has attached*, this does not mean *law enforcement officers* are prohibited from contacting a defendant who has not previously invoked his Fifth Amendment right to counsel. (**See *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 789.)

The *Sixth Amendment* does not prevent law enforcement officers from contacting a defendant (whether the defendant is in or out of custody) about the very case with which defendant has been charged. (***Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 789-790.) Of course, law enforcement officers may not speak to the defendant regarding the case with which he is charged unless they obtain a waiver of defendant's Sixth Amendment right to counsel. (***Id***. at p. 786.) In addition, if the defendant is in custody, law enforcement still must provide defendant ***Miranda*** warnings and obtain a waiver of the ***Miranda*** rights. (**Id**. at p. 794.)

> ***Editor's note:** Although, if the defendant waives his ***Miranda*** rights, there is no requirement that the officers obtain a separate waiver of defendant's Sixth Amendment right to counsel. (**See *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 786-787 ["As a general matter ... an accused who is admonished with the warnings prescribed by this Court in ***Miranda*** ... has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one."].)

It is questionable whether the *Sixth Amendment* even prevents a *prosecutor* from speaking with a represented defendant about his charged offense if the Sixth Amendment right to counsel is waived. (**See *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 790 [criticizing defendant's argument for confusing the professional rules of conduct prohibiting contacts between attorneys and represented parties with the dictates of the Sixth Amendment].) However, regardless of whether such contact is barred by the Sixth Amendment**, the *rules of professional conduct do* prevent a prosecutor from having such communications**. (**See** this IPG section II-C at p. 25.)

B. Limitations Imposed by the *Fifth* Amendment Right to Counsel on Prosecutorial Contacts with Persons Suspected of Crimes

A person who is in custody has a Fifth Amendment right to an attorney while being interrogated. Thus, regardless of whether the interrogation is going to be conducted by a law enforcement officer or a prosecutor, before the person may be interrogated, the person must waive his Fifth Amendment right to counsel. (**See *Miranda* v. *Arizona*** (1966) 384 U.S. 436, 444; ***Oregon* v. *Mathiason*** (1977) 429 U.S. 492, 495.)

Editor's note:** "Custody" for purpose of deciding whether a suspect must be given a ***Miranda admonition (i.e., Fifth Amendment custody) is different than custody for purposes of determining whether a suspect has been detained or arrested (i.e., Fourth Amendment custody). A suspect is in custody for Fifth Amendment purposes only when there is a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (***California* v. *Beheler*** (1983) 463 U.S. 1121, 1125 (per curiam), quoting ***Oregon* v. *Mathiason*** (1977) 429 U.S. 492, 495.)

If a person invokes his ***Fifth Amendment*** *right to counsel** right before or during custodial interrogation, neither law enforcement nor a prosecutor may initiate contact with the defendant and conduct a custodial (or possibly even a noncustodial) interview with the defendant about the offense for which he was arrested **or any other offense** - at least for a period of 14 days. And, if the person remains incarcerated solely on pending charges, contact *may* be barred until those charges are resolved or if the place of incarceration is considered a "custodial" setting for ***Miranda*** purposes. (**See *Maryland* v. *Shatzer*** (2010) 559 U.S. 98, 109-110.)

Editor's note:** In order to invoke the right to counsel, there must be a clear expression that the defendant was invoking that right. "Until and unless a suspect *affirmatively* invokes the ***Miranda right to counsel during interrogation, the less stringent rule [regarding re-contact after invocation of the right to silence] applies." (***People* v. *DeLeon*** (1994) 22 Cal.App.4th 1265, 1271.) And "a general ***Miranda*** invocation is not the specific expression of the exercise of the right to counsel under ***Miranda*** which is a prerequisite to bar all contact by all police for all potential offenses." (***People* v. *Lispier*** (1992) 4 Cal.App.4th 1317, 1322.)

1. Law Enforcement or Prosecutorial Contact with Persons Who Have Invoked Their *Fifth Amendment* Right to Counsel

In ***Edwards* v. *Arizona*** (1981) 451 U.S. 477, the High Court held an in-custody defendant who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (***Id.*** at pp. 484-485.) The rationale behind this rule is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." (***Maryland* v. *Shatzer*** (2010) 559 U.S. 98, 104-105 quoting ***Arizona* v. *Roberson*** (1988) 486 U.S. 675, 681.)

In ***Arizona* v. *Roberson*** (1988) 486 U.S. 675, the court held the ***Edwards*** rule applied *regardless* of whether "the officer who conducted the second interrogation did not know that [the suspect] had made a request for counsel" and *regardless* of whether the "contemplated reinterrogation concerns the same ***or a different offense***, or whether the same or different law enforcement authorities are involved in the second investigation . . ." (***Id***. at p. 687, emphasis added.) In other words, the ***Edwards*** rule "is not offense specific." (***McNeil* v. *Wisconsin*** (1991) 501 U.S. 171, 177.) "Once a suspect invokes the ***Miranda*** right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." (***McNeil*** at p. 177; **cf**., ***Texas* v. *Cobb*** (2001) 532 U.S. 162, 168, 172-173 [the right to counsel under the ***Sixth Amendment*** is offense-specific and cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.].)

In ***Minnick* v. *Mississippi*** (1990) 498 U.S. 146, the court held that the ***Edwards*** rule applied even if the suspect had a chance to consult with an attorney in the time between the first and second interview. (***Id***. at pp. 151-152.)

In ***Maryland* v. *Shatzer*** (2010) 559 U.S. 98, the Supreme Court held the ***Edwards*** rule does not apply when a defendant, who has invoked his right to counsel during custodial interrogation, is released from custody for a period of at least 14 days before the police conduct a second interrogation. (***Shatzer*** at pp. 109-110.) If police wait 14 days before re-contacting the suspect who has been released from custody, then the rationale for creating the ***Edwards*** rule no longer exists. This is because once a suspect has been released from his pretrial custody and has returned to his normal life: (i) the defendant is no longer isolated; (ii) has likely been able to seek advice from an attorney, family members, and friends; (iii) "knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt;" and (iv) knows "that investigative custody does not last indefinitely." (***Shatzer*** at pp. 107-108.) Simply put, the defendant who has been released from custody for 14 days is no more vulnerable to police pressure to give up his right to counsel during a second custodial interrogation than he was at the time of his first custodial interrogation; and just as *Miranda* warnings are sufficient to dispel such pressure at the time of an initial interview, they are sufficient to dispel such pressure at a second interview. No further "prophylactic measure" (i.e., the ***Edwards*** rule) is needed. (***Id***. at pp. 108, 115.) In contrast, releasing a defendant for a period less than 14 days does **not** permit re-contact and a *custodial* interview of a suspect. (***People* v. *Bridgeford*** (2015) 241 Cal.App.4th 887, 902.)

a. Does the *Shatzer* rule apply if less than 14 days has passed since the defendant was released from custody, but the defendant is not in custody during the second interview?

It is an open question whether re-interviewing a suspect who has been released from custody is permitted *before* 14 days has passed when the *second* interview is *non-custodial*.

*Argument for why **Shatzer** only governs secondary **custodial** interrogations*

If you go back and look at ***Edwards*** and the cases interpreting ***Edwards***, they all involved a second interview that involved custodial interrogation. This includes the second interview in ***Shatzer***. (**See *Shatzer*** at p. 112 ["No one questions that ***Shatzer*** was in custody for ***Miranda*** purposes during the interviews . . ."].) As made clear in ***Montejo* v. *Louisiana*** (2009) 556 U.S. 778, the "'***Miranda-Edwards*** regime' applies ***only*** in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply[.]" (***Montejo***, at p. 795, emphasis added.)

In ***People* v. *Elliott*** (Mich. 2013) 833 N.W.2d 284, a post-***Shatzer*** case, the court held that, regardless of whether a parole agent should be considered an agent of law enforcement, questioning by the parole agent of defendant *four* days after he invoked his right to counsel during a custodial interrogation did not violate the ***Edwards*** rule because the interview was not "custodial interrogation." And it did not matter that defendant remained incarcerated during those four days. (***Elliott*** at p. 287; accord ***United States* v. *Cook*** (10th Cir. 2010) 599 F.3d 1208, 1214-1215 [***Shatzer*** is only applicable when ***Edwards*** rule applies; and ***Edwards*** rule did not apply to interview of an in-custody defendant by undercover informants because such "questioning lacked the police domination inherent in custodial interrogation"].)

In the unreported case of ***People* v. *Johnson et al***. (unreported) 2017 WL 1179406, one of the defendants (Fuller) invoked his right to counsel during a custodial interrogation. Following a decision not to charge Fuller, the prosecution considered him a potential witness. Eight months later, at a subsequent court hearing to which Fuller was subpoenaed by the prosecutor, the prosecutor and investigating detective took Fuller aside and interviewed him in the prosecutor's office. Fuller was later charged and convicted along with his co-defendants. (***Id***. at pp. *10, *12.) On appeal, Fuller claimed this second interview violated the ***Edwards*** rule because of his earlier invocation of the right to counsel. However, citing to ***Shatzer*** and ***People* v. *Storm*** (2002) 28 Cal.4th 1007, 1024, the appellate court stated: "***Edwards*** is not violated here, however, because

there was a six-month break in custody." (***Id***. at p. *1.) Significantly, the appellate court then went on state: "***More to the point, Mr. Fuller was not in custody*** on [the date of the second interview[.]" (***Id***. at p. *12, emphasis added; **see also *People* v. *Storm*** (2002) 28 Cal.4th 1007, 1027 (overruled by ***Shatzer*** on a different point) [recognizing that "***Miranda*** and ***Edwards*** apply only to custodial interrogation" but nonetheless resolving question of whether re-contact and *noncustodial* interview after invocation violated ***Edwards*** rule by focusing on the fact officers gave defendant a two-day break in custody]; ***People* v. *Guilmette*** (1991) 1 Cal.App.4th 1534, 1541 ["***Edwards***, therefore, does not prohibit all questioning by police but rather questioning that constitutes under *Miranda* 'custodial interrogation'"].)

Moreover, the ***Shatzer*** court made it clear that the central question before the court was "whether a break in custody ends the presumption of involuntariness established in ***Edwards***[?]" (***Shatzer*** at p. 100.) It is important to understand this "presumption of involuntariness" does not refer to the presumption that the suspect's statement is involuntary, but to the presumption that the suspect's ***waiver*** is involuntary. (***Shatzer*** at p. 111, fn. 7 ["***Edwards*** establishes a presumption that a suspect's waiver of *Miranda* rights is involuntary"].) This "presumption of involuntariness is justified ***only*** in circumstances where the coercive pressures have increased so much that suspects' waivers of *Miranda* rights are likely to be involuntary most of the time." (***Shatzer***, at p. 116, emphasis added; **see also *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 795 ["When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering"].) But if a defendant is not "in custody," then *there is no need for a waiver of rights*. Ergo, when the reason for the rule does not exist, neither should the rule.

In addition, there is language in ***Shatzer*** indicating is holding is premised on the assumption that the second interview involves custodial interrogation. (**See e.g.**, ***Shatzer*** at p. 110 ["The 14–day limitation meets ***Shatzer***'s concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his ***Miranda*** right to counsel, the police will release the suspect briefly (to end the ***Edwards*** presumption) and then promptly *bring him back into custody* for reinterrogation."]; ***Shatzer*** at p. 116 [recognizing that the "inherently compelling pressures" of custodial interrogation do not "disappear when *custody is recommenced* after a break"]; ***Shatzer*** at p. 111 ["In every case involving ***Edwards***, the courts must determine whether the suspect was in custody when he requested counsel *and when he later made the statements* he seeks to suppress."] emphasis added by IPG.)

Finally, consider the results of assuming that ***Shatzer*** does require a waiting period of 14 days before *any* police interrogation may occur following an invocation of the right to counsel by a suspect during a custodial interrogation. Since the ***Edwards*** rule prohibits interviewing such a suspect about any crime and applies to all of law enforcement, then a suspect who is released from custody is free to commit any crime he wants for the next 14-days without any member of law enforcement being able to contact the defendant and interview him about that new crime. This is illogical.

Since (i) the 14-day rule of ***Shatzer*** is premised on the applicability of the ***Edwards*** rule to the second interview; (ii) the rationale for the ***Edwards*** rule only comes into play when assessing the voluntariness of a waiver of the right to counsel and there is no need for a waiver of that right when a suspect is not being subjected to a custodial interview (**see *Shatzer,*** at pp. 112-113; ***Berkemer* v. *McCarty*** (1984) 468 U.S. 420, 439-440); and (iii) a noncustodial interview is necessarily less coercive than a custodial interview, it makes no sense to apply the 14-day rule of ***Shatzer*** when the second interview does not constitute a *custodial* interrogation.

Indeed, at oral argument even Shatzer's attorney agreed the ***Edwards*** rule only applies where **both** the first and the second interrogation involve custodial interrogation. (Official Transcript of Oral Argument, *Maryland v. Shatzer*, p. 49.) And nothing the justices said or asked during oral argument indicated that this understanding was incorrect. (**See also** O'Neill, Cal. Confessions Law § 10:4 [***Shatzer*** only decided the rule governing the waiting period when it comes to *custodial* reinterviews].)

*Argument for why **Shatzer** governs all secondary interrogations, **including noncustodial** interrogations, that occur before the 14-day period has passed*

First, the ***Shatzer*** court indicated the reason for the 14-day break is to dispel any *lingering* coercive effect of the initial interrogation. (**See *Shatzer*** at p. 105 [underlying assumption of ***Edwards*** rule is that "subsequent requests for interrogation pose a significantly greater risk of coercion" and that increased risk results in part from "the police's persistence in trying to get the suspect to talk"]; at p. 108 [noting the "only logical endpoint of ***Edwards*** disability is termination of ***Miranda*** custody and *any of its lingering effects*"]; at p. 109 [noting ***Miranda*** warnings adequately ensure that police respect suspect's request for counsel "after a break in custody that is of sufficient duration to *dissipate its coercive effects*"]; at p. 110 [14 days provides time, among other things, "to *shake off any residual coercive effects* of his prior custody"]; at p. 116 [noting "a break in custody reduces the inherently compelling pressure upon which

Edwards was based" and indicating 14-day rule was adopted to terminate "***Edwards*** protection when the *custodial pressures that were the basis for that protection dissipate"*], emphasis added by IPG.) What the Court appeared to be doing is essentially setting up a conclusive presumption that a fortnight is of "sufficient duration to dissipate" the coercive effects of the initial interview, and anything less is presumptively insufficient. From this perspective, even if the second interview is non-custodial, any police request to speak with the defendant (about the previous crime or any other crime) constitutes a violation of the ***Edwards*** rule. The 14-day rule was created specifically to avoid disputes over how much time is needed to dispel the coercive effects. (***Shatzer*** at pp. 111-112.)

Second, if the ***Edwards*** rule does not apply so long as the re-contact does not involve custodial interrogation, then an officer could bring the defendant outside the police station, tell him he is free to leave, and immediately begin trying to convince the defendant to waive his right to counsel. If the ***Edwards*** rule does not apply in that circumstance, then termination of ***Miranda*** custody would be the endpoint of the rule; but the ***Shatzer*** court stated the "only logical endpoint of ***Edwards*** disability is termination of ***Miranda*** custody ***and*** any of its lingering effects." (***Shatzer***, at p. 108.)

Editor's note:** This argument is somewhat of a straw man because even before ***Shatzer issued, courts allowing re-contact after a defendant was released from custody following an invocation of the right to counsel did not permit re-contact where the break in custody was contrived or pretextual. (**See e.g., *People v. Storm*** (2002) 28 Cal.4th 1007, 1024–1025 ["We conclude only that ***Edwards*** is not violated when the police recontact a suspect after a break in custody which gives the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel if he or she wishes to do so. We do not suggest the police can avoid ***Edwards*** simply by allowing the suspect to step outside the station house at midnight on a Saturday, then promptly rearresting him without affording any realistic opportunity to seek counsel's assistance free of the coercive atmosphere of custody."]; ***People* v. *Scaffidi*** (1992) 11 Cal. App. 4th 145, 152 [finding ***Edwards*** rule did not apply, inter alia, where "there is no indication in the record that the break in custody was contrived or pretextual."].)

Third, if the High Court had assumed the ***Edwards*** rule did not apply to prevent a second non-custodial interrogation, why did they not say so in the opinion? The ***Shatzer*** court simply said the 14-day break in custody ends the application of the ***Edwards*** rule, nothing more or less.

Fourth, while it may be true that it is somewhat irrational to interpret ***Shatzer*** as creating a 14-day bubble preventing the police from questioning a defendant no matter what crime he commits after invocation regardless of whether the second interview is custodial, it is no less irrational to

create such a bubble when the second interview *is* custodial. Yet, it is indisputable that the ***Shatzer*** rule applies in the second circumstance.

(i) Assuming the *Shatzer* rule does not apply if the defendant is not "in custody" during the second interrogation, is a defendant who is incarcerated automatically deemed to be "in custody" for purposes of the *Miranda* and *Edwards* rule?

In ***Howes* v. *Fields*** (2012) 565 U.S. 499, the High Court addressed the question whether a prisoner, taken out of the general prison population for questioning, was in ***Miranda*** custody while being questioned. (***Id***. at 517.) Based in part on ***Shatzer***, the Court held a "prisoner is [not] always in custody for purposes of ***Miranda*** whenever [he] is isolated from the general prison population and questioned about conduct outside the prison . . ." (***Fields*** at p. 508.) Whether a prisoner is in custody for ***Miranda*** purposes is determined by the totality of the circumstances, including the "language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." (***Fields*** at p. 514.) Among the circumstances considered in ***Howe*** in finding no custody: (i) defendant "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted" (ii) defendant was not physically restrained or threatened; (iii) he was interviewed in a well-lit, average-sized conference room, where he was "not uncomfortable;" (iv) defendant was offered food and water; and (v) the door to the conference room was sometimes left open. (***Id***. at p. 515.)

The ***Fields*** court observed there were circumstances that weighed in favor of finding such custody: (i) defendant did not invite the interview or consent to it in advance; (ii) he was not advised that he was free to decline to speak with the deputies; (iii) the interview lasted for between five and seven hours in the evening and continued well past defendant's bedtime; (iv) the deputies who questioned defendant were armed; and (v) the deputies used a very sharp tone and one used profanity. (***Id***. at p. 515.) However, the presence of these circumstances was insufficient to create a custodial situation. (**Ibid**.)

Editor's note:** The ***Fields court discounted the fact that defendant was not free to leave the conference room by himself and had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell when the interview ended because "he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than police questioning; under no circumstances could he have reasonably expected to be able to roam free." (***Id*** at p. 515.) The court also discounted the claim defendant was coerced because he was told that if he did not want to cooperate he needed to go back to his cell since "[r]eturning to his cell would merely have returned him to his usual environment." (***Id***. at p. 516.)

b. Does the *Shatzer* rule *allowing for re-contact after 14 days* apply if the defendant remains incarcerated during that period?

The short answer to whether the ***Shatzer*** rule will be violated by re-contact when recontact is made after 14 days has passed when the defendant *remains incarcerated* during the period between interrogations is: It depends. It depends on: (i) why the person remains incarcerated; (ii) where the person remains incarcerated; (iii) whether defendant was subject to greater restrictions on his or her freedom while incarcerated as a result of the second interview; and (iv) whether the person is in "custody" for purposes of the ***Edwards*** and ***Miranda*** rule at the time of the second interview. These factors have come to the fore because of the reasons cited by the court in ***Shatzer*** for coming to its conclusion.

In ***Shatzer***, the defendant was serving time in a correctional institution for child sexual abuse. While he was serving his time, allegations surfaced that he had also sexually abused his own three-year old son. A detective assigned to investigate these allegations went to the correctional institution where defendant was housed. The detective had the defendant removed from the general prison population. The detective then made contact with the defendant and, after receiving a waiver of defendant's ***Miranda*** rights, began interviewing the defendant. After the detective explained the purpose of his visit, the defendant declined to speak without an attorney. The detective ended the interview and the defendant was released back into the general population of the prison. (***Id***. at pp. 100-101.) Two years and six months later, the same police department that had assigned the detective to investigate the incident between the defendant and his three-year old son received additional and more specific allegations regarding the incident. The department assigned a different detective to do further investigation. This second detective went out to interview the defendant, who was still imprisoned but was now in a different correctional institution. The defendant was again removed from the general prison population and placed in a maintenance room outfitted with a desk and three chairs. The detective then obtained a waiver from the defendant of his ***Miranda*** rights. Defendant made some partially incriminating statements during this interview before agreeing to take a polygraph test. The polygraph examination occurred five days later. The defendant again waived his ***Miranda*** rights before the examination was administered and made additional admissions after taking the polygraph. (***Id***. at pp. 101-102.)

The ***Shatzer*** court held that once a defendant who is interviewed by law enforcement *on a new crime* is released *back into the general prison population* to *serve a sentence for an unrelated crime*, this constitutes a break in custody for purposes of the ***Edwards*** rule. (***Id***. at pp. 113-115.)

And thus, even though the defendant was not physically released from incarceration in between the time he initially invoked and the time he was re-contacted, he was not treated as if he had been kept in "custody" for purposes of either the ***Miranda*** or the ***Edwards*** rule. Rather, he was treated as if he had been "released" from such "custody." (***Id***. at pp. 113-115.) The Court stated that "[b]ecause [the defendant] experienced a break in ***Miranda*** custody lasting more than two weeks between the first and second attempts at interrogation, ***Edwards*** does not mandate suppression of his [secondary] statements. (***Id***. at p. 117.) The court came to this conclusion based on three assumptions.

First, the Court believed "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in ***Miranda***." (***Id***. at p. 113.) The ***Shatzer*** court observed that a convicted prisoner lives in the general prison population "among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone." (***Id***. at p. 113.) Such a prisoner is not isolated with his accusers in the same way that a suspect who has just been arrested is isolated. (***Ibid***.)

Second, the ***Shatzer*** court assumed that the pressures on a defendant are different depending on whether the defendant was incarcerated solely due to an arrest on the crimes for which the defendant was being interrogated or whether the defendant was incarcerated for some other reason, e.g., because the defendant is serving time on an unrelated crime. The Court noted that in its previous cases finding re-contact improper (i.e., ***Edwards* v. *Arizona*** (1981) 451 U.S. 477 [less than a day between interrogations, second interrogation by different officers about same crime], ***Arizona* v. *Roberson*** (1988) 486 U.S. 675 [three days between interrogations, second interrogation by different officer about different crime], and ***Minnick* v. *Mississippi*** (1990) 498 U.S. 146 [three days between interrogation, second interrogation by different officer about same crime committed after escape from custody]),* the defendants were incarcerated solely based on an arrest for the unadjudicated crimes that were focus of the interrogation at the time of the second interrogation.

> ***Editor's note:** Since ***Minnick*** pre-dated the analysis ***Shatzer***, no significance was given in ***Minnick*** to the fact that defendant might have also been held in custody to serve out his earlier sentence. However, technically, since defendant in ***Minnick*** escaped from custody, he presumably might have had to be kept in custody for reasons unrelated to the crimes about which he was being interrogated.

In contrast to the defendants in ***Edwards***, ***Roberson***, and ***Minnick***, "whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would

receive" (***Shatzer*** at p. 114), defendants already convicted and incarcerated for some other crime are going to remain incarcerated regardless of what their interrogators say or do. "Their detention . . . is relatively disconnected from their prior unwillingness to cooperate in an investigation" and [their] interrogator has no power to increase the duration of incarceration, which was determined at sentencing." (***Id***. at p. 113.) "And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served." (***Id***. at pp. 113–114.) Thus, the "inherently compelling pressures" of custodial interrogation end when such defendants are returned to their normal life in the general prison population. (***Id***. at p. 114.)

Third, the ***Shatzer*** court assumed (because there was no contrary allegation), the defendant was not "placed in a higher level of security or faced any continuing restraints as a result of the [second] interrogation." (***Id***. at p. 114.) This assumption at least suggests that if a convicted defendant were to be placed in "a higher level of security or faced any continuing restraints" in the custodial facility where he was being housed as a result of an interview in which he invoked his right to counsel, the time in that higher level of security or in continuing restraints would not count as a "break" in custody for purposes of the ***Edwards*** rule. (**Ibid**.)

Shatzer did **not** involve any of the following circumstances: (i) a defendant who was subject to a noncustodial interview; (ii) a defendant who was *only* incarcerated because of the arrest on the crime for which he or she was interrogated; (iii) a defendant who was in custody pending trial in one case but who would nevertheless be in custody for some other reason; or (iv) a defendant who was subject to heightened restraint *after* the re-interrogation. Thus, lower courts have been forced to consider whether the rule of ***Shatzer*** applies when one or more of these circumstances ***are*** present.

(i) Does the *Shatzer* rule allowing for re-contact after 14 days apply if the defendant is incarcerated for some other reason than because he/she is facing *pending* charges that were the subject of the interrogation?

There is a split in the case law as to how dispositive it is that a defendant is incarcerated solely on pending charges, i.e., pre-trial incarceration. Some cases find there is not a significant difference between pretrial incarceration and posttrial incarceration, particularly when the defendant is being kept in custody for some other reason than solely the crime which is the subject matter of the conversation. Other cases find if the defendant is being held in custody pre-conviction, the ***Shatzer*** rule allowing re-contact after 14 days is inapplicable.

Here are some cases indicating the fact the defendant was incarcerated based, in part, on pending charges does <u>not</u> automatically render the Shatzer rule allowing recontact after 14 days inapplicable:

In ***Commonwealth* v. *Champney*** (Pa. Super. Ct. 2017) 161 A.3d 265, a defendant later convicted of murder was in a county prison on unrelated arson charges when he invoked his right to counsel during an interview with an investigator who tried to question him about the murder. The defendant remained incarcerated in county prison while awaiting trial on a host of separate charges. He later gave statements to the same investigator and a detective with the District Attorney's office in a prison conference room *five months* later. That conversation touched upon both the arson and the murder. Another conversation occurred between the investigator and the defendant seven months after that when defendant was arrested on the murder charge. (***Id***. at pp. 268-270, 281.) The ***Champney*** court recognized that "the question whether an unsentenced county prisoner may experience a ***Shatzer*** break in custody is an open one." (***Id***. at p. 282.) Nevertheless, it found "no material difference for purposes of the break-in-custody analysis between the incarceration described in [***Shatzer*** and ***Fields*** - **see** this IPG, section I-B-1-a-i at p. 14] and that experienced by [the defendant]." (***Id***. at p. 283.) The ***Champney*** court identified several factors that supported its finding the defendant was properly contacted. First, defendant had been in county prison for nearly 6 months. He was not "abruptly transported from the street into a police-dominated atmosphere" and subject to the coercive pressures inherent in "interrogative custody." (***Id***. at p. 283.) Rather, he had ample opportunity to adjust to "the ordinary restrictions of prison life, [which] are expected and familiar." (**Ibid**.) Second, the defendant was not detained on the murder charge, but on separate offenses for which he had been held for failure to post bond or in lieu of bail. The interviewing officer did not have the ability (nor could defendant believe he had the ability) to free the defendant from incarceration on unrelated charges if he were to talk about the homicide. (***Id***. at pp. 283-284.) Third, each time the defendant ended a conversation with the interviewing officer, he was returned to the general prison population; "nothing in the record suggest[ed] that police possessed the ability to reward [the defendant] for cooperating in the [murder] investigation or punish him for exercising his rights. Fourth, the nearly five-month break between the defendant's invocation of his right to counsel and the county prison interrogation clearly exceeded ***Shatzer***'s 14-day time bar and removed the presumption of involuntariness. (***Id***. at p. 284.)

In ***Smith* v. *Commonwealth*** (Ky. 2017) 520 S.W.3d 340, the defendant committed three robberies. He was arrested on one of them and while in jail, a detective sought to interview the defendant on a different robbery. The defendant invoked his right to counsel. Almost a month later,

the detective returned to the jail, at a prosecutor's request, to again try to speak to the defendant about the other robbery. Defendant gave a statement. The defendant claimed the second contact violated the ***Edwards*** rule, but the appellate court disagreed. (***Id***. at pp. 347-348.) The ***Smith*** court held "at least where the custodial interrogation is unrelated to the reason the suspect is incarcerated, an inmate-suspect's post-invocation return to the jail's general population is conceptually indistinguishable from an unjailed suspect's invoking, being released from custody, and going home." (***Id***. at p. 348.) Since the defendant "was returned to the jail's general population after he invoked . . ., he was no longer in custody under ***Miranda***" and "[b]ecause more than 14 noncustodial days passed before [the detective] returned . . ., that earlier invocation did not bar the detective from reinitiating questioning after he rewarned [the defendant] of his rights . . ." (***Smith*** at p. 348.)

In ***United States* v. *McWhorter*** (6th Cir. 2013 unreported) 515 Fed.Appx. 511, the defendant invoked his right to counsel while in custody. When he was re-contacted four months later, defendant was still in a correctional facility serving time on a parole violation and was facing pending charges. The ***McWhorter*** court held the defendant had not been in "***Miranda*** custody" for over three months; and since more than 14 days had passed, the re-contact was permissible. (***Id***. at pp. 519-520.)

Some cases indicating the fact defendant was incarcerated based on pending charges automatically renders the Shatzer rule allowing recontact after 14 days inapplicable:

In ***United States* v. *Coles*** (M.D. Pa. 2017) 264 F.Supp.3d 667, the defendant was a suspect in a drug-related triple homicide in Pennsylvania. Pennsylvania police coordinated with members of law enforcement in Maryland to have defendant arrested on an extraditable warrant for his arrest out of New York. One of the Pennsylvania officers went to speak with defendant about the homicide while defendant was in custody in Maryland on the warrant. Defendant invoked his right to counsel. A month later, the same officer returned to Maryland and interviewed defendant, who made admissions. (***Id***. at pp. 671-673.) The defendant remained in pretrial confinement "on the drug charge with the NY warrant lodged as a detainer" between the first and second interview. (***Id***. at p. 681.) The ***Coles*** court stated that while "[t]he ***Shatzer*** Court did not expressly conclude that return to general population breaks ***Miranda*** custody only for sentenced prisoners . . . the Court explicitly based its holding on the distinction between post-conviction incarceration and pretrial detention." (***Id***. at p. 683.) Noting (probably incorrectly - see pp. 18-19 in this IPG) that "[n]early every court to address this question in ***Shatzer***'s wake has concluded that a pretrial detainee is subject to the rule

of ***Edwards*** and not the exception of ***Shatzer***," and pointing out that the second interrogation concerned the same subject matter and involved the same trooper as the first interview, the ***Coles*** court held that the break of 35 days between interrogations while defendant remained in pretrial detention did not permit recontact after invocation. (***Id***. at pp. 683-684.)

In ***Trotter* v. *United States*** (D.C. 2015) 121 A.3d 40, the defendant was arrested on a robbery and murder. The defendant invoked his right to counsel. Five months later, while the defendant was still in pretrial detention (housed in the general population units of the local jail and correctional treatment facility), he was arrested on a warrant for a different robbery and questioned by one of the same detectives who tried to interview him earlier (and a different detective as well) about the other robbery. During the interview, the defendant brought up the earlier murder and the detectives pursued the subject with him. (***Id***. at p. 47.) The ***Trotter*** court held there was a violation of the ***Edwards*** rule and it did not make a difference that 5 months passed between interviews because the defendant "remained incarcerated *pending trial* on the charges against him without a break for the entire five months" and because, "[u]nlike the suspect in ***Schatzer***, [the defendant] was not serving a sentence of imprisonment when he terminated the initial interrogation by asserting his right to counsel." (***Id***. at p. 48.) The ***Trotter*** court observed defendant was not returned to his "accustomed surroundings and daily routine," and his continued detention was not "relatively disconnected" from the questioning he had undergone. (***Id***. at p. 49.) Under these circumstances, the ***Trotter*** court believed the defendant's lengthy pretrial detention continued to "exert[ ] the coercive pressure that ***Miranda*** was designed to guard against." (***Id***. at p. 49.)

In ***United States* v. *Hollister*** (D. Minn.) [unreported] 2012 WL 4076170, using similar logic to that employed in ***Trotter***, the ***Hollister*** court rejected a claim that the ***Shatzer*** exception to ***Edwards*** rule applied where the interviews occurred two weeks apart, but defendant remained in ***pre-trial*** custody in county jail. It did not make a different that the defendant was "returned to the general population at the Hennepin County Jail" as the ***Hollister*** court did not view this incarceration as a release from custody. (***Id***. at pp. *4-*7; **see also *United States* v. *McIntosh*** (unreported) 2014 WL 7642345, at *6 [***Shatzer*** rule allowing for recontact did not apply where defendant remained in pretrial incarceration during 27 days between custodial interrogations].)

2. Law Enforcement or Prosecutorial Contact with Persons Who Have Invoked Their *Fifth Amendment* Right to Silence

If a suspect has ***not*** invoked his right to counsel during custodial interrogation, *but only his right to silence* then neither law enforcement officers nor prosecutors are barred from re-contacting the suspect (even one who remains in custody) so long as the defendant's invocation of his right to silence was "scrupulously honored" and other factors weigh in favor of allowing re-contact. (***Michigan* v. *Moseley*** (1975) 423 U.S. 96, 102-105; **accord *People* v. *Warner*** (1988) 203 Cal.App.3d 1122, 1130-1131.) Although before defendant may be interrogated after re-contact, law enforcement must obtain a valid waiver of the ***Miranda*** rights. (***Michigan* v. *Moseley*** (1975) 423 U.S. 96, 106.)

*__Editor's note:__ In deciding whether re-contact is permissible after a suspect has invoked *only his right to silence*, courts will look at several factors: (i) whether the police immediately ceased the interrogation (i.e., did the police continue interrogating the suspect or engage in repeated efforts to wear down his resistance and make him change his mind); (ii) how much time has passed between the invocation and the re-contact; (iii) whether the suspect was given a fresh set of warnings; and (iv) whether the second interrogation related to a crime that had not been a subject of the earlier interrogation. (**See *Michigan* v. *Moseley*** (1975) 423 U.S. 96, 102-105; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 950; ***People* v. *Riva*** (2003) 112 Cal.App.4th 981, 994; ***People* v. *DeLeon*** (1994) 22 Cal.App.4th 1265, 1271-1272; ***People* v. *Warner*** (1988) 203 Cal.App.3d 1122, 1130-1131; ***United States* v. *Hsu*** (9th Cir. 1988) 852 F.2d 407, 409-411.)

II. Ethical Limitations on Contacts Between Represented Persons and Prosecutors (or Their Agents)

A. The Language of the New "No-Contact" Rule: California Rule of Professional Conduct 4.2

Rule 4.2 Communication With a Represented Person (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 an 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).

*"'Person' has the meaning stated in Evidence Code section 175." (CRPC Rule 1.0.1 (g-1).)

Evidence Code section 175 defines "Person" as including "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."

*"'Knowingly,' 'known,' or 'knows' means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." (CRPC Rule 1.0.1 (g).)

"'Partner' means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." (CRPC Rule 1.0.1 (g).)

*"Firm" or "law firm" means . . . lawyers employed in . . . the legal department, division, or office of . . . a government organization . . ." (CRPC Rule 1.0.1 (c).)

1. The Predecessor Statutes to Rule 4.2

Cases interpreting the predecessor statutes can be binding or at least persuasive authority – albeit only to the extent the predecessor statutes use language identical or similar to Rule 4.2. Accordingly, we have included the language of these predecessor statutes below for easy reference.

a. CRPC Rule 2-100

CPRC Rule 2-100, which governs prosecutorial conduct until November 1, 2018, provides:

(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.

b. CRPC Rule 7-103

Rule 7–103 provided: "A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall apply to communications with a public officer, board, committee, or body."

c. CRPC Rule 12

Rule 12 of the Rules of Professional Conduct read in, in relevant, part: "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." (***Continental Ins. Co.* v. *Superior Court*** (1995) 32 Cal.App.4th 94, 112.)

B. The Purpose Behind Rule 4.2 and How the Rule is Interpreted

Some version of the no-contact rule embodied in Rule 4.2 is in force in all 50 states. (***In re Dale*** (Cal. Bar Ct., May 6, 2005) 2005 WL 138922, *5, fn. 6.) The purpose behind Rule 4.2 and its predecessor "no-contact" rules (rule 2-100, rule 7-103, and rule 12) is the following:

"[The no-contact rule] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice.... It 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 [or her] proper role and to prevent the opposing attorney from impeding his [or her] 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." (***San Francisco Unified School District ex. rel. Contreras* v. *First Student, Inc.*** (2013) 213 Cal.App.4th 1212, 1230 citing to ***Mitton* v. *State Bar*** (1969) 71 Cal.2d 525, 534 [interpreting former Rule 12]; **see also *United States* v. *Talao*** (9th Cir. 2000) 222 F.3d 1133, 1138 [the objective of

rule 2-100 "is to establish ethical standards that foster the internal integrity of and public confidence in the judicial system" citing to ***Jeffry* v. *Pounds*** (1977) 67 Cal.App.3d 6 and ***Millsberg* v. *State Bar*** (1971) 6 Cal.3d 65].)

Notwithstanding the need for, and purpose behind, the various versions of the no contact rule, the rule "must be interpreted narrowly because 'a rule whose violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer's duty of zealous representation.' [Citation.]" (***Snider* v. *Superior Court*** (2003) 113 Cal.App.4th 1187, 1197–1198; **see also *Truitt* v. *Superior Court (Atchison, Topeka & Santa Fe Ry. Co.)*** (1997) 59 Cal.App.4th 1183, 1188 ["Rule 2-100 should be given a reasonable, commonsense interpretation, and should not be given a 'broad or liberal interpretation' which would stretch the rule so as to cover situations which were not contemplated by the rule."]; ***Jorgensen* v. *Taco Bell Corp.*** (1996) 50 Cal.App.4th 1398, 1401 [same].)

C. Does CPRC Rule 4.2 Prohibit Prosecutorial Communication with a Represented Person Who Has Been Charged With a Crime About the Charged Crime?

On its face, Rule 4.2 states: "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." (CRPC Rule 4.2(a), emphasis added by IPG.)

Paragraph [1] of the Comment to Rule 4.2, in part, also provides: "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."

Thus, unless subdivision (c) of Rule 4.2 permits such contact (**see** this IPG, section II-G-2, p. 31), a prosecutor or the prosecutor's intermediary is barred from communicating with a criminal defendant about the crime with which the defendant is charged. (**See** Cal. Confessions Law [Prosecutor's Ethical Rules] § 2:19 ["Where there is a pending prosecution, direct communication between a prosecutor and a represented defendant about the pending case without counsel's permission is forbidden."].)

Cases interpreting Rule 2-100 made it clear that a prosecutor has a duty not to communicate with a charged defendant known to be represented by counsel about the subject matter of the representation

regardless of whether the defendant is in or out of custody. (***United States* v. *Powe*** (9th Cir. 1993) 9 F.3d 68, 69; ***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1460; ***People* v. *Moore*** (1976) 57 Cal.App.3d 437, 441.)

D. Does Rule 4.2 Prohibit Contact Between Non-Lawyers Who Work for the District Attorney or Members of Law Enforcement and Represented Persons?

Paragraph (a) of Rule 4.2, in pertinent part, provides "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 . . ." (Emphasis added by IPG.)

Paragraph 3 of the Comment to CPRC 4.2, in pertinent part, states: "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." (Emphasis added by IPG.)

In this regard, Rule 4.2 does not appear to be a substantive change from Rule 2-100, which also prohibited ***indirect*** communications with a represented "party." (**See** CPRC 2-100(a).)

Rule 2-100 has been interpreted as applying to law enforcement members acting as alter egos of a prosecutor. However, it does not bar contact between charged represented defendants and law enforcement members (at least those not employed by the prosecutor's office) who are acting *independently of* counsel. (75 Ops. Cal. Atty. Gen. 223, 225, fn. 3; **see also *People* v. *Dickson*** (1985) 167 Cal.App.3d 1047, 1057; ***United States* v. *Jamil*** (2nd Cir. 1983) 707 F.2d 638, 645 [state laws governing attorneys may be found to apply in criminal cases, to government attorneys *and* to government law enforcement officers when they act as the alter ego of government prosecutors].) Investigators with a district attorney's office fall squarely into the category of an intermediary such as an agent or investigator for purposes of Rule 4.2(a). But whether members of *other* law enforcement agencies qualify as intermediaries will turn on how much direction they receive from prosecutors.

1. By Giving Advice to Police Officers Before They Interview a Represented Person, Can Prosecutors Convert the Officers into Agents or Alter Egos of the Prosecutor?

The greater the involvement of a prosecutor in directing an officer's interview with a represented person, the greater the likelihood the officer will be viewed as an agent. This holds true regardless of

whether the person is charged with a crime. However, just because police seek the advice of a prosecutor before conducting a jailhouse interview this does not mean the police are acting as agents of the prosecution. (**See *State* v. *Piorkowski*** (Conn. 1997) 700 A.2d 1146, 1153 [prosecutors did not violate ethics rule 4.2 where defendant initiated contact with police and prosecutor did not attempt either to contact the defendant or supervise the police in their communication with the defendant but simply answered questions concerning the legality of responding to the defendant's request to talk to the police]; **see also *People* v. *White*** (Ill. 1991) 567 N.E.2d 1368, 1387 [mere fact prosecutor has knowledge of police operation does not make police agent of the prosecution]; *compare* ***United States* v. *Koerber*** (D. Utah 2013) 966 F.Supp.2d 1207, 1227 [government agents were working as alter egos of prosecutors where prosecutors authorized interview and provided agents with at least half a dozen questions they should pose to the defendant, at least two of which dealt with the attorney-client privilege]; ***State* v. *Clark*** (Minn. 2007) 738 N.W.2d 316, 327 ["police contact with a suspect may be attributed to a prosecutor when the prosecutor orders or ratifies the police contact . . ."].)

Prosecutors who are confident that communication with an uncharged but represented person under the existing circumstances falls under the "otherwise authorized law" exception to the general prohibition of Rule 4.2(a) prosecutors (**see** this IPG memo, section II-G-2 at pp. 31-39) should not feel constrained in advising officers conducting an investigation into the person. However, where it is unclear whether a communication between the person and the prosecutor is authorized, prosecutors should not affirmatively seek out and ask police officers to conduct an interview with a represented and charged suspect even if an interview *by officers* would not violate the Sixth or Fifth Amendment.

If prosecutors are asked by police merely whether it would violate the law to contact a person (even a person who has been charged with a crime and has been appointed counsel), it should be permissible to inform the officers whether such contact *by the officers* is or is not prohibited. (**See *Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 789-790 [officers properly communicated with a charged and represented defendant after defendant waived right to counsel].) However, to be on the safe side, prosecutors should also inform the officer that any decision to contact the represented person is **solely** the decision of the officer and that a rule of professional conduct forbids attorneys from even *indirectly* contacting charged represented persons through an intermediary about the subject matter of the representation. Moreover, while prosecutors can answer an officer's legal questions regarding whether it is lawful for *the officer* to contact a charged and represented person, prosecutors should refrain from telling the officer what questions to ask or even advise the officer to go ahead and interview a charged represented person about the subject matter of the representation.*

***Editor's note:** CRPC Rule 8.4 states "it is professional misconduct for a lawyer to (a) violate these rules or the State Bar Act, knowingly *assist, solicit, or induce another to do so, or do so through the acts of another . . .*"

E. Does CPRC Rule 4.2 Prevent Contacts Between Prosecutors and *Unrepresented* Persons?

By its own terms, Rule 4.2 only prohibits lawyers from communicating "with a person the lawyer knows ***to be represented by another lawyer*** in the matter . . ." (CPRC, Rule 4.2(a), emphasis added by IPG.) Thus, CPRC 4.2 cannot prevent prosecutors from speaking with persons who are not represented by an attorney. This should hold true regardless of whether the person has been charged with a crime so long as the person has not yet obtained representation.

No case has held that there is any *ethical* bar to a prosecutor conducting an investigatory interview with either an out-of-custody or an in-custody suspect who has not been charged with a crime and who is not represented by counsel.

There may be a *constitutional* bar to a prosecutor initiating an investigatory interview with a person in custody if the defendant has previously invoked his Fifth Amendment right to counsel. (**See** this IPG, section I-B at pp. 7-20.) Moreover, even if the in-custody defendant has not invoked his right to counsel during a previous custodial interrogation, a prosecutor seeking re-contact with such a defendant must advise the defendant of his *Miranda* rights and obtain a waiver of these rights from the defendant. In addition, the *Sixth Amendment* would prevent prosecutorial contact with a person who has been *charged with a crime* but is not yet represented *if* there has not been a waiver of that right. (**See** this IPG, section I-A at pp. 7.) Finally, CRPC Rule 4.3 provides certain *limitations* on what can occur during that interview. (**See** this IPG, section III at pp. 55-64.)

As to whether prosecutors may contact persons represented on one crime about a different crime the person may have witnessed, **see** this IPG, section II-J at p. 42-45.

F. Does CPRC Rule 4.2 Prevent Contacts Between Prosecutors (or Their Agents) and *Represented* Persons When the Prosecutor or Agent is *Not Aware* the Person is Represented?

Rule 4.2(a) provides: "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the attorney ***knows to be represented*** by another lawyer in the matter, unless the member has the consent of the other lawyer. (Emphasis

added by IPG.) This language limiting application of the rule to contacts with persons the attorney "knows to be represented" was also found in Rule 2-100. (**See** Rule 2-100(a).)

There are no California published cases holding that a prosecutor in a criminal case is barred by any ethical rule in conducting an investigatory interview with a represented defendant *where the prosecutor is unaware the defendant is represented*. However, that aspect of the rule has repeatedly been interpreted in civil cases. Those cases make it "clear that rule 2-100 is only a bar to ex parte contact if the lawyer seeking contact actually knows of the representation." (***Koo* v. *Rubio's Restaurants, Inc.*** (2003) 109 Cal.App.4th 719, 732. And it does not make a difference that the attorney "should have known." (**See *Truitt* v. *Superior Court (Atchison, Topeka & Santa Fe Ry. Co.)*** (1997) 59 Cal.App.4th 1183, 1188 [rule "does not apply where the attorney does not actually 'know' but merely 'should have known' that the opposing party was represented"]; ***Jorgensen* v. *Taco Bell Corp***. (1996) 50 Cal.App.4th 1398, 1401 [same].)

Moreover, there are out-of-state cases interpreting comparable ethical rules to California's version of the no contact rule holding that knowledge of the representation by a prosecutor is required for the rule to apply - at least in situations where the contact was a pre-indictment, non-custodial, overt contact between an agent of the prosecution and the person stated he or she was not represented, and/or the contact is one otherwise authorized by law. (**See *United States* v. *Joseph Binder Schweizer Emblem Co.*** (E.D.N.C. 2001) 167 F.Supp.2d 862, 865; ***United States* v. *Gray*** (D. Vt. 1993) 825 F.Supp. 63, 64; **see also *In re Disciplinary Proceedings Regarding Doe*** (M.D.Fla.1993) 876 F.Supp. 265, 267-268 [rule barring communications with corporate employees applies "when it is *known* that the corporate employee involved is a managerial person or there is any significant likelihood that the lawyer initiating the communication may seek to use the employee's statement against the corporation in subsequent proceedings."].)

G. Does CPRC Rule 4.2 Prevent Communications Between Prosecutors (or Their Agents) and *Represented* Persons Who Have *Not* Yet Been Charged With a Crime?

A person engaged in criminal activity may choose to hire an attorney in anticipation of being charged with a crime or for some other reason. Is such a person now considered "represented" for purposes of Rule 4.2? And if so, can a prosecutor or an agent of the prosecutor nevertheless speak to the person outside the presence of the person's attorney under the rationale that such communication is "otherwise authorized by law?" (Rule 4.2(c)(2).)

1. Can a Person Who is Not Yet Charged With a Crime (or Not Yet Named in a Civil Suit) Ever Be Considered a "Represented Person" for Purposes of Rule 4.2?

One of the differences between Rule 4.2 and its predecessor Rule 2-100 is that the former prohibits communications with a "person" while the latter prohibited communications with a "party."

The comment section to Rule 4.2 also differs somewhat in this regard from the discussion section to Rule 2-100. The discussion section to Rule 2-100 stated: "As used in paragraph (A), the 'subject of the representation,' 'matter,' and 'party' are not limited to a litigation context." (Discussion to Rule 2-100.) Paragraph (2) of the Comment section to 4.2 reiterates that "the 'subject of the representation,' 'matter,' and 'party' are not limited to a litigation context." (Comment to Rule 4.2, paragraph [2].) However, the Comment expands upon that concept by stating: "This rule applies to communication 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." (**Ibid**.)

Under Rule 2-100, there was some question as to whether the term "party" could reasonably apply to someone who was not charged with a crime. For example, in an opinion issued by the California Attorney General regarding whether prosecutorial contacts with uncharged defendants during the investigative stage of a criminal proceeding fell within the "otherwise authorized by law" exception to Rule 2-100, the Attorney General "noted that Rule 2-100 pertains to communications with a 'party' known to be represented by counsel. That term, as well as the phrases 'while representing a client' and 'the subject of the representation' appear to contemplate an adversarial relationship between litigants, whether in a criminal or civil setting. Such a relationship would, at best, be difficult to define during the investigative stage of a criminal proceeding." (75 Ops.Cal.Atty.Gen. 223, *7 (1992); **see also *United States* v. *Balter*** (3rd. Cir. 1996) 91 F.3d 427, 436 [interpreting similar rule to 2-100 and noting it only applied to a "party," a "party" is necessarily a "party" to something and a criminal suspect is not a "party" until "after formal legal or adversarial proceedings are commenced"].)

Now that Rule 4.2 applies to "persons" not "parties" and the expanded commentary to Rule 4.2 says it "applies to communication with any person . . . who is represented by counsel concerning the matter to which the communication relates", it is fairly clear an uncharged person who has retained counsel *is* a represented person for purposes of the rule regardless of whether legal or adversarial proceedings have commenced against the person. (**See also *United States* v. *Jamil*** (D.C.E.N.Y. 1982) 546 F.Supp. 646, 654 [person who retains counsel as protection against grand jury investigation is a

represented party within an ethical context even if adversarial proceedings have not yet begun].) Of course, this does not dispose of the question of whether, assuming an uncharged defendant who has retained counsel qualifies as a represented person for purposes of Rule 4.2, prosecutors are nonetheless allowed to contact a represented person because they are "authorized by law" to do so. (Rule 4.2(c)(2).) We address *that* question immediately below.

2. Are Communications Between Represented but Uncharged Persons and Prosecutors or Their Agents Permissible on the Ground Such Communications are "Authorized by Law?"

Subdivision (c) of Rule 4.2 provides that the "rule shall not prohibit: . . . (2) communications ***otherwise authorized by law*** or a court order." (CRPC Rule 4.2(c)(2), emphasis added by IPG.)

> ***Editor's note:** Rule 2-100 also recognized that the rule does not prohibit "communications otherwise authorized by law." (CRPC Rule 2-100(C)(3).)

Paragraph [8] of the Comment to Rule 4.2 states: "[p]aragraph (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. . . 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 . . ." (Emphasis added.)

> ***Editor's note:** The comment to Rule 4.2 is more expansive than, but not inconsistent with, the discussion portion of Rule 2-100, which, in pertinent part, states: "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. . . . Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law." (Discussion to Rule 2-100.)

The comment to Rule 4.2 thus expressly recognizes that prosecutors and their agents can communicate with represented persons as part of their investigative activities to the extent such communication is not barred by the federal or state constitution, other statutes, rules, or case law. The comment does not purport to outline all the governing constitutional provisions or case law. Rather, it simply provides examples of two Ninth Circuit cases (***Carona*** and ***Talao***) that illustrate

the type of communications during investigative activities that the "rule is not intended to preclude". ***Carona*** and ***Talao*** themselves should not be binding authority on how a California state bar ethics rule is to be interpreted. (**See *United States* v. *Tapp*** (S.D. Ga. 2008) [unreported] 2008 WL 2371422, at p. *12 [and cases cited therein].) However, by incorporating the decisions into the discussion section of Rule 4.2 as examples of what investigative activities are permitted, the State Bar has effectively rendered the holdings in those cases binding authority – at least when it comes to State Bar prosecutions. Accordingly, we discuss both cases in greater depth.

***Editor's note:** The Ninth Circuit sometimes has to interpret California's no-contact rule of ethics because federal prosecutors are bound by ethical rules of the state where the federal prosecutor is practicing. (**See** 28 U.S.C. § 530B [known as the McDade Amendment].)

United States* v. *Carona (9th Cir. 2011) 630 F.3d 917 [as amended – see 660 F.3d 360]*

In the case of ***United States* v. *Carona*** (9th Cir. 2011) 630 F.3d 917 [660 F.3d 360], prosecutors were investigating the defendant (the sheriff of Orange County) for violating several federal statutes relating to alleged corruption. The defendant had retained an attorney and the prosecutors knew it. Nevertheless, the prosecutors signed a cooperation plea agreement with someone who had been engaged in bribing the defendant. Following this plea agreement, the prosecutors instructed this person to act as an undercover agent, meet with the defendant, and make surreptitious recordings of their meetings. (***Id***. at p. 363.) After two meetings, prosecutors provided the person acting as an undercover agent with two fake "subpoena attachments." The fake subpoenas identified certain records that the agent was instructed to tell the defendant he had been subpoenaed to produce. All these meetings took placed before defendant was indicted, though it was undisputed the defendant was a "represented party" for purposes of Rule 2-100. (***Id***. at pp. 363-364.) The defendant tried to suppress the statements he made during these meetings and disqualify the lead prosecutor on grounds the statements were allegedly obtained in violation of Rule 2–100, which governed the conduct of federal prosecutors in California. (**Ibid**.)

The ***Carona*** court did not adopt a bright line rule that "pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties" could *never* violate Rule 2–100. (***Id***. at p. 364.) Rather, it chose to take the "case-by-case adjudication" approach used in ***United States* v. *Talao*** (9th Cir. 2000) 222 F.3d 1133, 1138-1139 as to whether such communications violated the rule.

However, the ***Carona*** court observed that previous Ninth Circuit decisions, "more often than not held that specific instances of contact between undercover agents or cooperating witnesses and

represented suspects did not violate Rule 2–100." (***Id***. at p. 365 [citing to ***United States v. Powe*** (9th Cir.1993) 9 F.3d 68, 69 and ***United States* v. *Kenny*** (9th Cir. 1981) 645 F.2d 1323, 1337–1338].) The ***Carona*** court held that no violation of the rule had occurred–notwithstanding the use of the fake subpoenas. (***Id***. at p. 365.) In support of this conclusion, the court noted "[t]here were no direct communications here between the prosecutors and [the defendant]" and "[t]he indirect communications did not resemble an interrogation." (***Id***. at p. 366.)

The ***Carona*** court rejected the idea that use of the false subpoena attachment made the cooperating witness "more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor" and noted "it has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements." (**Id**. at pp. 365-366.) The ***Carona*** court also pointed out that "[i]t would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel." (***Id***. at p. 366 [and indicating this is especially true when the person under investigation is attempting to suborn perjury].)

> ***Editor's note:** The Comment to Rule 4.2 makes no mention of the opinion in ***Carona*** later being amended and uses the original cite: 630 F.3d 917. The amended opinion comes to the same conclusion as the original opinion and was not modified in a particularly significant way, so it is a bit of a mystery why the Comment does not use the citation for the amended opinion.

United States* v. *Talao (9th Cir. 2000) 222 F.3d 1133

In ***Taleo***, the government and defense counsel for a corporation had entered into talks regarding both civil and criminal proceedings and had begun extensive negotiations toward settlement as part of the civil suit. Prior to indicting the defendant, a prosecutor was contacted by an employee of the defendant corporation. The employee initiated a communication with the government for the purpose of disclosing that corporate officers were attempting to suborn perjury and obstruct justice. (***Id***. at pp. 1139-1141.) The employee explained she did not want to be represented by the same attorney who represented the corporation. The prosecutor informed the employee of her right to be represented by an attorney, but the employee declined representation. While the prosecutor was interviewing the employee, an attorney for the corporation demanded to speak with the employee. The employee was told of the corporate attorney's presence and of his desire to speak with her, but she did not wish to speak with him. The prosecutor checked with her supervisor before continuing the interview and the supervisor told her to continue the interview

outside the attorney's presence. During the remainder of the interview, the employee gave further instances of wrongdoing by her employers and explained how they concealed the truth from the investigators and the corporate attorney. (***Id***. at pp. 1135-1136.)

After the defendant was indicted, the defendant made a motion to dismiss the indictment, asserting the contact between the prosecutor and the employee violated Rule 2-100 and the company's constitutional rights. The trial court denied the motion but found a violation of Rule 2–100. The trial court initially stated that it would refer the prosecutor to the State Bar but later decided not to do so. However, the trial court stated it would inform the jury of prosecutor's misconduct and instruct them to take the alleged misconduct into account in assessing the employee's credibility at trial. (***Id***. at pp. 1136-1137.) The prosecutor then appealed the finding that she acted unethically and violated Rule 2–100. (***Id***. at p. 1137.)

The ***Talao*** court "declined to announce a categorical rule excusing all such communications from ethical inquiry" and took the approach of applying "the ethical rule through 'case-by-case adjudication,' policing clear misconduct while keeping in mind that prosecutors are 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations. (***Id***. at p. 1139.)

The ***Talao*** court found that Rule 2-100 *potentially* governed the prosecutor's pre-indictment, non-custodial communications with the employee under the particular circumstances existing in the case since there were "fully defined adversarial roles, impending grand jury proceedings, and awareness on the part of the responsible government actors of [the corporation's] ongoing legal representation. (***Id***. at p. 1139.)

***Editor's note:** The *employee* was potentially a "party" for purposes of Rule 2-100 because subdivision (B) of the rule states a "party" includes: . . . (2) 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." (**See** this IPG memo, section II-L at pp. 48-53.)

However, the ***Talao*** court held that Rule 2–100 did not prohibit the prosecutor's conduct and that "[d]espite the apparent conundrum created by [the employee's] dual role as employee/party and witness, the interests in the internal integrity of and public confidence in the judicial system weigh heavily in favor of the conclusion that [the prosecutor's] conduct was at all times ethical." (***Id***. at p. 1140.) The ***Taleo*** court deemed it "manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of

disclosing that *corporate officers are attempting to suborn perjury* and obstruct justice, Rule 2–100 does not bar discussions between the employee and the attorney. Indeed, under these circumstances, an automatic, uncritical application of Rule 2–100 would effectively defeat its goal of protecting the administration of justice. (**Ibid**., emphasis added by IPG.)

The ***Talao*** court cautioned, however, that it was not suggesting "that government officials have a license to approach an employee and initiate communications whenever there is a possible conflict of interest between the employee and the corporation for whom the employee works." (***Id***. at p. 1141.)

Editor's note:** In coming to its conclusion, the ***Taleo court placed a lot of emphasis on the fact that the corporate employee/witness had come forward to disclose attempts by the corporation's officers to coerce her to give false testimony. The court reasoned the general rationale behind Rule 2-100 (i.e., to support the attorney-client relationship) is not applicable since "once the employee makes known her desire to give truthful information about potential criminal activity she has witnessed, a clear conflict of interest exists between the employee and the corporation" and "corporate counsel cannot continue to represent both the employee and the corporation." (***Id***. at pp. 1140-1141.) "Under these circumstances, because the corporation and the employee cannot share an attorney, ex parte contacts with the employee cannot be deemed to, in any way, affect the attorney-client relationship between the corporation and its counsel." In this setting, the corporation's interest, therefore, clearly does not provide the basis for application of the rule." (***Id***. at p. 1141.)

a. What conclusions can or cannot be drawn from *Carona* and *Talao* regarding whether prosecutors or their agents may contact represented but uncharged persons?

Based on the holdings in ***Carona*** and ***Talao***, the following conclusions may reasonably be drawn:

First, it is very unlikely, but not automatic, that Rule 4.2 forbids noncustodial communications between represented but uncharged persons and prosecutors or their agents. Factors that may play a role in deciding whether the contact is proper include: (i) whether the communication occurred during an undercover investigation; (ii) whether the person was contacted directly or indirectly by the prosecutor; (iii) whether the communications resembled an interrogation; (iv) whether the represented person initiated the contact; (v) if the represented person was an employee of a business or corporation, whether the person initiated contact in order to disclose a serious crime by their employer; and (vi) whether, at the time of the contact, there were fully defined adversarial roles between the government and the represented person.

Second, since it is not even automatic that Rule 4.2 is inapplicable when the communications occur between agents of the prosecution and uncharged persons in a non-custodial setting, Rule 4.2 will also not be automatically applied when the communications are *overt* or *directly* between a

prosecutor and an uncharged but represented person, or when the communications occur in a *custodial* setting.

Third, neither ***Carona*** nor ***Talao*** stand for the proposition that direct contacts between an uncharged but represented person while the person is in custody are prohibited.

b. Undercover investigatory interviews with *out-of-custody* suspects who have not been charged with a crime and are represented by counsel

As indicated above, in light of the holdings in ***Carona*** and ***Talao***, it is safe to say that Rule 4.2 will not be violated in almost all cases involving investigatory interviews by undercover agents (acting on their own or at the behest of prosecutors).

The California Attorney General has opined that during the investigative phase of a criminal or civil law enforcement proceeding, Rule 2-100 does not prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel. (75 Ops. Cal. Atty. Gen. 223, 224.) This was because the Attorney General believed such investigatory interrogations were "communications otherwise authorized by law" within the meaning of subparagraph (C)(3) of Rule 2-100. (75 Ops. Cal. Atty. Gen. 223, 230.)

Moreover, courts interpreting comparable "no-contact" rules have overwhelmingly concluded that the no-contact rule does not prevent non-custodial pre-indictment communications by undercover agents with represented parties which occur in the course of legitimate criminal investigations. (**See** 75 Ops. Cal. Atty. Gen. 223, 231 [and cases cited therein]; ***United States* v. *Balter*** (3rd. Cir. 1996) 91 F.3d 427, 436; ***United States* v. *Powe*** (9th Cir. 1993) 9 F.3d 68, 69; ***United States* v. *Heinz*** (5th Cir. 1993) 983 F.2d 609, 613; ***United States* v. *Ryans*** (10th Cir. 1990) 903 F.2d 731, 740; ***United States* v. *Sutton*** (D.C.Cir.1986) 801 F.2d 1346, 1366; ***United States* v. *Dobbs*** (8th Cir. 1983) 711 F.2d 84, 86; ***United States* v. *Fitterer*** (8th Cir. 1983) 710 F.2d 1328, 1333; ***United States* v. *Vasquez*** (2nd Cir. 1982) 675 F.2d 16, 17; ***United States* v. *Kenny*** (9th Cir. 1981) 645 F.2d 1323, 1339; ***United States* v. *Weiss*** (5th Cir. 1979) 599 F.2d 730, 740; ***United States* v. *Lemonakis*** (D.C. Cir. 1973) 485 F.2d 941, 955-956; ***United States* v. *Brown*** (M.D.Pa. 2005) 356 F.Supp.2d 470, 481-482; ***United States* v. *Grass*** (M.D. Pa. 2003) 239 F.Supp.2d 535, 541; ***United States* v. *Ward*** (N.D. Ill. 1995) 895 F.Supp. 1000, 1006; ***United States* v. *Infelise*** (N.D.Ill.,1991) 773 F.Supp. 93, 95; ***United States* v. *Marcus*** (D. Md. 1994) 849 F.Supp. 417, 421 ["with the exception of ***Hammad***, federal appellate case law is virtually unanimous in holding that

preindictment under cover operations against represented targets are not contrary to the Rules of Professional Conduct"]; **see also** Paragraph [5] of the Comment to CRPC Rule 8.4 [Paragraph (c) of Rule 8.4 (which renders it professional misconduct "to engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation") "does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of civil or criminal law or constitutional rights, provided the lawyers' conduct is otherwise in compliance with these rules and the State Bar Act."].)

It is likely, but not certain, that *overt* contacts with represented defendant before charging will also be found permissible. As explained in ***In re Amgen Inc.*** (E.D.N.Y. 2011) [unreported] 2011 WL 2442047, a case involving prosecutorial communications with employees of the company Amgen, there is not a significant distinction between overt and covert communications insofar as the reasons behind the "no-contact" rule are concerned. "First, to the extent that the no-contact rule is designed to protect 'a defendant from the danger of being tricked into giving his case away by opposing counsel's artfully crafted questions[,]' . . . it is by no means apparent that Amgen faces a greater risk from overt agent interviews of its employees—interviews that Amgen is in any event professedly eager to facilitate. . . —than from covert approaches to such employees by informants. Second, . . . the no-contact rule is not a source of rights but a standard of courtesy. . . .While the prosecutorial conduct at issue here may be discourteous to Amgen's counsel, it is certainly no less courteous than the covert use of informants. Indeed, if anything, the transparency of the government's position is more consonant with both views of the no-contact rule than the covert use of informants: it gives Amgen's counsel more notice of the risk it faces and enables counsel to provide Amgen's employees with such instructions as the company deems appropriate about how to respond to an agent's inquiry, and it does counsel the courtesy (as the use of informants does not) of candor." (***Id***. at p. *18.) In ***United States* v. *Sabean*** (D. Me. 2016) [unreported] 2016 WL 5721135, at *6 [finding overt contact with represented person prior to charging permissible where government's posture was clearly still investigative at the time of contact and describing ***Koerber*** (see below) as an "isolated, unusual case" that reflects "an egregious violation of the no-contact rule"].)

On the other hand, in ***United States* v. *Koerber*** (D. Utah 2013) 966 F.Supp.2d 1207, the district court held there was a violation of Utah's no contact rule where an *overt* noncustodial communication with represented person was made pre-charging and was done by agents acting on the instruction of prosecutors who previously tried to subpoena the person to testify before a grand jury and who were rebuffed in this attempt by the person's counsel. (***Id***. at pp. 1227-1229 [and indicating, at fn. 7, this result would be consistent with holding in ***Talao***].)

c. Investigatory interviews with *in-custody* suspects who have not been charged with a crime and are represented by counsel

One of the few cases finding a prosecutorial communication with an uncharged but represented defendant violate the no-contact rule is ***United States* v. *Hammad*** (2nd Cir. 1988) 858 F.2d 834. In ***Hammad***, the court held that a prosecutor had violated ABA professional responsibility rule DR 7-104(A)(1) (which prohibited a lawyer from communicating with a "party" he knew to be represented by counsel regarding the subject matter of that representation) where the prosecutor issued a counterfeit subpoena for an informant, who then met with the defendant and recorded their conversation at the behest of the prosecutor - even though the defendant was not in custody and was not yet charged with a crime. (***Id.*** at pp. 838-840.) However, even the ***Hammad*** court recognized that that no-contact rule specifically permitted contacts between prosecutors and represented defendants as "authorized by law," and that "the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to DR 7-104(A)(1) . . ." (***Id.*** at p. 839; **see also *United States* v. *Harloff*** (W.D.N.Y. 1992) 807 F.Supp. 270, 276 [finding of an ethical violation in ***Hammad*** was "limited ... to the circumstances of that case"]; ***United States* v. *Benjamin*** (W.D.N.Y. 1999) 72 F.Supp.2d 161, 192-193 [rule of ***Hammad*** does not apply where prosecutor directs undercover agent to contact represented defendant as part of investigation but does not do so to learn defense strategies or tactics or to otherwise interfere with the attorney's ability to provide an effective defense]; ***United States* v. *Scozzafava*** (W.D.N.Y. 1993) 833 F.Supp. 203, 210 [same].)

In interpreting Rule 2-100, the California Attorney General has opined that during the investigative phase of a criminal or civil law enforcement proceeding, the rule **does not prohibit** a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel, ***regardless of whether the person is in custody***. (75 Ops. Cal. Atty. Gen. 223, 224, 232, emphasis added.) The theory is that investigatory interrogations are "communications otherwise authorized by law" within the meaning of subparagraph (C)(3) of Rule 2-100." (75 Ops. Cal. Atty. Gen. 223, 230; **see also *United States* v. *Balter*** (3rd. Cir. 1996) 91 F.3d 427, 436 [interpreting comparable rule].)

However, this opinion must be viewed in light of paragraph [8] of the Comment to Rule 4.2 citing to ***United States* v. *Carona*** (9th Cir. 2011) 630 F.3d 917 and ***United States* v. *Talao*** (9th Cir. 2000) 222 F.3d 1133 – both of which held even *non-custodial* communications between investigators

and represented persons during the investigative stage are not automatically outside the scope of the rule. (**See** this IPG, section II-C-2 at pp. 31-35.)

Some federal decisions have specifically held that the applicable rules of professional conduct do not bar prosecutors from conducting investigatory interviews with uncharged represented suspects who are in custody about the subject matter of the representation. (**See e.g.**, ***United States* v. *Balter*** (3rd. Cir. 1996) 91 F.3d 427, 436; ***United States* v. *Infelise*** (N.D.Ill. 1991) 773 F.Supp. 93, 95, fn. 3.) However, ***Balter*** hinged its interpretation in part on the fact that the no-contact rule it was interpreting barred contacts with a "party" and a criminal suspect cannot be a "party" to something until he is charged. Moreover, the underlying facts in ***Balter*** actually involved undercover operations targeted at represented but uncharged suspects conducted under the guidance of the prosecution, rather than actual contact by the prosecutor. (***Id***. at p. 436.)

And some federal decisions have stated that the applicable rules of professional conduct do not bar prosecutors from conducting investigatory interviews with uncharged represented suspects about the subject matter of the representation *without qualification*, although in those cases, factually, the defendant was not in custody. (**See e.g. *United States* v. *Plumley*** (8th Cir. 2000) 207 F.3d 1086, 1095; ***United States* v. *Marcus*** (D.Md., 1994) 849 F.Supp. 417, 420-422.)

On the other hand, some decisions have indicated prosecutors *are* ethically barred from directly conducting investigatory interviews with uncharged represented suspects who are in custody about the subject matter of the representation. (**See *United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1460, fn. 2**; *United States* v. *Killian*** (5th Cir.1981) 639 F.2d 206, 210; ***United States* v. *Durham*** (7th Cir.1973) 475 F.2d 208, 211; ***United States* v. *Thomas*** (10th Cir.1973) 474 F.2d 110, 112; ***Suarez* v. *State of Florida*** (Fla. 1985) 481 So.2d 1201, 1206; **see also** 75 Ops. Cal. Atty. Gen. 223, 231 [noting cases but disagreeing].)

Caution: Since it is an open question whether direct contacts by a prosecutor with represented but uncharged persons who are in custody are permissible, prosecutors may want to defer to investigating officers in making such contact.

H. Does CPRC Rule 4.2 Prohibit Contact Between Represented Persons and Prosecutors if the Represented Person Initiates the Contact and/Waives Application of the Rule?

Sometimes a charged defendant who is represented by counsel will want to speak directly with the prosecutor about his pending case. There exists a myriad of reasons why a defendant might wish to do so. The defendant may lack of confidence in his appointed counsel and seek direct contact in the belief he can secure a better deal than his attorney. The defendant may be getting impatient with the progress of his case and believes negotiating directly with the prosecutor will speed things up. Or the defendant may not trust his attorney to be looking out for his best interests. For example, after a drug courier is arrested, the drug trafficking organization may immediately pay for an attorney to represent the courier in order to discourage the courier from pleading in exchange for providing information to law enforcement. The courier, however, may want to negotiate without his conflict-ridden, cartel-sponsored attorney being made aware of the courier's intent. (**See e.g.**, ***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1461.) What should a prosecutor do?

Paragraph [1] of the Comment to Rule 4.2 states the general bar on communicating with a represented person "applies even though the represented person initiates or consents to the communication." This paragraph also states "[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." (Comment to CRPC Rule 4.2, paragraph [1].)

Prosecutors should be aware that it does not make a difference that the charged, represented defendant "waives his right" to have his attorney present. (**See *People* v. *Arias*** (1996) 13 Cal.4th 92, 132, fn. 12 [noting prosecutor's direct communication with a suspect who initiated contact with prosecutor was treated as a violation of rule 2-100]; ***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1462 [charged represented defendant cannot waive rule 2-100 on behalf of his attorney, in part, because, the rule "is fundamentally concerned with the duties of attorneys, not with the rights of parties"]; ***Monceret* v. *Board of Professional Responsibility*** (Tenn. 2000) 29 S.W.3d 455, 461 ["An apparent majority of courts . . . have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate."]; ***People* v. *Green*** (Mich. 1979) 274 N.W.2d 448, 451-453 [finding prosecutor violated ethical rule similar to rule 2-100 (i.e., DR 7-104) by talking to charged represented defendant even though defendant initiated the discussion, waived his right to counsel and indicated he wanted to talk to authorities without his attorney present]; ***State* v. *Miller*** (Minn. 1999) 600 N.W.2d 457, 464 [only a party's attorney, not

party, can waive the attorney's right to be present under state professional conduct rule similar to rule 2-100 (i.e., rule 4.2) during a communication between the attorney's client and opposing counsel].) However, the fact the contact was initiated by the defendant might be a circumstance in mitigation in a state bar prosecution. (**Cf.**, ***People* v. *Green*** (Mich. 1979) 274 N.W.2d 448, 453.) *Compare* ***Montejo* v. *Louisiana*** (2009) 556 U.S. 778, 786 [defendant may waive his Sixth Amendment right "whether or not he is already represented by counsel."]

The Ninth Circuit has recognized a possible exception exists when a prosecutor obtains approval from the court to respond to a defendant's request to meet without defense counsel. (***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1460 [albeit finding it did not apply in the case before it since prosecutor materially misled judge in seeking authorization for conversation by indicating that defense counsel was being paid by third party with interests inimical to those of defendant].)

Possible Solution to the Issue of the Desperate Defendant Fearful of His Own Counsel

Now that Rule 4.2 specifically permits contact if authorized by a court, before communicating with a charged represented defendant who desires direct communication outside the presence of his attorney (**see** this IPG, section II-I at p. 42), a prosecutor should, at a minimum, obtain court approval for such a communication. If a represented charged defendant wants to have a discussion with the prosecution without his attorney learning about the communication, the prosecutor should be able to advise the defendant about her right to obtain substitute counsel. (**See *United States* v. *Talao*** (9th Cir. 2002) 222 F.3d 1133, 1141.) If that is not feasible, the prosecutor can re-contact the court, explain the situation, and ask that a second attorney be appointed for the sole purpose of representing the defendant during communications with the prosecutor. (**See *United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, 1461 ["we agree that in an appropriate case, contact with a represented party could be excepted from the prohibition of Rule 2-100 by court order"].) However, it is important that the court be made aware of the actual reason for appointment of the second attorney. In ***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455, the court held that approval of prosecutor meeting with represented charged defendant by magistrate did not constitute a contact authorized by law for purposes of rule 2-100 because the prosecutor had misled the magistrate as to the circumstances necessitating the contact. (***Id.*** at pp. 1461-1462.)

Editor's note:** Paragraph 5 of the Comment to Rule 4.2 states: "The rule does not prohibit communications initiated by a represented person seeking advice or representation from an ***independent lawyer of the person's choice." (Emphasis added by IPG.) However, this language does not authorize communication with a represented defendant by a prosecutor because the prosecutor represents *an adverse party* to the defendant. The prosecutor could not be considered "an independent lawyer" as the prosecutor would not be free of any conflict.

I. Does CPRC Allow a Prosecutor to Make Contact With a Represented Person if Authorized by a Judge?

Subdivision (c) of Rule 4.2 expressly provides: "This rule shall not prohibit: ¶ (2) communications otherwise authorized by law ***or a court order***. (Emphasis added by IPG.)

Paragraph [8] of the Comment to Rule 4.2, in pertinent part, states: "Paragraph (c)(2) recognizes that . . . court orders may authorize communications between a lawyer and a person that would otherwise be subject to this rule."

Rule 4.2(c) differs from Rule 2-100, which simply said that Rule 2-100 did not prohibit "communications authorized by law." (**But see *Kaveney* v. *Murphy*** (D. Mass. 2000) 97 F.Supp.2d 88, 94 [noting judge may permit violation of Rule 4.2 even though the language in the "no-contact" rule does not expressly refer to judicial authorization but simply permits such contact when "authorized by law"].)

Obviously, if the contact is barred for some *other* reason than the rule, judicial authorization would be ineffective (i.e., a judge could not permit contact in violation of the Fifth or Sixth Amendment). However, where there is no other bar to contact than Rule 4.2, a prosecutor with a good reason for making contact with a represented party, prosecutors should consider seeking court authorization for such contact. The prosecutor should make the court aware of the exception in Rule 4.2(c)(2) and, if applicable, point out why the contact would not undermine any of the purposes behind the rule. (**See also** this IPG, section II-B at pp. 24-25 and II-O at p. 55.)

J. Does Rule 4.2 Prevent Contacts Between Prosecutors and Witnesses Who Are *Represented* and *Charged* in an *Unrelated* Case?

The issue of whether a prosecutor may communicate with a charged defendant often arises when a witness in one criminal case has a pending criminal charges and the prosecutor wishes to discuss the testimony of the witness without contacting the defense attorney representing the witness on the witness' pending charges. Is this proper? Yes.

Paragraph (a) of Rule 4.2, in pertinent part, provides "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 . . ." (Emphasis added by IPG.)

In the past, there was some controversy over whether a prosecutor could speak with a defendant (in or out of custody) who was represented by counsel in a charged case when the communications were limited to discussions regarding the defendant being a witness in an unrelated case. (**See** editor's note below at p. 45 for a discussion of this controversy].) Decisions by the California Supreme Court in ***People* v. *Gonzales*** (2011) 52 Cal.4th 254 and in ***People* v. *Maury*** (2003) 30 Cal.4th 342 put the controversy to bed.

In ***Gonzales***, the California Supreme Court held that rule 2-100 did **not** bar communications between *an agent* of the prosecution and a person suspected of committing a crime even though the person was in custody for a different crime and was represented by counsel on a different crime. (***Id***. at p. 284.) Specifically, in ***Gonzales***, the prosecution arranged for an inmate to wear a wire to record a conversation with the defendant while the two were being transported in a van. The defendant was serving time in jail for felony possession of methamphetamine after having pleaded guilty to that offense. The wired inmate spoke to the defendant about several murders, none of which had yet been charged. The California Supreme Court assumed the wired inmate *was an agent of the prosecution* but still held the contact did not violate rule 2-100. (***Id***. at pp. 284-285.)

In ***People* v. *Maury*** (2003) 30 Cal.4th 342, a defendant who had recently been convicted of receiving stolen property and was facing jail time spoke with a detective and prosecutor investigating a murder. The communication took place at defendant's home before defendant was charged with the murder. (***Id***. at pp. 363.) Although the defendant mentioned an interest in obtaining some sort of benefit on his pending case, the prosecutor indicated no promises could be made before he heard defendant's statement. (***Id***. at pp. 406-407.) The defendant claimed the district attorney engaged in "unethical conduct" by violating then rule 7-103 of the California Rules of Professional Conduct. However, the court summarily rejected this argument, noting defendant was represented by counsel only on an unrelated charge and not on the murder. (***Id***. at p. 408.)

To the extent, there is any life to the argument that prosecutors cannot contact represented persons in custody about unrelated charges, it is extinguished by the language of Rule 4.2 and paragraph [4] of the Comment to Rule 4.2. Paragraph [4] expressly states: "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].)" (Comment to CRPC Rule 4.2; **see also** 75 Ops. Cal. Atty. Gen. 223 [interpreting

Rule 2-100]; ***State* v. *Porter*** (NJ 1986) 510 A.2d 49, 54.) There is no constitutional bar to such a contact either. (**See** this IPG, section I-A at p. 5.)

Prosecutors and their agents must be alert to two potential problems that can crop up when speaking with a represented in-custody defendant who has been contacted because he or she is a potential witness in an unrelated case.

First, if the questions regarding the crime to which the person is a witness are likely to incriminate the defendant cum witness, ***Miranda*** warnings should be given.

Second, if the defendant cum witness begins asking questions regarding what benefit he might receive *on his charged case* for cooperating as a witness in the unrelated case, the prosecutor or agent must shut this aspect of the conversation down and explain to the defendant cum witness that the prosecutor or agent is legally barred from discussing the charged case with the defendant in the absence of his or her counsel. (**See *People* v. *R.T.P.*** (2006) 43 Cal.Rptr.3d 536, 544-545 [depublished] [prosecutor could talk to represented defendant about being a witness in unrelated case outside presence of counsel, but finding it misconduct for prosecutor to discuss possible concessions in pending case and then to use defendant as a witness at the preliminary hearing without the presence of defendant's counsel, despite the near certainty that defendant would be cross-examined about the current charges].) If the defendant persists in discussing the charged cases, it is best to terminate the conversation. Moreover, it is advisable to tape-record the conversation to help insulate the interviewer from being accused of a constitutional or ethical violation.

Editor's note**: The past controversy over whether prosecutorial contacts with charged defendants about having witnessed *unrelated* crimes stemmed from a 1970's State Bar opinion and a subsequent case relying on that opinion. Specifically, the State Bar (in an ethics opinion) interpreted a predecessor no-contact rule (Rule 7-103) as prohibiting a prosecutor from communicating with a criminal defendant he knows to be represented by counsel, **even if** the communication was limited to inquiring about conduct for which the defendant has not been charged. (State Bar Ethics Opinion 1979-49.) The state bar opinion was later cited favorably in a California appellate case called ***People* v. *Sharp (1983) 150 Cal.App.3d 13. The ***Sharp*** court held it was improper for a prosecutor to direct his agents to conduct a lineup without insuring that defense counsel was properly notified since doing so violated the prosecutor's professional ethical responsibilities, by interfering with defendant's right to effective assistance of counsel, and fell within prohibition against interrogating suspect represented by counsel on related charges without express consent of his or her attorney as outlined in the case of ***People* v. *Boyd*** (1978) 86 Cal.App.3d 54. (***Sharp,*** at pp. 18-19.) ***Sharp***'s assumption that a prosecutor may not interview a defendant who has retained counsel concerning an uncharged case has never been specifically overruled.

However, in a subsequent opinion, interpreting the scope of Rule 2-100, the Attorney General keenly explained why ***Sharp***'s assumption (and the State Bar Opinion upon which it was based) was no longer good law:

First, the predecessor rule to Rule 2-100 (Rule 7-103) provided: "A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel ***upon a subject of controversy***, without the express consent of such counsel." The Attorney General opined Rule 2-100 only prohibits attorneys from communicating with represented parties "about the subject of the representation". Thus, ***Sharp*** and the earlier State Bar Opinion were interpreting a now-abandoned rule of professional conduct, not Rule 2-100 which only bars contacts about the subject of representation. (75 Ops. Cal. Atty. Gen. 223, 226-227.) And second, the Attorney General Opinion noted the comment to Rule 2-100 acknowledged that it did not override case law, and case law indicates government prosecutors and investigators are permitted to conduct criminal investigations into uncharged crimes. (75 Ops. Cal. Atty. Gen. 223, 226-227.)

The later opinion derived additional support in 2001, when the High Court in ***Texas* v. *Cobb*** (2001) 121 S.Ct. 1335 made it clear that the Sixth Amendment right to counsel did not attach until a defendant has been charged with a crime and that the rule in ***Boyd*** (i.e., that the Sixth Amendment right to counsel attaches to crimes closely-related to the crime being investigated) was no longer good law. (***Cobb*** at p. 1344 [finding that police could properly interrogate an in-custody burglary suspect who was represented by an attorney on the burglary charge about an uncharged murder that was committed in the course of that burglary].) Albeit, one of the reasons the later Attorney General opinion gave in support of its conclusion is no longer applicable in light of Rule 4.2, i.e., that Rule 2-100 used the term "party" when referring to the prohibition on communications – a term that appeared to contemplate an adversarial relationship between litigants - a relationship that likely does not exist at the investigative stage of a criminal proceeding. (**See** 75 Ops. Cal. Atty. Gen. 223, 232.)

K. If a Witness Obtains an Attorney to Advise the Witness Regarding Whether to Testify, May a Prosecutor Communicate With the Witness?

It is not unusual, especially in cases involving familial sexual assault or child abuse, that the parent of the child hires an attorney to "represent" the child. Often, the attorney hired to represent the child is affiliated with (or very friendly with) the attorney representing the parent and, not surprisingly, informs the victim of the rules preventing incarceration of the victim for refusing to testify. (**See** Code of Civ. Proc., §§ 1219, 1219.5.)

This creates a tricky situation. The child is not a defendant in the criminal case. However, the attorney was not hired to defend the child against criminal charges. Rather, the attorney was hired to represent the desires or "best interests" of the child – albeit the only issue is almost always whether it is the desire or in the best interests of the child to testify. Can the prosecutor speak with the child, either to elicit additional information about the crime or to persuade the child to testify?

Paragraph [2] of the Comment to Rule 4.2 expressly provides "'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."

There are no cases directly addressing this issue. Arguably, and, to a certain extent, the answer may turn on how broadly the scope of the representation is interpreted. Paragraph [4] of Rule 4.2, in pertinent part, states: "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." (Comment to CRPC Rule 4.2, paragraph [4].)

Expect the attorney for the witness to state the witness may not be contacted without going through the attorney and point out that victims and witnesses have an absolute right to refuse to be interviewed. (**See *People* v. *Valdez*** (2012) 55 Cal.4th 82, 118-119; ***Reid* v. *Superior Court*** (1997) 55 Cal.App.4th 1326, 1337, fn. 4; ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 872 873; ***Walker* v. *Superior Court*** (1957) 155 Cal. App. 2d 134, 140.) Moreover, expect the attorney to argue that any communication between the prosecutor and the child about *anything* involving the

criminal case must be with the consent of the child's "attorney." Setting aside the issue of whether an "attorney" paid by the parent to represent the child who is a victim of the parent can provide conflict-free representation, this argument is not illogical.

On the other hand, a plausible (albeit not definitive) argument can be made that if the prosecutor is only going to be speaking to the witness about what occurred and does not seek to persuade the child to testify, such communication is not really about the "subject of the representation" which is focused on whether it is in the best interests of the child to testify. Although, in light of the language in paragraph [2] of Rule 4.2, it is more difficult to convincingly argue that the prosecutor is permitted to speak to the child about testifying outside the presence of counsel if the prosecutor is going to be trying to persuade the child to testify.

Prosecutors may also be able to argue that such contact is "authorized by law" - especially if the case is still in the investigatory stage - under the same rationale that permits a prosecutor to contact a person who is represented before the person is charged with a crime. (**Cf.**, this IPG, section II-G at pp. 28-37.) One of the few cases to address this issue, albeit in the context of a different version of the rule than existing in California is ***People* v. *Kabir*** (N.Y. Sup. Ct. 2006) 822 N.Y.S.2d 864. In ***Kabir***, the court held the New York version of the no-contact in existence at the time (DR 7–104(a)(1)) did "not prohibit an attorney from communicating on the subject of a criminal proceeding, which he is engaged in the defense or prosecution of, with a witness who is not a suspect, defendant or potential defendant in that proceeding whom he knows to be represented by counsel." (***Id.*** at p. 869.) However, the ruling turned in large part on the fact that the rule prohibited communications with a "party." (***Id.*** at pp. 868-869.)

If the victim is a child, it may be possible (although not necessarily likely) that a guardian ad litem could be appointed to advise the child if the attorney representing the child is receiving payment for the representation from the defendant. If there already exists a guardian ad litem, it may be possible to interview the witness in the presence of the guardian rather than the retained attorney. (**See** Welf. & Inst. Code, § 326.5 ["The Judicial Council shall adopt a rule of court effective July 1, 2001, that complies with the requirement of the federal Child Abuse Prevention and Treatment Act (Public Law 93-247) for the appointment of a guardian ad litem, who may be an attorney or a court-appointed special advocate, for a child in cases in which a petition is filed based upon neglect or abuse of the child ***or in which a prosecution is initiated under the Penal Code arising from neglect or abuse of the child***. The rule of court may include guidelines to the courts for determining when

an attorney should be appointed rather than a court appointed special advocate, and caseload standards for guardians ad litem"].)

In any event, since it is an open question whether it would violate Rule 4.2 for a prosecutor to speak with a child witness who is represented by an attorney absent permission from the attorney, prosecutors who do not receive such permission should seek a court order allowing such communication to take place. This should avoid a violation of Rule 4.2 as subdivision (c) of that rule states the rule does not prohibit . . . "communications otherwise authorized by law ***or a court order***." (CPRC Rule 4.2(c)(2), emphasis added.) And obtaining court permission is consistent with the directive of the California Supreme Court to seek judicial guidance in resolving doubts about application of the rule. (**See** this IPG, section II-O at p. 55.)

L. Can Prosecutors Criminally or Civilly Prosecuting Corporations or Businesses Speak to Employees of the Company Without Violating Rule 4.2?

Subdivision (b) of Rule 4.2 provides: "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 an person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability."

Subdivision (d) of Rule 4.2 provides: "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."

Subdivision (l) of CRPC Rule 1.0.1 defines "substantial" in the following manner: "'Substantial' when used in reference to degree or extent means a material matter of clear and weighty importance."

CRPC Rule 2-100 has similar language regarding communications with represented organizations. Rule 2-100 prohibits communications with represented "parties" and subdivision (B) of that rule stated: "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." (CRPR Rule 2-100(B)

1. Does Rule 4.2 Prohibit Prosecutors from Communicating with Members of the Corporation or Business Being Prosecuted Without Contacting the Attorney for the Corporation or Business if the Member is Separately Represented by Their Own Counsel?

Paragraph 6 of the Comment to Rule 4.2 states: "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."

Editor's note:** The inclusion of this language undoubtedly stems from the Comment to Model Rule 4.2 of the American Bar Association (ABA) Model Rules of Professional Conduct. The Comment to ABA Model Rule 4.2 (which, like CRPC 4.2, proscribes unauthorized contacts with represented persons or entities unless counsel consents) provides that, in the case of a represented corporation, "If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this [r]ule." (La Jolla Cove Motel and Hotel Apartments, Inc.* v. *Superior Court*** (2004) 121 Cal.App.4th 773, 783.)

CRPC Rule 2-100 does not have a comparable comment. However, even without such language for guidance, California courts interpreting Rule 2-100 have held communication with a member of a represented organization is, in certain circumstances, permissible if the member had separate counsel who consented to the communication. For example, in ***La Jolla Cove Motel and Hotel Apartments, Inc.* v. *Superior Court*** (2004) 121 Cal.App.4th 773, the court held contact by an attorney for a minority stockholder with the directors a represented corporation was proper where the directors had separate counsel who consented to the communication and a conflict of interest had arisen between the corporation and the director (***Id.*** at pp. 776-777 [and finding, at p. 791 that even if the contact had been improper, it was unnecessary to disqualify the attorney making contact where there was no evidence any privileged communications were divulged].)

2. Does Rule 4.2 Prohibit Prosecutors from Communicating with Members of Corporations or Businesses Before the Initiation of Criminal or Civil Proceedings?

Because a "current officer, director, partner or managing agent of the organization" is, for purposes of the rule 4.2, no different than any other represented person, the question of whether a prosecutor may communicate with an officer, director, partner or managing agent before the initiation of a criminal or civil case turns on whether a prosecutor may communicate with *any* represented person in that circumstance. (**See** this IPG, section G, at pp. 29-39.)

When it comes to current employees, members, agents, or other constituents of the organization, a prosecutor would be permitted to communicate with them in any circumstance where communication would be permitted with a current officer, director, partner or managing agent of the organization. However, there may be occasions where communication would be permitted with an employee, member, or agent when such communication would *not* be permitted with a current officer, director, partner or managing agent. Namely, if the subject of the communication is **not** "any act or omission of such a person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability." (CRPC Rule 4.2(b)(2).)

When it comes to civil proceedings, whether Rule 4.2 will bar communications with represented members of an organization during the investigative phase of a potential civil suit before the civil suit is filed may turn on a variety of factors including how long the contacts take place before the filing of the civil suit. (**See e.g.**, ***Jorgensen* v. *Taco Bell Corp***. (1996) 50 Cal.App.4th 1398, 1403 [finding no violation of Rule 2-100 primarily on ground counsel did not have actual knowledge of representation, but also noting interviews occurred seven months prior to the filing rather than on the eve of the filing of the lawsuit and that the interviews appeared to be "routine prelitigation investigation activities, which many counsel engage in before deciding whether to send a demand letter or file a lawsuit"]; **see also *Stahl* v. *Wal-Mart Stores, Inc.*** (S.D. Miss. 1998) 47 F.Supp.2d 783, 789 ["proscription against attorney communication with a represented person or party of Rule 4.2 has force even before actual litigation is commenced" and a "proper reading of rule would count as off limits any party with whom a lawyer already has an adverse relationship, whether or not litigation has been filed"]; ***Miano* v. *AC & R Advertising, Inc.*,** (S.D.N.Y.1993) 148 F.R.D. 68, 79 [finding rule applied even to prelitigation communication and that actual commencement of litigation was not essential to application of the rule].)

3. Does Rule 4.2 Prohibit Communication with *Former* Members of Corporations or Businesses?

On its face, Rule 4.2 only bars communication with a person who is a "***current*** officer, director, partner* or managing agent of the organization" or "***current*** employee, member, agent, or other constituent" of the "represented corporation, partnership, association or other private or governmental organization . . ." (CRPC Rule 4.2(b)(1) & (2).)

Case law interpreting the analogous language in Rule 2-100 and Rule 7-103 have held the prohibition of the rule on communications with member of the organization being prosecuted did not apply to former members of the organization – even though neither Rule 2-100 nor Rule 7-103 expressly qualified the prohibition on contact by limiting it to "current" members of the organization as does Rule 4.2. (**See *State Farm Fire & Casualty Co. v. Superior Court*** (1997) 54 Cal.App.4th 625, 652; ***Continental Ins. Co.* v. *Superior Court*** (1995) 32 Cal.App.4th 94, 119 [Rule 2-100 does not apply to former employees]; ***Nalian Truck Lines, Inc.* v. *Nakano Warehouse & Transportation Corp***. (1992) 6 Cal.App.4th 1256, 1262.)

However, attorneys who speak with former employees of an organization should not seek to elicit privileged information. (**See** CRPC 4.3(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."]; ***Muriel Siebert & Co., Inc.* v. *Intuit Inc.*** (NY 2007) [868 N.E.2d 208, 211 [citing to ABA Comm. on Ethics and Prof. Responsibility Formal Op. 91–359 [1991] for the proposition that "adversary counsel may interview former employees of an opponent but must disclose their role in the matter and whom they represent, and must not induce former employees to disclose privileged communications"]; ***Berger* v. *Home Depot USA, Inc***. (C.D. Cal. 2011) [unreported] 2011 WL 13224880, at p. *4, fn. 3 [citing to ***Terra Intern., Inc.* v. *Mississippi Chemical Corp.***, (N.D. Iowa 1996) 913 F.Supp. 1306, 1316 for the proposition that "an attorney communicating with a former employee of the opposing party may not inquire into privileged attorney-client communications because [a]ny privilege existing between the former employee and the organization's counsel belongs to the organization, and can only be waived by the organization"].)

4. Can an Organization's Attorney Automatically Create an Effective "Blanket" Representation of Every Member of the Organization by Asserting the Attorney-Client Privilege on Behalf of All Members?

Counsel for an organization may not automatically create representation for all members of the organization by asserting a blanket attorney-client privilege and on that basis try to enjoin opposing counsel from any and all contact with employees not covered by the no-contact rule. (***La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court*** (2004) 121 Cal.App.4th 773, 787 [interpreting Rule 2-100]; ***Triple A Machine Shop, Inc.* v. *State of California*** (1989) 213 Cal.App.3d 131, 143 [same].)

5. Does Rule 4.2 Only Apply When the Prosecutor Has Actual Knowledge an Employee of an Organization is Represented?

In order to run afoul of Rule 4.2 by communicating with a represented member (i.e., constituent) of an organization, an attorney must have *actual* knowledge that the member is represented by the organization's counsel. (**See *Snider* v. *Superior Court*** (2003) 113 Cal.App.4th 1187, 1214 [interpreting Rule 2-100]; ***Truitt* v. *Superior Court (Atchison, Topeka & Santa Fe Ry. Co.)*** (1997) 59 Cal.App.4th 1183, 1188 [same] ***Jorgenson* v. *Taco Bell Corp.*** (1996) 50 Cal.App.4th 1398, 1401 [same].) The rule is not violated just because the attorney "should have known" that the other person was or would be represented. (**Ibid**.) And knowledge that the organization employs corporate counsel *in general* does not trigger the rule. (**Ibid**.)

However, if there is a reason to believe that the employee is represented, it may be considered circumstantial evidence of actual knowledge. (**See *Snider* v. *Superior Court*** (2003) 113 Cal.App.4th 1187, 1215–1216.) Thus, in cases where a prosecutor "has reason to believe that an employee of a represented organization might be covered by [Rule 4.2], that [prosecutor] would be well advised to either conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee. A failure to do so may, along with other facts, constitute circumstantial evidence that [the prosecutor] had actual knowledge that an employee fell within the scope of [Rule 4.2]. It might further provide support for a more drastic sanction if a violation of [Rule 4.2] is found." (**Ibid** [bracketed information added by IPG].)

Prosecutors should attempt to learn pre-interview whether Rule 4.2 would bar communications with a current member of an organization either because (i) the person is a "current officer, director,

partner or managing agent of the organization" or (ii) the intended subject of the communication is "any act or omission of such person in connection with matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability." (CRPC Rule 4.2(b)(2).) If that information cannot be obtained pre-interview, once actual contact is made, [a prosecutor] should ***first*** ask questions that would establish the employee's status within an organization before moving to substantive questions." (***Snider* v. *Superior Court*** (2003) 113 Cal.App.4th 1187, 1216 [bracketed information and emphasis added by IPG].) That is, a prosecutor or agent of the prosecutor should begin the communication by asking questions geared toward determining whether the member is a current officer, director, partner or managing agent of the organization or if the member fills a role in the organization such that an act or omission of the person could be binding upon or imputed to the organization.

M. Does CPRC Rule 4.2 Prevent Prosecutors from Calling Represented Persons to Testify Before a Grand Jury About the Subject of Representation?

There do not appear to be any California cases addressing the question of whether the "no contact" rule prohibits prosecutors from calling represented persons to testify before a grand jury.

However, the issue was addressed in the federal Second Circuit case of ***United States* v. *Schwimmer*** (2d Cir. 1989) 882 F.2d 22. In ***Schwimmer***, prosecutors attempted to compel the testimony of a represented defendant before a grand jury by granting him use immunity. The defendant had been convicted of a crime whose appeal was pending at the time and was compelled to testify before a grand jury on matters that were the subject of his conviction. The defendant refused to testify and was held in contempt. He appealed the contempt finding. On appeal, defendant claimed the prosecutor could not question him before the grand jury without violating the no contact rule (ABA Code of Professional Responsibility Disciplinary Rule 7–104(A)(1)). (***Id***. at pp. 23-24, 28.)

The ***Schwimmer*** court held the grand jury appearance and questioning fell within the "authorized by law" language of Rule 7–104(A)(1). In making this finding the court noted that the federal rule of criminal procedure prohibited the presence of counsel, other than attorneys for the government, inside the grand jury room, that the defendant was not the target of the investigation, and that his testimony was immunized. (***Id***. at p. 28 [and also finding a grand jury witness who has an appeal pending from a prior criminal conviction has no absolute Sixth Amendment right to have counsel present inside the grand jury room]; **see also *In re Newell*** (Oregon 2010) 234 P.3d 967, 974 [albeit

holding "authorized by law" exception to no contact rule did not permit attorney to subpoena and depose a former employee of a company regarding former employee's embezzlement of funds from the company without the former employee's criminal counsel being present].)

N. Can Evidence Derived from a Violation of Rule 4.2 Be Suppressed?

Even assuming there is a violation of Rule 4.2, evidence stemming from the contact should not be suppressed in a California court unless the contact simultaneously constitutes a violation of the federal Constitution. (**See** California Constitution, art. I, § 28(f) ["Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . ."]; **cf.**, ***People* v. *McKay*** (2002) 27 Cal.4th 601, 608 [since the passage of Proposition 8, the California state Constitution "forbids the courts to order the exclusion of evidence at trial as a remedy for an *unreasonable search and seizure* unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court", emphasis added]; ***State* v. *Porter*** (NJ 1986) 510 A.2d 49, 54-55 [violation of an ethical rule that does not rise to the level of deprivation of a constitutional right cannot, by itself, result in the exclusion of evidence].)

It is not even clear whether *federal* courts are empowered to exclude evidence based solely on a violation of the ethical rule barring communication with represented and charged defendant. (**See *United States* v. *Harrison*** (9th Cir. 2000) 213 F.3d 1206, 1215.) In dicta, some federal opinions have indicated a court is potentially empowered to exclude evidence obtained in violation of the no-contact rule. (**See e.g, *United States* v. *Powe*** (9th Cir.1993) 9 F.3d 68, 69 [albeit declining to exclude in case before it]; ***United States* v. *Hammad*** (2nd Cir.1988) 858 F.2d 834, 842 [same]; ***United States* v. *Koerber*** (D. Utah 2013) 966 F.Supp.2d 1207, 1245 [holding federal prosecutor's purportedly egregious conduct violating both the no-contact rule and an "internal agency procedure" (the ***McDade*** Amendment) constituted a violation of due process meriting suppression of information gathered during communications with represented person].).) However, most other federal courts to weigh in on the issue find no basis for excluding evidence. (**See *United States* v. *Heinz*** (5th Cir. 1993) 983 F.2d 609, 613–614 [noting their research "shows that no court has ever suppressed evidence in a criminal case because a prosecutor ... violated DR 7-104(A)(1) in the course of an investigation and before the grand jury indicted the defendant"]; **accord *United States* v. *Joseph Binder Schweizer Emblem Co.*** (E.D.N.C. 2001) 167 F.Supp.2d 862, 866.)

O. What Should a Prosecutor Do If He or She Has Doubts About Whether an Intended Communication Violates Rule 4.2?

If a prosecutor has doubts about whether an intended communication might violate Rule 4.2, it is recommended that judicial guidance/authorization be obtained. As discussed in ***San Francisco Unified School District ex. rel. Contreras* v. *First Student, Inc***. (2013) 213 Cal.App.4th 1212, "California courts have held that attorneys should resolve doubts about whether communications violate the rule by avoiding suspect communications and seeking court guidance. (***Id***. at p. 1233.)

Courts may balk at providing such ex parte advice and/or giving authorization to a requested communication. However, between the appellate court's advice in ***San Francisco Unified School District ex. rel. Contreras* v. *First Student, Inc***. (2013) 213 Cal.App.4th 1212 as to how to proceed when application of Rule 4.2 is unclear and Rule 4.2's safe harbor provision specifically allowing communications with represented person if authorized by court order, prosecutors should be able to calm any judicial fears that providing such guidance is inappropriate. This is especially true when the communication sought relates to a person who has not yet been charged with a crime that is the subject of the communication – as will usually be the situation.

III. Ethical Limitations on Relations Between Unrepresented Persons and Prosecutors (or Their Agents)

In November of 2018, a new rule of professional conduct (Rule 4.3) governing the interaction between attorneys and unrepresented persons goes into effect. There was no previous version of this rule in effect in California. Thus, unlike 4.2, there is no California law interpreting how the rule should be applied. However, subdivision (a) of Rule 4.3 is based on ABA Model Rule of Professional Conduct 4.3 and contains very similar language. And subdivision *(b)* of Rule 4.3 is based in part on language from the *Comment to* ABA Model Rule of Professional Conduct 4.3. Many states base their own rules of professional conduct on the ABA model rules so cases interpreting comparable versions of Rule 4.3 can provide some guidance.

Two subdivisions of CRPC Rule 3.8 specifically govern the interactions of *prosecutors* with unrepresented persons. They have been in effect in California since November of 2017. They were initially enacted as Rule 5-100 (B) and (C). However, as of November 2018, they have been re-designated as subdivisions (b) and (c) of Rule 3.8. Before November 2017, there was no previous

version of those subdivisions in effect in California. Thus, like Rule 4.3, there is no California law interpreting how these subdivision of Rule 3.8 should be applied. However, these two subdivisions are based on subdivisions (b) and (c) of ABA Model Rule of Professional Conduct 3.8 and contain very similar, albeit not identical language to the ABA rule. Since many states have comparable rules based on the ABA Model Rule's version, prosecutors can find guidance in interpreting these versions of CPRC Rule 3.8(b) and (c) from cases in other states interpreting comparable ethical rules.

We discuss both of these rules below.

A. The Language of the New Rule of Professional Conduct Governing Communications with Unrepresented Persons: Rule 4.3

Rule 4.3 Communicating with an Unrepresented Person

(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 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." (CRPC Rule 4.3.)

As explained in paragraph [1] of the Comment to Rule 4.3: "This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client."

ABA Model Rule of Professional Conduct 4.3 has comparable language to subdivision (a) but not subdivision (b) of CRPC 4.3. However, the Comment to ABA MRPC 4.3 has language that was incorporated into subdivision (b) of CRPC 4.3.

The language of Rule 4.3 should be read in conjunction with the language of those subdivisions of Rule 3.8 (which generally describes the special responsibilities of a prosecutor) when it comes to communication with "accused" persons who do not yet have representation. (**See** this IPG, section III-B at p. 57.)

B. The Language of the New Rule of Professional Conduct Governing Prosecutorial Relations With Unrepresented but "Accused" Persons: Subdivisions (b) and (c) of Rule 3.8

CRPC Rule 3.8 Special Responsibilities of a Prosecutor

"The prosecutor in a criminal case shall:

¶

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonably opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona; . . ."

C. Are Prosecutors Prohibited from Questioning an Unrepresented and Person (Charged or Uncharged) by Rules 4.3 or 3.8?

As indicated above, Rule 4.2 does not impose any barriers to a prosecutor communicating with an unrepresented person. (**See** this IPG, section II-E at p. 28.) Indeed, paragraph [8] of the Comment to Rule 4.2 allows most investigative communications with even represented persons of the kind most likely to be engaged in by prosecutors: "prosecutors and other government lawyers are authorized to contact ***represented*** persons either directly or through investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law" and that "the rule is not intended to preclude communications with ***represented*** persons in the court of such legitimate investigative activities as authorized by law." (Emphasis added by IPG.) Certainly, any communications lawfully permitted between prosecutors and represented person should also be lawful if those same kinds of communications are between prosecutors and unrepresented persons. But does either Rule 4.3 or 3.8 impose *any* barriers or limitations on communications with unrepresented persons?

The American Bar Association Model Rule 4.3, upon which CRPC 4.3(a) is patterned, "does not place an affirmative obligation upon the lawyer to disclose that he represents a client in connection with the subject matter of the contact. Rather, it merely places the burden upon the lawyer to make no statements or otherwise imply that the lawyer is disinterested." (***People* v. *Pautler*** (Colo. O.P.D.J. 2001) 35 P.3d 571, 581.) However, if it is not obvious to an unrepresented person being interviewed by a prosecutor that the prosecutor is seeking to elicit information to facilitate a prosecution of the person, Rule 4.3(a) might require the prosecutor to at least identify himself as a district attorney or prosecutor as a means of showing he or she is not a disinterested party.

Paragraph [2] of the Comment to Rule 3.8, in pertinent part, provides: "Paragraph (c) of Rule 3.8 does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent."

The Comment appears to be trying to clarify that obtaining a waiver of the ***Miranda*** rights will not run afoul of subdivision (c) of Rule 3.8's prohibition on seeking to obtain a waiver of important pretrial rights. However, it could (but should not) be read as implying that subdivision (c) somehow forbids the lawful questioning of a charged suspect or the noncustodial questioning of an uncharged suspect who has not waived his right to counsel or silence.

Subdivision (b) of Rule 3.8 states the prosecutor has an obligation to ensure a person charged with a crime (an accused) has been advised of the right to counsel and been given a reasonable opportunity to obtain counsel. It does not state when such advice must be given. There are not many (and maybe no) cases involving violations of this rule. Presumably, this just means that a prosecutor should ensure that a defendant is made aware at some point of the right to an attorney (e.g., that defendant has been advised of his or her ***Miranda*** rights). And that if the accused asserts his or her right to counsel, a prosecutor should ensure the accused is given an opportunity to exercise that right. Albeit, the rule does not speak to when the opportunity must be provided.

D. Are Prosecutors Prohibited from Negotiating a Plea Bargain with an Unrepresented Person?

With the possible exception of the case of ***State* v. *Farfan-Galvan*** (Idaho 2016) 389 P.3d 155, there does not appear to be any case that has decided whether a prosecutor can negotiate a plea bargain with an unrepresented person. Thus, the remaining discussion reflects mere speculation on

the part of IPG of how the issue *might* be analyzed if the issue were to be decided by a California court.

Paragraph [2] of the Comment to Rule 4.3, in part, states: "This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer discloses the lawyer represents an adverse party and not the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and underlying legal obligations."

On its face, this comment suggests that, pursuant to Rule 4.3, a prosecutor *could* enter into a plea negotiation with an unrepresented defendant – so long as the prosecutor did not give legal advice to the unrepresented person during the course of that negotiation (**see** CRPC Rule 4.3(a)).

However, subdivision (c) of Rule 3.8 suggests otherwise. Subdivision (c) states a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona". (CPRC Rule 3.8(c).) This rule seems to contemplate that direct negotiations with persons accused of a crime may only take place after a judge has granted the accused pro per status.

True, there is no waiver of rights until the defendant actually enters a plea, but even engaging in a negotiated disposition with a person who agrees to enter a plea of guilty seems like it might entail a waiver of important pretrial rights. Certainly, if the prosecutor successfully persuades a defendant to plead guilty to a charge absent the advice of a defense attorney, the prosecutor would improperly be obtaining a waiver of the right to counsel. This not only seems to run afoul of subdivision (c) but seems inconsistent with the spirit behind (if not the actual language of) subdivision (b)'s requirement that the prosecutor "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonably opportunity to obtain counsel". (CPRC, Rule 3.8(b).)

Moreover, in ***State* v. *Farfan-Galvan*** (2016) 161 Idaho 610, the court observed: "Although not a basis for our decision, we observe that we are aware of the practice by certain prosecuting entities of initiating contact with defendants while they are in custody in advance of their initial appearance or arraignment in order to extend plea offers which, if not accepted, expire at the time of the initial appearance or arraignment. We take this opportunity to express our disapproval of this practice. In

our view, the practice of establishing the initial appearance or arraignment as the time a plea bargain offer expires has the practical effect of dissuading indigent defendants from seeking the assistance of court-appointed counsel to evaluate the offer. At a minimum, we view such conduct as violating Idaho Rules of Professional Conduct 3.8(b), 3.8(c) and 8.4(d)." (***Id***. at p. 612, fn. 2.)

*__Editor's note:__ Subdivisions (b) and (c) of the Idaho Rule of Professional Conduct 3.8 are very similar to subdivisions (b) and (c) of the CRPC 3.8. Idaho Rule of Professional Conduct 8.4(d) is identical to California's Rule of Professional Conduct 8.4(d) – both of which provide that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

The above discussion should not be taken as indicating that Rule 3.8 prevents a prosecutor from simply communicating with an unrepresented person about a crime committed by the person. It does not. (**See *State* v. *Porter*** (N.J. Super. Ct. App. Div. 1986) 510 A.2d 49, 54.)

Though, of course, in any circumstance where a prosecutor would be constitutionally or ethically barred from conducting an investigatory interview with an accused, the prosecutor would also be barred from directly conducting plea negotiations with that defendant. (**See *People* v. *Moore*** (1976) 57 Cal.App.3d 437, 441 ["It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval."]; ***United States* v. *Lopez*** (9th Cir. 1993) 4 F.3d 1455 [prosecutor violated Rule 2-100 by conducting plea negotiations with a represented defendant].)

It is best to avoid engaging in plea bargaining with an unrepresented defendant. However, if a prosecutor chooses to risk entering into plea negotiations with an unrepresented person, the prosecutor should, at least, adhere to the following guidelines:

1. No Interference With Right to Counsel

To avoid any claims that plea negotiations were an attempt to undermine or interfere with a suspect's right to counsel, it should be made clear to the suspect that the prosecutor's offer is not contingent upon whether the suspect retains or does not retain counsel. (**Cf.**, ***Boulas v. Superior Court*** (1986) 188 Cal.App.3d 422, 430[dismissal of case based on intentional interference by law enforcement personnel with defendant's relationship with his attorney which occurred when defendant was told that he would not be able to secure plea bargain so long as he was represented by his current attorney].) Defendants should be told they have a right to an attorney and should be given every reasonable opportunity to consult with an attorney of their choice. (**See** CRPC, Rule

3.8(b); Ethics Line 1992-2, p. 13, citing to CDAA Ethics and Responsibility for the California Prosecutor, Section 5.3(c).)

2. No Legal Advice Should Be Provided

CRPC Rule 4.3 (a) prohibits a lawyer who knows that the interests of the unrepresented person are in conflict with the interests of the client (i.e., the government, when the attorney is a prosecutor) from giving legal advice to the unrepresented person. Government Code section 26540 prohibits a deputy district attorney from defending or assisting in the defense of or acting as counsel for any person accused of any crime in any county. (66 Ops. Cal. Atty. Gen. 30.) At least one prosecutorial ethics publication (Ethics Line 1992-2, p. 12) has interpreted this as meaning a prosecutor is strictly prohibited from giving legal advice to a defendant in a criminal case. Business and Professions Code section 6131(a) makes it a misdemeanor for a prosecutor to directly or indirectly advise, aid, or promote the defense of any action or proceeding in any court if the action is carried on, aided or promoted by that same prosecutor or other public prosecutor in the same office. This section has been interpreted by the same ethics publication (Ethics Line 1992-2, p. 12) as making it a misdemeanor for a prosecutor handling a civil or criminal case to give legal advice to a defendant in the same case. (Ethics Line 1992-2, p. 12.)

3. No Misrepresentations May Be Made

Paragraph (c) of CRPC 8.4 renders it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation. Although law enforcement may engage in deceit and fabrication during an investigatory interview (**see e. g.**, Paragraph [5] of the Comment to CRPC Rule 8.4; ***People* v. *Thompson*** (1990) 50 Cal.3d 134, 166-167; ***People* v. *Watkins*** (1970) 6 Cal.App.3d 119, 124-125), this would not protect a prosecutor who engages in misrepresentation while negotiating a plea with an unrepresented defendant. (**See also** CRPC Rule 4.1 ["In the course of representing a client a lawyer shall not knowingly: (a) Make a false statement of material fact or law to a third person"].) Moreover, a prosecutor must be careful not to convey the impression the defendant is potentially facing more charges than *admissible* evidence would support. (**See** ABA Standard for Criminal Justice 14-3.1(h) ["In connection with plea negotiations, the prosecution should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges or the prosecuting attorney has no good faith intention of pursuing those charges."].)

4. Negotiations Should Be Kept Separate From the Investigatory Interview

Prosecutors conducting an interview with a defendant that begins as an investigatory interview should not engage in plea negotiations until the investigatory interview is completed. A clear distinction should be drawn between the investigatory interview and plea negotiations. There are two good reasons for this:

First, the investigatory interview must be determined to be voluntary in order for it to be admissible in court. A promise of leniency (even if only implied) can render a statement involuntary. (**See *People* v. *Cahill*** (1994) 22 Cal.App.4th 296, 316; ***United States* v. *Weiss*** (5th Cir. 1979) 599 F.2d 730, 737 ["a confession founded on a violated plea bargain or promise of immunity is not considered voluntary"].) If negotiations are intertwined with the investigatory interview, it may appear that defendant's statements are being made in the hopes of obtaining the deal being discussed and, at the very least, result in extensive litigation over the issue if not exclusion of the defendant's statements. (**See *Grades* v. *Boles*** (4th Cir. 1968) 398 F.2d 409, 413.)

Second, section 1153 of the Evidence Code makes evidence of an offer to plead guilty inadmissible in a criminal action and Penal Code section 1192.4 prohibits the admission of evidence of a withdrawn guilty plea. These statutes have been judicially extended to preclude the introduction not only of offers to plead guilty but to admissions which are made in the course or "context" of bona fide plea bargaining. (**See *People* v. *Magana*** (1993) 17 Cal.App.4th 1371, 1376; ***People* v. *Crow*** (1994) 28 Cal.App.4th 440, 450; ***People* v. *Tanner*** (1975) 45 Cal.App.3d 345, 352-353; **cf.**, ***People* v. *Crow*** (1994) 28 Cal.App.4th 440, 453,fn. 7 [it is an open question whether the judicial extension of the rule barring use of statements made in the course or context of plea bargaining has survived Prop 8].) The prohibition applies to plea negotiations made directly between a defendant and a prosecutor outside the presence of counsel. (***People* v. *Hamilton*** (1963) 60 Cal.2d 105, 112.) If plea negotiations are intertwined with an investigatory interview, there is a potential risk that the entire statement may be excluded (**see *State* v. *Watford*** (NJ 1991) 618 A.2d 358, 362), although it would still be admissible for purposes of impeachment. (***People* v. *Macias*** (1997) 16 Cal.4th 739, 756; ***People* v. *Crow*** (1994) 28 Cal.App.4th 440, 452; **see also *United States* v. *Mezzanatto*** (1995) 513 U.S. 196 [holding a prosecutor may impeach the defendant with statements he made during plea negotiations].)

5. Avoid Delaying the Process of Arrest to Engage in Negotiations

The Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. (***County of Riverside* v. *McLaughlin*** (1991) 500 U.S. 44, 47 [citing to ***Gerstein* v. *Pugh*** (1975) 420 U.S. 103].) A "jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." (***County of Riverside* v. *McLaughlin*** (1991) 500 U.S. 44, 56.) However, even a probable cause determination provided within 48 hours may "nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for dela"s sake." (***County of Riverside* v. *McLaughlin*** (1991) 500 U.S. 44, 56.) In general, engaging in conduct to bolster a case is not considered to be an unreasonable delay under ***McLaughlin***. (**See *United States* v. *Sholola*** (7th Cir. 1997) 124 F.3d 803; ***United States* v. *Daniels*** (7th Cir.1995) 64 F.3d 31.) This includes interrogating a suspect about the crimes for which he was just arrested. (**See *Riney* v. *State*** (Alaska App. 1997) 935 P.2d 828; ***State* v. *Chapman*** (1996) 471 S.E.2d 354, 356; ***Peterson* v. *State*** (Ind.App.1995) 653 N.E.2d 1022, 1025.) However, the same might not be said for a delay to engage in plea bargaining.

Similarly, Penal Code Section 825, in pertinent part, states: "(a)(1) Except as provided in paragraph (2), the defendant shall in all cases be taken before the magistrate *without unnecessary delay*, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays." (**See also** Penal Code section 145 ["Every public officer or other person, having arrested any person upon a criminal charge, who ***willfully delays*** to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor"].)

If a defendant is arrested and then brought to a prosecutor for the purpose of negotiations before being brought before a magistrate for a probable cause determination, the defense may argue there was an improper delay. Although it is unlikely that a delay to interview a suspect in order to negotiate a disposition with a defendant will be viewed as an unreasonable or unnecessary delay under (and even more unlikely in the situation where a suspect is released), it is not beyond the realm of possibility that such a delay will be viewed as unreasonable, especially if the court views the delay as an attempt to get around a defendant's right to counsel. Thus, if plea negotiations are going to occur after a suspect has been arrested, the prosecutor may want to obtain a waiver of any statutory or

constitutional right to be brought before a magistrate for a prompt determination of probable cause. (**Cf.**, ***Gorlack* v. *Ferrari*** (1960) 184 C.A.2d 702, 710 [plaintiff, charged with stealing a ring, was held in jail for more than 36 hours was not entitled to complain about the delay where a detective in charge told her she could call an attorney and be released on bail, but also offered to speed up the investigation, which might allow her release without a formal charge and save her the cost of bail bond and attorney's fee because plaintiff acquiesced in the delay].) Although securing this waiver is **very likely** to run afoul of Rule 3.8(c)'s prohibition on obtaining a waiver of important pretrial rights unless the tribunal had approved of the person's pro per status.

1. May a Prosecutor Engage in "Confession Bargaining" Without Running Afoul of Rule 3.8 or 4.3?

Whether a prosecutor can engage in "confession bargaining" with an unrepresented suspect is a different question than whether a prosecutor can engage in plea bargaining. The few cases out there indicate that so long as the bargain is not induced by improper promises and is voluntary, it would be permissible for a prosecutor to agree to a set disposition in exchange for defendant's confession. For example, in the case of ***Pontow* v. *State*** (Wis. 1973) 205 N.W.2d 775, a defendant with "much experience in the criminal process" "initiated hard-headed, arms-length bargaining with the police to attempt to gain favorable treatment." (***Id***. at p. 778.) The defendant volunteered the information that he had been involved in numerous unspecified burglaries. He refused to elucidate on these other crimes on the ground that he had received a 'bum' deal from the police on a previous occasion. He indicated that he would be willing to cooperate if he were assured of fair treatment." (**Ibid**.) "[T]he interrogating detective responded to this suggestion of the defendant by suggesting that perhaps all the crimes could be resolved by a plea of guilty to the single charge. The officer, however, testified that he immediately told the defendant that only the district attorney had authority to make any promises in regard to the charges that would be brought. Defendant had previously stated he wanted to talk to someone in authority." (**Ibid**.) The defendant was then taken to a prosecutor where the defendant initiated a conversation "by suggesting that he be charged with only one offense in return for confessing to several others." (**Ibid**.) The "defendant maintained the bargaining initiative throughout the conference and attempted to secure the assistant district attorney's agreement for a recommendation for concurrent sentences." (**Ibid**.) The prosecutor refused to accede to this request. After the defendant insisted the agreement be in writing, he signed a confession to the crime and to the 17 other burglaries not charged. The confession contained a statement that it was conditioned upon the district attorney's promise that only a single charge be brought." (**Ibid**.) The "defendant

was repeatedly given the full *Miranda* warnings by each of the teams of detectives and by the district attorney. It is conceded that the defendant knowledgeably and voluntarily waived his right to counsel after being fully informed of the extent of that right." (**Ibid**.)

The appellate court recognized that a promise of leniency can potentially render a confession involuntary but found the confession to be voluntary. (**Ibid**.) Moreover, the court recognized that "plea bargaining, as contrasted to confession bargaining herein, contains safeguards which tend to make it more consonant with the ends of justice." (**Ibid**.) Nevertheless, the court rejected the claim that it is "improper under any circumstances for the police and prosecutor to engage in confession bargaining with an unrepresented defendant." (**Ibid**.) The court held where a defendant voluntarily waives his right to counsel, it is "inappropriate to lay down a rule that forbids the prosecutor from discussing the disposition of charges with a defendant who manifestly prefers to negotiate on his own behalf." (**Ibid** [albeit also noting any "confession bargain will be subjected to severe post hoc scrutiny"]; **see also *Harrison* v. *Com.*** (Va. Ct. App. 1986) 349 S.E.2d 167, 169-171 [defendant's statement deemed voluntary where defendant agreed to cooperate and tell the truth in exchange for promise from prosecutor that he would only be prosecuted on three of eight separate bank robberies defendant was suspected of having committed]; ***United States* v. *Weiss*** (5th Cir. 1979) 599 F.2d 730, 737 ["a confession founded on a ***violated*** plea bargain or promise of immunity is not considered voluntary", emphasis added by IPG].)

E. Does Rule 3.8 Prevent a Prosecutor from Obtaining a Waiver of Rights in Order to Allow an Unrepresented Person to Assist in Criminal Prosecutions or Investigations?

Although plea bargaining with an unrepresented person may be improper, it is not improper for prosecutor to seek waivers of pretrial rights when necessary to facilitate an ongoing investigation. Paragraph [2] of the Comment to Rule 3.8 seems to contemplate that communications between prosecutors and unrepresented persons will take place when the prosecutor or law enforcement is seeking the assistance of the person in facilitating a prosecution or investigation into criminal activity. Specifically, that paragraph, in part, states: "Paragraph (c) "does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement operation." (Paragraph [2], Comment to CRPC Rule 3.8.)

-END-

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.