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Cover: Friesian stallions living in a bachelor herd in Arcata, Humboldt County. www.ForestBoyz.com

TALKING TO A REPRESENTED WITNESS

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THE ISSUE

What do I do if there's a witness on my case that I want to interview, and that witness has a lawyer? Many attorneys answer that question with a simple, "I have to ask the other attorney for permission to speak to his client." With few exceptions that is the incorrect conclusion. In almost every situation, asking the witness's lawyer for permission to talk to the witness is a breach of the duty of loyalty to the client. Each situation requires analysis before a determination can correctly be made.

The Controlling Statute, or in This Case, the Controlling Rule and the Case That Interprets It

The starting point with any legal question is figuring out what statute controls the issue. In this case the "statute" is California Rule of Professional Conduct, rule 2-100 which reads as follows:

(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

(C) 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.

(D) 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.

The first question is, "What does the plain language of the 'statute' say?" The plain language says that a lawyer cannot communicate with a represented party in the lawsuit about the lawsuit without the permission of that party's attorney. The next question is, "Who is a 'party'?" The clear and only answer is a party in the lawsuit, but if that's not clear enough, the case that interprets the rule defines a "party" as a party in the lawsuit.

Case Study One: Talking to a Represented Witness With a Completely Unrelated Case

Here's the easiest analysis, which I call the "ABC" situation, because it's as easy as ABC. The players are as follows:

Andy: Your client;
Bob: The represented witness;
Charlie: The represented witness's lawyer (Bob's lawyer);
Dave: You;
Edward: The co-defendant;
Frank: The co-defendant's lawyer (Edward's lawyer).

You (for purposes of the discussion your name is Dave) represent Andy, who is charged with a petty theft,[1/] along with co-defendant Edward, who is represented by a buddy of yours, Frank. Andy tells you that his friend, Bob, saw the theft happen and that if you go talk to Bob, he'll tell you that he was there and saw some other dude do it, and that he saw Andy minding his own business on the other side of the store. Now it looks like this case is going to be wrapped up with one quick interview. The only problem is that Bob has a completely unrelated pending capital murder case,[2/] in which he's represented by your buddy Charlie. Charlie is not a part of your law firm, because if he is, that involves a different longer analysis of potential conflict. You're pretty sure that if you go ask your buddy Charlie for permission to talk to Bob that he's going to say, "No," or will tell Bob not to talk to you. There may even be a culture of professional courtesy in your jurisdiction of not talking to a represented person without getting permission from that person's lawyer.

Should you interview Bob without getting permission from Charlie? Should you ask Charlie for permission to talk to Bob, even though you know that's going to silence Andy's only witness and take him from an almost sure acquittal to an almost assured conviction? The smart thing to do is figure out what the law is and follow the law, whatever the

professional courtesy may or may not be. The answer to the question is that you can interview Bob without Charlie's permission, and that you must interview Bob without contacting Charlie, and if you do contact Charlie, you are violating your duty of loyalty to Andy.

The Controlling Case:
***In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798**

The rule is perfectly clear in its plain language that it does not apply to an interview of Bob, because Bob is not a "party" in any lawsuit in which Andy is a party. However, if one were to make an argument that the plain language of the rule says something more, or something different, that argument falls flat, because *Dale* interprets the rule as meaning exactly what it says and nothing more.

Dale concludes that "party" means a party in the lawsuit, and that is the single determining factor: is the person to be communicated with a party in the lawsuit? If the person is a party in a different lawsuit, that person **can** be communicated with, period. In this case, Bob is a party in a different lawsuit, the case of *People v. Bob*; he is not a party in the *People v. Andy* lawsuit, therefore, Andy's attorney Dave is allowed to communicate with Bob.

If a person is a party in the same lawsuit, Rule 2-100 applies. In this case, that would be Edward, and only Edward—everyone else in the world can be communicated with no matter what their relationships may be to the case. For Edward, there are follow-up questions: is the communication about the "subject of the representation," or in other words, is the communication about the subject of the lawsuit, as opposed to just talk about matters unrelated to the lawsuit? The next follow-up question is whether the party is, ". . . represented by another lawyer in the matter." In other words, does the party in this lawsuit have a lawyer in this lawsuit? In this case, Dave knows that Edward is represented by Frank, and therefore, Dave cannot talk to co-defendant Edward without getting permission from Edward's lawyer, Frank. But that's not your question; you want to talk to Bob; he's the witness that saw some other dude do it.

The Rule Established by the *Dale* Case

Dale doesn't just establish a rule; it also gives a guideline as to what not to do when communicating with a represented witness. It's best to know the *Dale* case before interviewing a represented witness. Dale did not get into trouble with the State Bar for talking to a represented witness, however, he did get into trouble, and was suspended, for **how** he talked to the represented witness. *Dale* establishes a clear rule as to who is a "party" -- a named party in the lawsuit -- that part is easy and clear. *Dale* also goes through all the unseemly things that Dale did, and which were found to be acts of moral turpitude, which result in a "Don't Do This While Talking to a Represented Witness" list. Dale's behavior was extreme and can be easily avoided, but knowing what he did before interviewing a represented witness is critical.

Dale involved two different lawsuits resulting from one crime. On June 11, 1996, Darryl Geyer set fire to an apartment building at 1011 Bush Street in San Francisco. One person was killed in the fire, "several" people "were injured, and many suffered property damage."[3/] Geyer was charged with murder with an arson murder special circumstance, 13 counts of arson and auto theft in the case of *People v. Geyer*. Geyer's appointed counsel for the *People v. Geyer* case was Kenneth Quigley. There was another case where William Burke and several tenants of the building which Geyer set ablaze hired Joshua Dale to represent them in a separate lawsuit against Grace Chen, the owner of the building. That separate lawsuit was *Burke v. Chen*. Geyer was not a defendant in the *Burke v. Chen* case. He was only a "party" in *People v. Geyer*, the separate case that stemmed from the same events.

Dale was operating before the clear rule established by the *Dale* case, and at that time, he asked Quigley, Geyer's attorney on the separate case of *People v. Geyer*, for permission to interview Geyer as part of his representation of Burke in the separate *Burke v. Chen* case. Quigley refused to grant permission to Dale to interview Geyer and advised Geyer that he should not talk to Dale. Despite Quigley having refused permission, Dale went to the jail to interview Geyer. Pursuant to rule 2-100, the contact was permissible, because Geyer was not a party in the *Burke v. Chen* lawsuit.

The jail visit occurred after Geyer had pled guilty to arson and had been found guilty of second degree murder, but before Geyer was sentenced to 20 years to life in prison. At the jail, visit Geyer said that he needed to speak to Quigley before he would submit to an interview. Geyer followed up on the conversation by sending a letter to Dale explaining that he hadn't been able to get in contact with Quigley and therefore, would not be willing to submit to an interview.

Dale then went to the jail five more times, all before Geyer was sentenced, to talk to Geyer. The Bar Opinion in *Dale* states:

> The purpose of these visits was to befriend Geyer in order to cultivate him as a favorable witness in [Dale's] personal injury case. During these visits, they discussed current events, the challenges of life in jail and Geyer's hopes and dreams, in addition to his involvement as a witness in the *Chen* case.[4/]

After Geyer was sentenced, and after Quigley had filed a Notice of Appeal listing Geyer as acting in propria persona, Dale went to the prison where Geyer was housed and presented Geyer with a contract for services where Dale would be Geyer's attorney or witness at his parole hearing,[5/] in exchange for Geyer signing a pre-typed declaration as to how the arson occurred. Dale assured Geyer that the declaration could not be used against him in his appeal. Before signing the declaration in which Geyer admitted to setting the building on fire for no apparent reason, an addendum was added in Dale's handwriting stating that Dale had assured Geyer that the declaration could not be used against Geyer in his appeal in his separate case of *People v. Geyer*.

Dale then filed the declaration in his separate *Burke v. Chen* case. Quigley appears to have immediately found out about the declaration, because he demanded that Dale withdraw the declaration, and within two days of the declaration being filed, he sent Dale a scathing letter. The next day Dale sent Geyer a letter which read:

> Kenneth Quigley is trying to get my law license for talking to you, even though you'd fired him, and he wasn't even your attorney after

> sentencing. I'd say you should expect a visit or letter from him, or his representative, soon. . . . I'll write to you soon regarding all the commotion that your declaration has created. I again think that your telling the truth is the best thing you could have done.[6]
>
> [Dale] communicated with Geyer on at least three other occasions for the purpose of currying his favor as a witness at the upcoming civil trial. For example, one letter, dated November 3, 1999, said, "*Your declaration saved the tenants' case*. Thank you. Your letter of apology is spectacular, and the tenant will, and some have already, forgive [*sic*] you for the disruption to their lives. You have much to be proud of and I look forward to visiting soon. . . . you are a special person on earth. . . . [Emphasis in the original.]"[7]

Eventually, John Jordan was appointed as Geyer's appellate attorney. Dale continued to write to Geyer after Jordan was appointed. In one of those letters he attempted to drive a wedge in the attorney-client relationship between Jordan and Geyer by saying, "I'd really be careful with any promises if they've seen you. They are the ones that got you convicted, remember?" Dale also "persisted with his cultivation of Geyer's friendship, stating: 'I'm enclosing some things for you like before. . . .'"[8]

Three days after sending that letter, Dale filed a motion in the *Burke v. Chen* case to transport Geyer for trial. Dale did not give Jordan notice that he was making a motion to transport Geyer for trial. Without Jordan present, the motion to transport Geyer was granted, which resulted in the *Burke v. Chen* case settling for $400,000.00. Dale "never again communicated with Geyer, and he provided no further legal assistance to him. Geyer lost his appeal, although his declaration did not affect the outcome."[9]

The holding in the *Dale* case is broken into two very distinct parts: that for which Dale did NOT get into trouble with the Bar and that for which he did get into trouble with the Bar.

The Rule as Applied to Case Study One: The Witness With a Completely Unrelated Case

For our purposes in analyzing the "ABC" scenario, the "statute" begins: "While Dave [remember you're Dave] is representing Andy, Dave shall not communicate directly or indirectly about the subject of the representation . . ." So far Dave is being told not to talk about the case. Dave is free to talk about things other than the case, such as sports, the weather, or any other small talk, with anyone including a "party."

The next thing is to figure out with whom Dave cannot talk about the case as stated in the plain language of the rule. It goes on to read: ". . . with a party . . ." There is nothing in the rule to lead one to believe that a "party" is anyone beyond a party to the lawsuit. The rule even further defines "party" in 2-100(B), and nowhere there does it say anything about witnesses. So, to finish the reading of the rule for this particular case, it reads, "While Dave is representing Andy, Dave shall not communicate directly or indirectly about the subject of the representation with a party." The parties in Dave's case are the plaintiff, the People of the State of California, and the defendants, Andy and Edward. Dave's case is *People v. Andy and Edward*; therefore. Dave cannot communicate with Edward about the case, without Edward's lawyer's permission, because Edward is a party in the lawsuit. Bob simply is not a party. Dave can, and must, interview Bob without alerting Charlie, and alerting Charlie would violate Dave's duty of loyalty to Andy.

The rule goes on to read, ". . . the member knows to be represented by another lawyer in the matter," or in this case, ". . . Dave knows to be represented by another lawyer in the lawsuit of *People v. Andy and Edward*." The "matter" in this case is the case of *People v. Andy and Edward*. If the witness is represented in a different "matter," such as *People v. Bob*, rule 2-100 simply does not apply.

Case Study Two: The Represented Witness Committed the Crime

The next scenario, which I call the "Socrates, Plato, and Aristotle," or more accurately the "Plato did it" scenario, is where you represent Socrates in the petty theft, and Socrates tells you that Plato did it, and Plato will admit it to you if you go talk to him. Plato is of course represented by your buddy Aristotle on his unrelated capital murder. The conclusion is still the same, but the analysis and duties are different.

Applying the Rule and *Dale* to Case Study Two: The Represented Witness Committed the Crime

Plato is not a party in the case of *People v. Socrates*. He may have his own unrelated *People v. Plato* capital murder case, but he's not a party to Socrates's case. Neither rule 2-100 nor *Dale* establishes a rule that a potential party is a "party" to the lawsuit. They actually both clearly state just the opposite. But there are additional duties to be considered in the Socrates, Plato, and Aristotle scenario that are discussed below.

Dale sets a clear test that is simple and true to the language of the rule. All the lawyer who wants to communicate with someone has to do is follow a simple flow of questions in the order they are presented on the face of the rule: 1) Does Dave want to communicate about "subject of the representation,," in other words, does Dave want to communicate about this very case, *People v. Socrates*? If the answer is no, the issue is resolved, and Dave may communicate about unrelated matters. Dave may chat with Socrates, Plato, or anyone else for that matter, about who's going to win the next Super Bowl, interior decorating, or whatever else, other than the *People v. Socrates* case, that is of interest to everyone involved in the conversation.

If the answer is yes, Dave wants to talk to Plato about the *People v. Socrates* case, then there are more questions: 2) Is the person with whom Dave wants to communicate a named party in the lawsuit or listed under rule 2-100(B)? Remember that neither 2-100(A) nor 2-100(B) says anything about a witness or the guy that really did the crime, they only talk about parties to the lawsuit. So, if the answer is no, the person is not a named party or listed in 2-100(B), the issue is resolved, and Dave may communicate with that person about anything including the *People v. Socrates* case, even if the person is Plato, the guy that really did the crime.

The only question is whether Plato is a party in the *People v. Socrates* lawsuit. If the answer is no, and it clearly is no,

because Plato's name is not part of the case, and he's not listed in 2-100(B), the parties are the plaintiff and Socrates. If the answer is yes, then there are more questions: 3) Does Dave know that the person with whom he wants to communicate is represented "in the matter"? If the answer is no, the issue is resolved. In this case there are no co-defendants so the answer has to be no. The lawyer may communicate about the case with the party that he believes to be unrepresented.[10/]

If the answer is yes, the person is a named co-defendant (and in this example Plato is not a named co-defendant), then there is one more question: 4) Does Dave have the consent of the lawyer of the other party in his lawsuit? If the answer is yes, the issue is resolved, and Dave may communicate with the other party in the case. If the answer is no, Dave may not have any communication with a person that is a party in the lawsuit about the subject of the lawsuit.

This means that all the myths such as "Dave can't talk to Plato about Plato's case," "you've got to get permission from any represented witness's lawyer before talking to him," and "it's unethical to talk to a witness whose got his own case without getting permission from his lawyer" are all false. That doesn't mean that Dave doesn't have to be careful when talking a represented witness.

Case Study Three:
The Represented Witness is a Snitch

The "ABC" and "Plato did it" scenarios seem to come up quite often. The snitch witness, Tom, Dick, and Harry, scenario comes up less often, but can lead to the same conclusion, depending on whether the snitch is a named party in the case. The first variation of this scenario is where Tom is charged with an auto theft that he did with Dick. For some reason the D.A. really wants to convict Tom, perhaps he was recently acquitted so the D.A. is ripe to avenge that loss. The D.A. finds Dick, and with the help of Dick's attorney, Harry, they enter into a snitch agreement where Dick will testify against Tom in the *People v. Tom* case, in exchange for a dismissal in an unrelated *People v. Dick* petty theft case. This clearly leads to the same conclusion as the "ABC" scenario that Dave can and must interview Dick, because Dick is not a "party" in the *People v. Tom* lawsuit. It does NOT matter that Dave wants to talk to Dick about an auto theft in which Dick participated. The analysis ends at Dick not being a party in the *People v. Tom* case.

The second variation is where Tom is charged with an auto theft that he did with Dick, and Dick has signed a snitch agreement, with the assistance of his lawyer Harry, with the D.A. to testify against Tom, just as in the prior scenario. However, in this case, Dick is charged with that auto theft, but on a different charging document. Perhaps Dick was caught later so he was charged on a different Complaint, or perhaps the D.A. purposely charged them on separate cases, so they wouldn't have to go to court on the same days. It doesn't matter *why* they have separate cases; it just matters that they have separate cases. The analysis remains the same: Dave may and must interview Dick. It doesn't matter that Dick is charged with the very same crime, it only matters that he's not a party in the *People v. Tom* case and that he has a separate *People v. Dick* case, even though both cases charge the same crime.

In *Dale*, both the *People v. Geyer* and *Burke v. Chen* cases stemmed from the very same arson, just as in this scenario both the *People v. Tom* and *People v. Dick* cases stemmed from the same auto theft. It doesn't matter that the two cases could potentially be consolidated; it only matters that Dick is not a party to the *People v. Tom* lawsuit. If the authors of rule 2-100 wanted a person who could potentially be consolidated to be a party, they could have added, "Any person who could potentially be consolidated or added to the case" to rule 2-100(B), which defines a "party" right in the rule. They clearly chose not to add that language, and *Dale* is very clear that someone who has a different, yet related lawsuit, is not a "party."

The third variation is again where Tom commits an auto theft with Dick, and Dick signs a snitch agreement with the D.A., and again does that with the assistance of his attorney, Harry. But this time Tom and Dick are charged on the same charging document; the case is *People v. Tom and Dick*. Now Dave is going to have to ask Harry for permission to interview Dick. It may seem like a hyper-technical difference, but it is critical because rule 2-100 and *Dale* are clear that the line is drawn at whether or not the witness is a "party" to the lawsuit; and in this scenario, Dick is a party in the *People v. Tom and Dick* case.

All of the California authority on this issue, with the exception of *In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, addresses communication with an opposing party. *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, which is discussed below, deals with a cross-defendant, who is both an opposing party and a co-defendant. The Notes of Decisions under the heading "1. Purpose of Rule" after 2-100 are clear that the purpose of the rule is to prevent attorneys for an opposing party from communicating with a represented opposing party. It is explained in the "Purpose of Rule" that, "An important reason why the ethical rules bar ex parte communication is that statements made by the uncounseled party to an *opposing* attorney might be offered against that party as admissions in court, thereby seriously damaging the case." (Emphasis added.) *Dale* cites and quotes federal authority, *United States v. Lopez* (1993) 4 F.3d 1455:

> The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by *opposing counsel* . . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with a *lawyer for the opposition* [emphasis added].[11/]

Dale then cites and quotes California authority, *Mitton v. State Bar* (1969) 71 Cal.2d 525, where again the discussion only concerns *opposing* parties. There is no specific mention of co-defendants in either rule 2-100 or the Notes of Decisions after the rule.

The only case that somewhat addresses co-defendants is *Chronometrics, Inc. v. Sysgen, Inc., supra*, 110 Cal.App.3d 597, in which the person with whom the communication took place was a cross-defendant, and therefore, both an opposing party and a co-defendant. In *Chronometrics*, the communication was between Eugene Albertini, attorney for the plaintiff, Chronometrics, Inc., and Harold Fatt, who was a cross-defendant in the *Chronometrics, Inc. v. Sysgen, Inc.* lawsuit. Bruce Speiser was Fatt's

attorney. In his declaration, Fatt stated that Albertini was the lawyer for "parties adverse to him."[12] The communication concerned settling the portion of the case where Chronometrics, Inc. and Fatt were opposing parties and Albertini's attempts to drive a wedge between Fatt and Speiser. The Appellate Court allowed Albertini, but not his entire firm, to be disqualified from the case by the trial court for communication with Fatt. Even though the case technically involved a co-defendant, it was actually about communication with an opposing party. With all the authority (other than *Dale*, which allows communication with the witness) addressing opposing parties, it would seem that rule 2-100 should only apply to opposing parties, but a broad reading of *Dale* would include co-defendants who are actually named in the lawsuit.

That for Which Dale Did NOT Get Into Trouble with the Bar

Dale did NOT get into trouble for communicating with Geyer, and in coming to that conclusion, the Bar Review Department judges established a bright line, exceedingly clear, definition of a "party" for purposes of California Rule of Professional Responsibility, rule 2-100.

"Party" State vs. "Person" State

One of the foci of the holding is the issue of states electing in their similar "no contact" rules to be either "party" states or "person" states. This is discussed at length in footnote 6, which reads as follows:

> Versions of this "no contact" rule are in effect in all fifty states. Twenty-seven states use the term "party" in their analogous rules to rule 2-100. Of those, eighteen states (Alabama, Arkansas, Arizona, Colorado, Connecticut, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, West Virginia, Wisconsin, and Wyoming) have provided drafter's Commentary to expressly clarify that the rule covers any person whether or not a party to a formal proceeding. Twenty-two states use the word "person" and clearly intend the rule to prohibit communications with any person who is represented by counsel, whether or not a party in a proceeding (Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Vermont). (*In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, 804.)

The conclusion was that California is a "party" state and that they needed to define "party" in order for the rule to be comprehensible. Dale made two arguments in his defense. The first argument was a specious argument that Geyer was not represented when the interviews occurred. This was clearly not the case, because there were at least five meetings while Geyer was represented by Quigley and two meetings while Geyer was represented by Jordan. However, the second argument that Dale made prevailed, and that was that Geyer was not a party in the lawsuit in which Dale was engaged. Geyer was not a party in *Burke v. Chen*, just as Bob is not a party in *People v. Andy and Edward*, Plato is not a party in *People v. Socrates*, and Dick is not a party in *People v. Tom*. The Bar Review Department Court was very clear that Dale's second argument could not be dispatched, as was his first argument. The ruling reads as follows:

> [Dale's] second contention that rule 2-100 is inapplicable because Geyer was not a represented "party" in the *Burke v. Chen* personal injury suit is not so readily disposed of. Geyer's involvement with the civil suit was only as a witness. Thus, in order to find a violation of rule 2-100, we must construe the proscription against communicating with a represented "party" to mean represented "person." This was the approach taken by the hearing judge below, but we find very limited support for this broad interpretation of rule 2-100. (*In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, 805.)

Returning to Case Studies

The language can easily be replaced by language from Andy's, Socrates's, or Tom's cases by changing the names of people involved and the names of the lawsuits:

> . . . rule 2-100 is inapplicable because Bob [Plato or Tom] was not a represented "party" in the *People v. Andy and Edward* [*Socrates* or *Tom*] criminal suit . . . Bob's [Plato's or Dick's] involvement with the *People v. Andy and Edward* [*Socrates* or *Tom*] criminal suit was only as a witness. Thus, in order to find a violation of rule 2-100, we must construe the proscription against communicating with a represented "party" to mean represented "person" . . . but we find very limited support for the broad interpretation of rule 2-100.

Rule 2-100 Does NOT Prevent an Interview of a Represented Witness

Dale goes on to explain that the only possible interpretation of rule 2-100 is a narrow reading and a narrow definition of a "party." The reasoning is as follows:

> The few cases that have interpreted rule 2-100 have given it a narrow construction, albeit while focusing on different provisions of the rule than those of concern here. Thus, in *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401, the Court of Appeal expressly rejected Taco Bell's assertion that the rule should be construed broadly, finding instead that "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." (*In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, 806; citing *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 120-121.)

It is clear that the common sense definition of a "party" is "a party in the lawsuit." The "broad or liberal interpretation" that *Dale* **rejects**, citing *Jorgensen v. Taco Bell Corp.*, which in turn cites *Continental Ins. Co. v. Superior Court*, is a "broad or liberal interpretation" that would have Bob [Plato or Dick], who was only a witness, not a party, in *People v. Andy and Edward* [*Socrates* or *Tom*], be unavailable for an interview by the attorneys of parties to the separate lawsuit, which in turn would be a clear Due Process violation.[13] There is absolutely nothing in rule 2-100 that says, or even implies, that the rule contemplated pre-

venting an attorney from interviewing a witness who is not a party to the lawsuit.

Dale points out that discipline has only been imposed "in those instances when a member made an ex parte communication with an opposing party."[14] Not only is Bob [Plato or Dick] not an opposing party in the *People v. Andy and Edward* [*Socrates* or *Tom*] lawsuit; he is clearly only a witness. Even Plato and Dick are clearly not opposing parties in the *People v. Socrates* and *People v. Tom* lawsuits. Even though they were involved in the crime and could potentially be added to the respective lawsuits, they are only witnesses, until they are added as co-defendants.

Dale gives the definition of a "party" and states clearly with whom a lawyer can communicate: "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented 'party.'"

The Opinion laments that its interpretation of rule 2-100, which is "a strict construction of the rule," limiting "party" to mean a party in the lawsuit, does not accomplish the policy objective of the rule:

> We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction [Footnote omitted] could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez, supra*, 4 F.3d 1455, 1458-1459: "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel.
>
> . . . The trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." Our Supreme Court echoed this same assessment in *Mitton v. State Bar, supra*, 71 Cal.2d 524,[15] 534: "[The no contact rule] shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [P] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist." (*In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, 806.)

This fact of the strict construction appears to bother, but yet is accepted by, the Bar Review Department Court as being the result of the clear plain language of the rule. Although it cites *Jorgensen* and the language used in that case concerning using a "reasonable, commonsense interpretation," the Bar Review Department Court does not establish a reasonableness test, or even apply a common sense test. It only establishes a strict construction interpretation that a "party" is a party to the lawsuit. *Dale* could have easily adopted a "reasonable, commonsense interpretation" standard, but instead chose a strict construction. That is why the "Plato did it" or "Dick the snitch" fact patterns which would make Plato and Dick potential co-defendants, do not change the analysis. Dave can and must interview Plato and Dick. It is a specious argument that Plato or Dick are somehow "parties" even though they are not "parties" in the *People v. Socrates* and *People v. Tom* lawsuits, because they are potential parties. Neither Plato nor Dick is protected by rule 2-100 because on the plain language of the rule and the "strict construction" that must be applied. The rule does not contemplate a "party" as being someone, like Geyer, who has a different case arising out of the same incident, or Plato or Dick who are a potential parties, but are not parties in the case.

Dale also was a potential party in the *Burke v. Chen* lawsuit, but was not a party because the plaintiff chose not to make him a party, just as the plaintiff chose not to make Plato a party in the *People v. Socrates* case, or Dick a party in the *People v. Tom* lawsuit. If the *Dale* court wanted to establish a reasonableness test, or even a common sense test, it could have done so by citing *Jorgensen*. Instead it chose the much simpler and more easily understood option and followed strict construction. If the *Dale* court had chosen to adopt a *Jorgensen* reasonable or common sense test, it really would have provided no useful guidance to attorneys to indicate with whom they may or may not communicate. We lawyers may not like the strict construction of *Dale*, because we don't want other lawyers talking to our clients, but at least with the *Dale* strict construction interpretation we have a clear rule that is easily understood and followed.

Regarding the actions for which Dale did NOT get into trouble, the *Dale* court states a bright line rule:

> The instant case illustrates how the concern about interference with the attorney-client relationship as expressed by the Ninth Circuit Court of Appeals and the Supreme Court is equally relevant when the represented individual is not a party to the proceedings. But we defer to the Board of Governors and the Supreme Court for any curative efforts should they determine that the purpose of rule 2-100 is ill-served by its present language. We therefore are compelled to conclude that [Dale] is not culpable for his communications with Geyer under rule 2-100, because Geyer was not a represented party in the *Burke v. Chen* lawsuit, and we dismiss Count One with prejudice. (*In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. 798, 807.)

In this paragraph, the Opinion makes clear that the rule is a simple reading of the plain language of the statute, that the plain language does not serve the policy purpose, and invites the California Supreme Court and Board of Governors of California Bar Association to change the rule if they want the policy objectives met.[16]

The language from this paragraph of the Opinion can easily be replaced with the names from the sample cases: ". . . We therefore are compelled to conclude that Dave is not culpable for his communication with Bob [Plato or Dick] under rule 2-100 because Bob [Plato or Dick] was not a represented party in the

People v. Andy and Edward [*Socrates* or *Tom*] lawsuit . . ."

That for Which Dale Did Get Into Trouble with the Bar and How to Avoid Those Pitfalls

Dale was found to have committed acts of moral turpitude for the manner in which he communicated with Geyer. The Bar Review Department Court went through the many ways that Dale overreached in his communications with Geyer, which in turn creates a list of pitfalls, which can easily be avoided, and must be avoided in order to not commit the same acts of moral turpitude that Dale did. Below is a list of the ten things to not do when interviewing a represented witness.

The Rules When Interviewing a Represented Witness

The analysis of *Dale* leads to a set of simple rules when interviewing a represented witness in the "ABC" scenario, where you have no reason to believe that the witness is going to implicate himself, and will just exonerate your client. These are rules that derive from all things that Dale did with which the court was none too pleased:

1) Do not establish a friendship relationship with the represented witness;
2) Do not give the represented witness gifts;
3) Do not talk to the represented alone. Take an investigator with you, not just for all the obvious reasons, but especially if talking to him alone is a means to forging a friendship with the represented witness;
4) Do not speak critically of the represented witness's lawyer when talking to the represented witness, or in any other way drive a wedge in the attorney-client relationship between the witness and his lawyer;
5) Do not put the witness in a situation where he has to act as his own attorney and negotiate with you. For example, don't show up with a written declaration forcing the witness to negotiate the language of the declaration;
6) If the witness's lawyer has contacted you and told you not to talk to the witness, do not convince the witness to ignore his lawyer's advice;
7) Do not imply to the represented witness that you have his best interests at heart. Do tell him that your client is the only person you're interested in protecting;
8) Do not lie to the represented witness, or even tell half-truths. Telling the witness that a statement cannot be used against him for appeal is such a half-truth; it is only technically true, because the goal of most appeals is a new trial where any statement can be used against the represented witness;
9) Do not establish a fiduciary duty toward the represented witness by;
   a) Offering to provide legal services to the represented witness; or
   b) Giving the represented witness legal advice;

And if it is a "Plato did it" or "Dick the snitch" scenario, where you believe that Plato may not just exonerate Socrates, but also implicate himself, there is an additional rule.

10) Admonish the represented witness that what he says can be used against him by the District Attorney. The court in *Dale* commented that Dale "was grossly negligent in not fully explaining the consequences of Geyer's cooperation, or at worst, that [Dale] intentionally misrepresented the legal effect of his second confession."[17] It appears that this portion of *Dale* establishes a duty on your part to admonish the witness in the "Plato did it" and "Dick the snitch" situations. In order to follow the guidance of *Dale*, you must fully explain the potential consequences to represented witness should the witness decide to agree to an interview. This is a case of deciding which case is more important, *De Luca v. Whatley* (1974) 42 Cal.App.3d 574 or *Dale*. *De Luca* unequivocally states that an attorney's only loyalty is to his client and therefore he is not required to protect witnesses' rights, but *Dale* says that the represented witness should be admonished if he's going to incriminate himself. I call this the "cual caso es mas macho" dilemma. There's language in *Dale* that implies that admonishing the witness is only needed when a fiduciary duty has been established by offering to provide legal services or giving legal advice. Despite *De Luca* being unequivocal, it seems that if you have a good reason to believe that the represented witness is going to confess, it may be a good idea for you to advise the witness of the potential consequences of submitting to an interview. This is one where you're going to have to read *Dale* and *De Luca* and make you own call.

An Attorney Not Only May Interview a Represented Witness Who is Not a Named Party in His Case Without the Permission of the Represented Witness's Attorney, But He Must Interview That Witness Without Telling His Attorney

Dave may feel really bad about interviewing Bob without talking to his buddy Charlie first. He may feel as though there is a professional courtesy in his legal community that he would be violating. All of that may make Dave uncomfortable in the situation, but he still has to interview Bob without telling Charlie that he is going to conduct the interview. The authority that Dave has to follow, along with his duty of loyalty to his client, is *De Luca v. Whatley* (1974) 42 Cal.App.4th 574, which makes clear that an attorney's only loyalty is to his client. See also *Wiggins v. Smith* (2003) 539 U.S. 510, *Rompilla v. Beard* (2005) 545 U.S. 374, and *In re Hardy* (2007) 41 Cal.4th 977, all of which require defense counsel to conduct a full investigation.

Specious Arguments that *Dale* Doesn't Mean What it Says

The sentiment of lawyers who feel like it just can't be right that another lawyer can talk to their clients without their permission is so strong that I've heard many arguments that *Dale* just doesn't count. The language in both rule 2-100 and the *Dale* Opinion is so strong that a represented witness can be interviewed, that it renders all the arguments to the contrary absolutely specious.

Specious Argument One: *Dale* Only Applies to Civil Cases

One of those arguments is that the

rule and *Dale* only apply to civil cases. There is absolutely nothing in the rule or in *Dale* that even implies such an interpretation would be correct. What really renders this argument as specious is that rule 2-100 gives further definition to "party" within the rule. Rule 2-100(B) reads as follows:

(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.

If the drafters of the rule wanted it to apply to only civil cases, they could have added a section (B)(3) stating that a "party" includes anyone in any way involved in a criminal case, or perhaps at the end, a section (D) that says the rule doesn't apply to criminal cases. But those additions do not exist in the rule. There is absolutely nothing in the rule or in *Dale* that even implies that criminal cases are somehow different. The argument is factually incorrect, because *Dale* involved both a civil and criminal case. If one were to accept that *Dale* does not in any way involve a criminal case because it is a Bar Court Opinion, that still does not mean that it does not apply to criminal cases.

If the argument that it doesn't apply to criminal cases were to be accepted, extending that argument would mean that the courts do not have the power to interpret criminal laws because the case that says the courts have such power is, get ready to go all the way back to law school, *Marbury v. Madison* (1803) 5 U.S. 137, which was a civil case. William Marbury sued for a Writ of Mandate to make Secretary of State James Madison deliver paperwork for Marbury to get the job to which the outgoing President John Adams had appointed him. It was a civil case that set a precedent for all cases. There just isn't a rule that civil case precedents don't count in criminal cases. There is nothing whatsoever in either the rule or in *Dale* that suggests that one should go off on a tangent and contemplate whether the cases are civil and civil, civil and criminal, or criminal and criminal.

Specious Argument Two: *Dale* Doesn't Apply if the Represented Witness "Coulda, Woulda or Shoulda" Been Consolidated

The next specious argument I've heard is that the rule and *Dale* do not apply when a case could have been consolidated, would have been consolidated, or should have been consolidated. This is the "coulda, woulda, shoulda" argument. However, there is absolutely nothing in the rule or in *Dale* that even begins to imply that there's a "coulda, shoulda, woulda exception" to the rule. Again, if the drafters of the rule wanted there to be a "coulda, woulda, shoulda exception," they could have easily added it to rule 2-100(B) or added a separate section (B)(3) stating that a "party" includes anyone that in anyway could, should, or would be consolidated into the matter. However, the drafters chose not to add any such language.

There's nothing in the rule or in *Dale* that suggests one should ruminate on whether the two cases could have been consolidated. There's a reason that the "coulda been consolidated" argument is specious, and that is because if it were to exist, it would take a rather simple rule -- a witness who is not a party on my case can be interviewed -- and turn it into a mushy, gray area rule that has no value in guiding an attorney as to which witnesses can be interviewed.

The "woulda been consolidated" and "shoulda been consolidated" arguments are even more ridiculous. No attorney can ever know if a witness "woulda been consolidated" by the plaintiff. If there were a "coulda been consolidated" exception it would render that rule absolutely useless, because it would be pure guesswork as to how a court might rule on a consolidation motion. Lastly, there's the "shoulda been consolidated" argument. Again, asking the attorney who wants to interview a witness to divine whether the two cases "shoulda been consolidated" would only render the rule useless.

Specious Argument Three: A Transaction is Something More or Different Than a Contract, Merger, Acquisition or Transaction That a Transactional Attorney Would Handle

This is by far the most bizarre and just plain silly specious argument that I've heard. The theory is that in the "Plato did it" or snitch scenarios that the crime is a transaction. A transaction is clearly a contract, merger, acquisition, sale, or some other business transaction in which the parties are represented, most likely by transactional attorneys. Crimes are simply not transactions as used as a legal term of art. This argument that a crime is a transaction is so specious and ridiculous that an attorney's time may be better spent skipping this paragraph.

This argument comes from the one place in *Dale* where the word "transaction" is used: "We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction [footnote omitted but discussed below] could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez, supra*, 4 F.3d 1455, 1458-1459."[18] Right after the word "transaction" is footnote 11 which states: "The Discussion accompanying rule 2-100 makes clear that it is not limited to a litigation context."[19] So the next place to look is "The Discussion" after the rule to see what *Dale* is talking about. The grand total of the discussion in "The Discussion" is: "As used in paragraph (A), 'the subject of the representation,' 'matter,' and 'party' are not limited to a litigation context." So the question is in what scenario there would be represented parties in a non-litigation context; the only answer is in a business transaction context.

The word "transaction" is nowhere to be found in rule 2-100, nor in "The Discussion." It is used twice in *Chronometrics*:

> Gold's declaration stated that he was attorney for the plaintiff in an action entitled *McHale v. Hilson*, Los Angeles Superior Court No. WEC 32912, and that in connection with that lawsuit he had discussed with Albertini various transactions and documents involving Gourmet

> Wines and that Albertini had indicated that he would seek out some of the managers or officers of Gourmet Wines and endeavor to obtain information needed in respect of that lawsuit that he did not have. (*Chronometrics, Inc. v. Sysgen, Inc., supra,* 110 Cal. App. 3d 597, 602.)

This clearly involves a business transaction. However, the second place where "transaction" is used in *Chronometrics* is illustrative of exactly what "The Discussion" is talking about, i.e., a non-litigation context such as probate representation:

> The client then died, naming the attorney as his coexecutor. The trial court denied the attorney's motion to be substituted as party plaintiff for the deceased client and the attorney again sought a writ of mandate, this time successfully. The Court of Appeal held that the unclean hands with which it had previously been concerned was in a different transaction, though a related one, from the instant matter, that its effect had been substantially attenuated by the death of the client and that the petition could no longer be denied on that basis. (*Chronometrics, Inc. v. Sysgen, Inc., supra,* 110 Cal. App. 3d 597, 606-607.)

The only other case in this area that uses the word "transaction" is *La Jolla Cove Motel v. Superior Court* (2004) 121 Cal.App.4th 773, in which it is again clear that "transaction" refers to a business transaction: "However, this ignores the fact that they were elected to the board by the Jackmans and that they allege that the representatives of the majority shareholders have engaged in improper transactions and have excluded them from any role in overseeing the corporation."

This concept is so basic that the first place to look is equally basic. According to Black's Law Dictionary, Fifth Edition, the definition of "transaction" is:

> Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements have some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract." *Hoffman Machinery Corporation v. Ebenstein,* 150 Kan. 790, 96 P.2d 661, 663. See also **Transact.** (Emphasis in the original.)

As is suggested by Black's Law Dictionary, the definition of "transact" also illustrates the point:

> To "transact" means to prosecute negotiations; to carry on business; to have dealings; to carry through; bring about; perform; to carry on or conduct; to pass back and forth as in negotiations or trade; to bring into actuality existence. *Knoepfle v. Suko, N.D.,* 108 N.W.2d 456, 462. The word embraces in its meaning the carrying on or prosecution of business negotiations, but it is a broader term than the word "contract" and may involve business negotiations which have been either wholly or partly brought to a conclusion. *Bozied v. Edgerton,* 239 Minn. 227, 58 N.W.2d 313, 316. See also **Negotiate; Transaction.** (Emphasis in the original.)

The thought that the one and only time *Dale* used the word "transaction" it was meant to ignore the legal meaning of the word "transaction" and imply that a crime could be a "transaction" is not just ridiculous on its it face, it's the exact opposite of what *Dale* holds. If the petty theft in the "Plato did it" case study was a transaction, then the arson in *Dale* would be a transaction. If the auto theft in the snitch case studies was a transaction, then here again the arson in *Dale* would be a transaction, and *Dale* would not have come to the conclusion it did. Trying to change the legal definition of "transaction" to make it so that *Dale* doesn't mean what it says is beyond a specious argument.

What Does the Bar Ethics Line Have to Say?

After I faced this situation in an actual case, it was suggested that it may have been a good idea to call the Bar ethics line before conducting an interview of a represented witness. In my case, I did not call the Bar ethics line before the interview, because I figured the Bar ethics line is there for situations where the law is unclear. I also knew that the Bar ethics line doesn't say, "Yes, that's ethical," or, "No, that's not ethical," but instead only refers lawyers to law on the subject. I knew that I had thoroughly researched the law and that all the Bar ethics line could do was refer me to rule 2-100 and *Dale.*

But just for the sake of doing it, after the fact I ran the experiment and called the Bar ethics line. They made it very clear that they are "prohibited from advising" as to ethical issues and that their only role is to refer to authorities. The first question I asked was, "What are the authorities for interviewing a witness who is represented by another lawyer?" She gave me three pre-*Dale* cites; the first was *Abeles v. State Bar of Calfornia* (1973) 9 Cal.3d 603, which is a civil case where the communication was between a lawyer and an opposing party and the defense was that the party with whom counsel communicated wasn't properly represented. The defense was rejected. This citation had absolutely nothing to do with the posed question of interviewing a represented non-party witness.

The second was Formal Opinion 1979-49 (that's from 1979), which is a case where a D.D.A. talked to a represented person about an unrelated case: so there's one case *People v. A* and another case *People v. B* (the Formal Opinion uses A and B). The D.D.A. is a party in both cases and talks to A about B's case. So the D.D.A. is talking to an opposing party, but not about "the matter." The Formal Opinion says he can't do that. This again has nothing to do with the posed question about interviewing a non-party witness. Another problem with this citation is that *McNeil v. Wisconsin* (1991) 501 U.S. 171, *Texas v. Cobb* (2001) 532 U.S. 162, and *People v. Slayton* (2001) 26 Cal.4th 1076 all establish a clear rule that a D.D.A. can talk to a represented party about a different case.

The last one was *La Jolla Cove Motel v. Superior Court* (2004) 121 Cal.App.4th 773, another case about communications with an opposing party. It's a case where the opposing party had two lawyers and the attorney only got permission

from one of the opposing party's two lawyers before he talked to the opposing party. It's interesting because the ethics hotline woman told me that the case is an example of an attorney violating rule 2-100 for only getting permission from one, and not both, attorneys for the opposing party. In fact, the attorney was found to have NOT violated rule 2-100, because he got permission from one of the attorneys.

Figuring that perhaps my question wasn't clear enough, I then asked, "What are the authorities for interviewing a represented person who is not a party to the lawsuit?" She said, "You can always interview a witness, but if a witness has a lawyer and you want to do the safest thing possible you should talk to the witness's lawyer." I then asked, "Okay, what's the authority for that, what authority addresses a witness who's not a party?" She then said that *Dale* is the only authority that addresses that issue. I then said, "Doesn't *Dale* say that 2-100 doesn't apply to someone who isn't a party to the lawsuit?" She said, "That's true, but we refer people to the older authorities."

My goal was not to engage in a debate with her, but what she was saying didn't make any sense at all. So I asked, very nicely, "Okay, is *Dale* the only authority that addresses interviewing a non-party represented witness?" She answered, "Yes." Again very nicely, "Am I correct or incorrect that *Dale* says that 2-100 does not apply to a non-party witness?" She said, "That's what *Dale* says, but it's always a good idea to consult with an ethics attorney; we are prohibited from advising."[20] I then asked, "Is there any post-*Dale* authority that's contrary to the *Dale* holding?" She said, "No there isn't any authority after *Dale* that is contrary to it."

I considered going back into the loop of "why then would you refer people to older authorities that don't have anything to do with interviewing a non-party witness?" But I just didn't do it. She did however say again after that quick discussion about *Dale* that she is "prohibited from advising on ethical issues." I then thanked her for her time.

I'm not really sure what that was all about. She acknowledged that *Dale* says what it says, but at the same time in an almost rote manner gave me, "We refer people to the older authorities." Had I not been doing everything I could to not be contrarian and just get information from her, I would have asked about *De Luca* and the duty of loyalty to the client.

I don't know what to say other than that making the phone call proved to be utterly useless. I was referred to authorities that didn't have anything to do with the question at hand. If my question had been, "What are the authorities for interviewing an opposing party?" then the call would have yielded helpful information. My best guess is that because the Commission for Revision of the Rules of Professional Conduct has been trying to change rule 2-100 since 2005 (because of *Dale* and its invitation to the Supreme Court and the California State Bar Board of Governors to change rule 2-100 because the plain language of the statute limits it to actual parties to the lawsuit) that whoever decides what authorities are cited has decided that they prefer to send people to older cases that have nothing to do with interviewing a non-party, represented witness, instead of to *Dale*, because the rule may be changed because of *Dale*. But that's only a guess. What is clear from the call to the Bar ethics hotline is that they concede that *Dale* is the only authority that addresses the question of interviewing a non-party witness and that no contrary authority exists.

The really disturbing part of the call is that the Bar ethics line appears to be engaging in intellectual dishonesty, when a question is asked about this issue. I suppose technically they didn't engage in intellectual dishonesty because when I asked the very pointed second question I was referred to *Dale*, but it seems to me that *Dale* is the clear answer to the first question, as well. Referring to older cases that don't have anything to do with the question is at best answering in half-truths, and remember it was the Bar that busted Dale for telling half-truths. Advising that if "a witness has a lawyer and you want to do the safest thing possible you should talk to the witness's lawyer" is the height of irresponsibility, in that the advice completely ignores the duty of loyalty to the client, as required under *De Luca*, *Wiggins*, *Rompilla*, and *Hardy*. It certainly is not the "safest thing possible." A responsible attorney cannot allow a client to be convicted of a crime he did not commit, because he thinks that he should talk to the witness's lawyer and let the defense that would exonerate the client be closed off because the witness's lawyer didn't feel like allowing a lawyer from another case to talk to his client. The law says a lawyer cannot put a client in that kind of peril; the attorney's loyalty is to the client, not to the other lawyers in the community. I don't know what one can do when the people who are supposed to be giving guidance on ethical issues are intellectually dishonest, but I will say that the next time I get an e-mail from the Bar saying that they need volunteers for their ethics committee I'm going to feel compelled to step up.

What Should I Do If I'm Charlie

If you find yourself reading this and say to yourself, "Oh no, I'm Charlie (Aristotle or Harry), and another lawyer has talked to my client. I thought I was the righteous one, and it turns out I've got problems, because I didn't advise Bob (Plato or Dick) to not talk if that lawyer showed up for an interview." I think you, in fact, do have problems. Your saving grace may be that despite *Dale* being an almost eight-year-old case, it's not as widely known as it should be. Perhaps you could argue that you were relying on a professional courtesy in the legal community, but that's weak to say the least. Maybe you could run with the specious arguments. They're specious, but if that's all you've got between you and a malpractice suit, you might as well run with it.

***Dale* Is a Workable Solution**

Many defense lawyers are bothered by the plain language reading of rule 2-100 and *Dale*. It is certainly much more comfortable to have a professional courtesy of other attorneys not talking to your client, but that's not the law. California is not a "person" state, we are a "party" state, and it is a far more workable rule than being a "person" state. These are some scenarios to imagine if *Dale* had interpreted "party" to mean "person": You represent Andy on a murder case and Andy tells you that Bob saw some other dude do it, you want to interview Bob, but Bob is represented by Charlie on a misdemeanor driving without a license case. If the alternate universe of *Dale* says we're a "person" state, you have to ask Charlie for permission to talk to Bob. Charlie says no.

You now cannot interview Bob. You're either forced to not call Bob as a witness, because you don't know what he'll say, or call Bob blind if you cannot not get an examination outside the presence of the jury. It is very possible that whichever call you make, it will turn out to be the wrong one, and Andy gets convicted of a murder he did not commit, all because you couldn't interview Bob.

How about this? You want to interview Bob and find out that he's going through a divorce. You call Charlie, his divorce attorney, to ask Charlie's permission to talk to Bob. Charlie says no. What if Bob is part of a class of homeowners who are involved in a construction defect suit in his housing subdivision, and Bob has never had any involvement in that case other than signing on to be a member of the class? Charlie represents the homeowners, so you call Charlie to ask permission to talk to Bob and Charlie says no. How about if Bob is getting evicted and is represented by the local Legal Aid office in his unlawful detainer suit, and you call Charlie, his Legal Aid lawyer, to ask permission to talk to Bob and Charlie says no? It gets even better. Bob is an officer in an association, his local Little League, and the League is engaged in litigation over a broken leg a kid suffered sliding into home plate. Charlie is the association's lawyer. You call Charlie and ask permission to talk to Bob, and he says no.

The rule in its current state with the *Dale* interpretation is a simple rule that everyone can easily understand and follow. If you're Bob's lawyer and know that he has some involvement in a different case, *Dale* gives you the option of contacting the lawyers from that case and telling them not to talk to Bob. You can still protect the Bobs in your caseload without having the Andys in your caseload completely denied Due Process.

What Criminal Defense Attorneys Need to Do

Knowing what rule 2-100 and *Dale* say, there are steps that every defense lawyer should take today. You have to stop and think if your clients are involved in cases in which they are not parties. If they are involved in such a way, you need to advise your clients that an attorney or investigator from the case in which he is not a party may request an interview.

The *Dale* interpretation of rule 2-100 just requires that we all take responsibility for our own clients without trampling on the Due Process rights of clients who need a witness interviewed, and possibly need a witness interviewed to prevent being wrongfully convicted, or serving jail or prison time for crimes they did not commit.

CONCLUSION

The fear of potentially doing something unethical by interviewing a represented witness is simply misplaced. The real danger is violating the duty of loyalty to the client by not conducting an interview. If you find yourself thinking that you'd be pissed if another lawyer talked to your client, please stop, rethink it, and put your priorities where they belong, and ask instead how your client would feel if you blew his case, because you were worried about another attorney's feelings.

ENDNOTES

1/ It doesn't matter what the crime is. Whether the client is charged with driving without license or capital murder, it's the exact same analysis.

2/ Again, it doesn't matter what the charges are, the analysis is the same even if the client's charge is minor such as a petty theft and the witness's charge is very serious, such as a capital murder, the issue is the law and loyalty to the client, neither of which vary depending on the severity of the crime charged.

3/ *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, 801.

4/ *Id.* at p. 802.

5/ The conversation took place on October 21, 1999. Because of Mr. Geyer's 20-years-to-life sentence, his soonest possible parole hearing would be 14 years later in 2013.

6/ *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, 803.

7/ *Id.* at pp. 803-804.

8/ *Id.* at p. 804.

9/ *Ibid.*

10/ As is discussed below, Dave is not free to unilaterally decide that a party in the lawsuit is not represented. He must take steps to confirm that the party is in fact unrepresented.

11/ *United States v. Lopez* (1993) 4 F.3d 1455, 1458-1459.

12/ *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 599.

13/ *Dale* doesn't actually show any concern for a defendant's Due Process right to interview a witness; however, protecting a defendant's right to Due Process through an ability to interview a witness is a fortunate collateral benefit of the *Dale* decision.

14/ Immediately after the passage quoted here is footnote 10 in the Opinion which states, "Several cases have considered the application of the no contact rule to individuals in the dual role of witness/party. (See, e.g., *Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 Cal.App.3d 116, 126-128; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140; *United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455.)" *Mills Land & Water Co. v. Golden West Refining Co.* is a civil case which actually distinguishes the rule that the case establishes as applying only to civil cases. This is discussed further in the "Specious Arguments" section, where the person with whom the attorney communicated was actually a party. The person was a member of the Board of Directors of the party corporation. In *United States v. Talao*, the prosecutor communicated with a party, an employee of the party corporation, about other members of the party planning to suborn perjury. The court found that such communication was not barred by the federal "no contact" rule. In *United States v. Lopez*, the prosecutor communicated with a party defendant.

15/ *Dale* actually uses a mistaken citation here; the correct citation is *Mitton v. State Bar, supra*, 71 Cal.2d 525, 534.

16/ I have contacted attorneys who attended the Commission for Revision of the Rules of Professional Conduct meetings that were set into motion after the *Dale* holding to discuss whether in

light of *Dale* the rule should be changed, so an attorney cannot communicate with a represented "person," as opposed to the current rule which only proscribes communication with "a party" on that very lawsuit. It was the District Attorneys who were in attendance who most vociferously opposed the change, unless the change came with an exception for District Attorneys. No action has been taken to change the rule, and *Dale* and its "strict construction" that "a party" is only a party to the actual lawsuit remains the law.

17/ *In the Matter of Dale, supra,* 4 Cal. State Bar Ct. Rptr. 798, 808.

18/ *Id.* at p. 806.

19/ *Ibid.*

20/ Again, just to run the experiment, I contacted an ethics attorney and former Bar Chief Trial Counsel Paul Virgo. He agreed with my analysis of *Dale*. I also contacted Terri Towery, from the Appellate Branch of the Los Angeles County Public Defender's Office, who has been published on this subject, and she also agreed with my analysis of *Dale*.

NOTES