

Rule 4.3 Dealing with Unrepresented Person. [Sorted by Commenter]						
						TOTAL = 4 Agree = 1 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	COPRAC	A	Yes		COPRAC supports the adoption of Proposed rule 4.3 and the Comments to the Rule.	No response required.
2	Long, Patricia J.	D	No		<p>In Family Law cases, divorcing spouses have a duty to give full financial disclosure. As a Family Law practitioner, I worry I would be accused of a violation of this rule by seeking to get this private financial information under Family Law Code.</p> <p>Examples are needed to describe what constitutes misleading the opposing, unrepresented spouse. Family Law lawyers often must deal with issues of mental illness, substance abuse, and/or cultural differences which can affect a person's perception of being misled.</p> <p>Prior experience with rule violations by opposing counsel being overlooked by the State Bar questions enforcement of proposed rules.</p>	<p>No change in the Rule is necessary. Paragraph (a) and Comment [1] clearly provides that in seeking information on behalf of a client from an unrepresented person, the lawyer may not mislead the person <i>concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents.</i>" If the lawyer knows or reasonably should know that the unrepresented person incorrectly believes that the lawyer is disinterested, the lawyer must make reasonable efforts to correct the misunderstanding. "Reasonably" and "reasonable should know" are defined terms for purposes of the rules. See proposed Rule 1.0.</p> <p>Paragraph (a) is based primarily on Model Rule 4.3. a rule that is followed in most jurisdictions and is consistent with case law.</p>
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

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

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1	San Diego County Bar Association	D	Yes		<p>Common law provides sufficient protection against the abuses of lawyers toward the unrepresented without adding a rule of discipline.</p> <p>Comment [4] and [5] state exceptions not found in the Rule itself.</p> <p>Unclear what “reasonable possibility of being in conflict” means and whether it is limited to the present or foreseeable future.</p>	<p>Commission disagreed, in part, because the longstanding Model Rule counterpart and existing California ethics opinions and case law that address this area of public protection favor the guidance that is afforded by having a rule of professional conduct.</p> <p>The Commission made no change because it disagrees. Comment [4] states no exception to paragraph (b), and Comment [5] explains “not otherwise entitled to receive” in paragraph (b).</p> <p>The questioned language comes directly from the Model Rule. The Commission is not aware that it has caused any difficulty and, because the application of the rule necessarily will be fact specific, it does not believe that any meaningful refinement of the language is possible.</p>

Rule 4.3 Dealing with Unrepresented Person (Commission's Proposed Rule – Clean Version)

- (a) In dealing 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 an 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 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.
- [2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.
- [3] Paragraph (a) distinguishes between the situation in which a lawyer knows or reasonably should know that an unrepresented person has interests that are adverse to those of the lawyer's client and the situation in which the lawyer does not have that actual or presumed knowledge. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice merely by negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may state a legal position on behalf of the lawyer's client, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the

COMMENT

- [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In acting to correct a misunderstanding about the lawyer's role, a lawyer may disclose the client's identity if it is not confidential. Whether the lawyer identifies the lawyer's client, the lawyer shall explain, where necessary, that the client has interests opposed to those of the unrepresented person. For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

meaning of the document or the lawyer's view of the underlying legal obligations.

- [4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules [4.4], 8.4(c) and 8.4(d).
- [5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.
- [6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.