

# Proposed Rule 4.3 [n/a] “Dealing with Unrepresented Person”

(Draft #5.1, 10/15/08)

**Summary:** Proposed Rule 4.3(a) substantially follows Model Rule 4.3 by placing restrictions on a lawyer's communications with an unrepresented person and seeking to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf. A new paragraph (b) has been added to prohibit a lawyer from seeking to obtain privileged or other confidential information from an unrepresented person when the lawyer knows or reasonably should know the person may not reveal the information without violating a duty to another or which the lawyer is not otherwise entitled to receive.

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rules

RPC 3-600(D).

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10  
Opposed Rule as Recommended for Adoption 2  
Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

San Diego County Bar Association believes common law provides sufficient protection against lawyers' abuses toward the unrepresented without adding a disciplinary rule.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 4.3\* Dealing with Unrepresented Person

October 2009

Draft rule following consideration of public comment

### *INTRODUCTION:*

Proposed Rule 4.3 is similar to Model Rule 4.3 in placing restrictions on a lawyer's communications with an unrepresented person. Restrictions on a lawyer's communications with a represented person are governed by proposed rule 4.2. Rule 4.3 is intended to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf and provides protection against overreaching by the lawyer. Paragraph (a) is a variation of Model Rule 4.3 in addressing the same three requirements as the Model Rule. First, a lawyer must not mislead the unrepresented person about the lawyer's role. Second, when the lawyer knows or reasonably should know that the person incorrectly believes the lawyer is disinterested, the lawyer must take reasonable steps to correct the misunderstanding. Third, when the lawyer knows or reasonably should know that interests of the unrepresented non-client are in conflict with the interests of the lawyer's client, the lawyer shall not give legal advice to the unrepresented person except that the lawyer may advise the person to secure counsel.

Paragraph (b) is new and provides that in communicating with an unrepresented person, a lawyer shall not seek to obtain information that should not be disclosed by the unrepresented person because the information is privileged or is subject to another legally recognized confidentiality obligation. Paragraph (b) is intended to further the lawyer's obligations under Model Rule 4.4(a) in the context of communicating with an unrepresented person.

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\* Proposed Rule 4.3, Draft 5.1 (10/15/08).

*INTRODUCTION (Continued):*

*Minority.* A minority of the Commission objects to paragraph (a) because it creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client. The term "disinterested" does not have a clear meaning. The prohibition on "implying" that the lawyer is "disinterested" furthers the ambiguity, so that lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The minority of the Commission also objects to the last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person's dispute with the client is inevitable. While Comment [3] allows lawyers "merely" to state a client's legal position to an unrepresented person, the Comment does not explain what distinguishes a mere statement of a client's legal position from advice that would subject the lawyer to discipline. California law historically has avoided imposing duties on lawyer's to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such a conflict.

A minority of the Commission objects to paragraph (b) because it also compromises a lawyer's ability to represent a client with respect to an unrepresented person. There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The knows or reasonably should know standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not distinguish situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer's client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented. The minority believes that paragraph (b) would do more harm than good.

*Current California Law and Variations in Other Jurisdictions.* Although there is no counterpart to Model Rule 4.3 which imposes duties on a lawyer in dealing with unrepresented persons, current California rule 3-600(D) imposes similar duties on lawyers representing an organization as to constituents of an organization. Approximately 12 states have adopted variations of Model Rule 4.3. Kansas, Maryland and Michigan, for example, retain the pre-2002 version of the rule which does not include the third requirement against giving legal advice to

*INTRODUCTION (Continued):*

an unrepresented person. Several states, including New Jersey, have added a provision dealing with communications with persons who are officers, directors or other constituents of an organization represented by the lawyer. Florida's rule provides that a lawyer shall not give legal advice to any unrepresented person other than advice to secure counsel. Florida's rule also has a separate paragraph on communicating with a person to whom limited representation is being provided. Georgia's rule includes a 30 day cooling off period prior to any contact with a potentially adverse party in a matter involving an accident or disaster involving that person or a relative of that person. Utah has added a provision on who qualifies as a represented and unrepresented person for purposes of rules 4.2 and 4.3. Washington adds a comment on communications by government lawyers that do not violate the rule. Several other jurisdictions, including the District of Columbia, North Carolina and Pennsylvania track the substance of the Model Rule but reorder the language and divide the rule into subparagraphs.

<p align="center"><u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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 misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.</p>	<p>(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 <del>misunderstands</del> <u>incorrectly believes</u> the <del>lawyer's role</del> <u>lawyer is disinterested</u> in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. <del>The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if</del> the lawyer knows or reasonably should know that the interests of <del>such an unrepresented</del> person are <del>or have a reasonable possibility of being</del> in conflict with the interests of the client, <u>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.</u></p>	<p>The first sentence in paragraph (a) follows Model Rule 4.3. The second sentence is revised to make it clearer that the lawyer's duty to correct the unrepresented person's misunderstanding arises when the lawyer knows or reasonably should know that the person "incorrectly believes the lawyer is disinterested" rather than "misunderstands the lawyer's role" in the matter. No substantive change is intended. The third sentence is rewritten to make the lawyer's obligation more definite by removing the phrase "or have a reasonable possibility of being in conflict" and reversing the order of the sentence. The sentence is also changed to provide that advising the person to secure counsel is discretionary depending on the circumstances and not a requirement.</p>

\* Proposed Rule 4.3, Draft 5.1 (10/15/08). Redline/strikeout showing changes to the ABA Model Rule

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(b) <a href="#"><u>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.</u></a></p>	<p>Paragraph (b) does not have a counter-part in Model Rule 4.3 although there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violates the legal rights of a third person. The Commission believes that including a requirement in this Rule that prohibits a lawyer from seeking to obtain privileged or other confidential information that 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, is important to protect the attorney-client privilege and legal rights of third persons with whom the lawyer interacts.</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 4.3 Dealing With Unrepresented Person</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 4.3 Dealing With Unrepresented Person</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[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 order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).</p>	<p>[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 <del>order acting to avoid</del><u>correct a misunderstanding about the lawyer's role, a lawyer will typically need to identify</u><del>may disclose the client's identity if it is not confidential.</del><u>Whether the lawyer identifies the lawyer's client</u><del>and, the lawyer shall explain,</del> where necessary, <del>explain</del> that the client has interests opposed to those of the unrepresented person. For <del>misunderstandings that sometimes arise</del><u>guidance</u> when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).</p>	<p>Comment [1] explains the purpose of the Rule and is a modified version of Comment [1] to Model Rule 4.3. The second sentence has been changed to point out that the client's identity may be disclosed if it is not confidential and that the lawyer must explain if necessary that the client has interests opposed to those of the unrepresented person whether the client's identity is disclosed. The third sentence has been shortened and the cross reference changed to the relevant paragraph of proposed Rule 1.13 dealing with the Organization as Client</p>
	<p><u>[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.</u></p>	<p>Comment [2] is new and is intended to provide guidance by identifying erroneous assumptions and other misunderstandings that an unrepresented person might have when dealing with a lawyer.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 4.3 Dealing With Unrepresented Person</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 4.3 Dealing With Unrepresented Person</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. 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. 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 has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may 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 meaning of the document or the lawyer's view of the underlying legal obligations.</p>	<p><del>[23] The Rule Paragraph (a) distinguishes between situations involving the situation in which a lawyer knows or reasonably should know that an unrepresented person whose person has interests may be that are adverse to those of the lawyer's client and those the situation in which the person's interests are lawyer does not in conflict with the client's have that actual or presumed knowledge.</del> 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. <del>This Rule A lawyer does not prohibit give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer from also does not give legal advice merely by</del> 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 <u>state a legal position on behalf of the lawyer's client</u>, 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 meaning of the document or the lawyer's view of the underlying legal obligations.</p>	<p>Comment [3] is a modified version of Model Rule 4.3, cmt. [2].</p> <p>The first sentence is revised to be more precise and to conform to the wording of the Rule without changing its meaning. The third sentence clarifies that simply stating the client's legal position is not giving legal advice under the rule. The fourth sentence has been changed to make to same point.</p>

<p align="center"><u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[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).</a></p>	<p>Comment [4] is new and explains the prohibition in paragraph (b) against seeking to obtain information that should not be disclosed by an unrepresented person due to its privileged nature or some other legally-cognizable confidentiality obligation. A cross reference has been added to other rules that might also be violated if the lawyer knows or reasonably should know that the information obtained is legally protected from disclosure. Brackets have been placed around "4.4" pending the Commission final consideration of that Rule.</p>
	<p><a href="#">[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.</a></p>	<p>Comment [5] is new and explains that paragraph (b) does not prohibit seeking information from third persons through the use of discovery in litigation or at trial.</p>
	<p><a href="#">[6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.</a></p>	<p>Comment [6] is new and points out that paragraph (a) does not apply to lawful government or private covert criminal and civil investigations.</p>

## Rule 4.3 Dealing with Unrepresented Person

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~or have a reasonable possibility of being~~ 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.

### 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).

- [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] ~~The Rule~~ Paragraph (a) distinguishes between ~~situations involving~~ the situation in which a lawyer knows or reasonably should know that an unrepresented person ~~whose~~ has interests ~~may be~~ that are adverse to those of the lawyer's client and ~~those~~ the situation in which the ~~person's interests are~~ lawyer does not in conflict with the client's 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. ~~This Rule~~ A lawyer does not ~~prohibit~~ give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer ~~from~~ 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 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. ~~Obtaining~~A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure ~~may~~might also violate Rules [4.4], 8.4(c) and 8.4(d). ~~Paragraph (b) does not prohibit a lawyer from seeking to obtain such information in a legal proceeding pending before a tribunal where the person to whom the duty is owed is present or is represented by counsel.~~

[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain, ~~during a legal proceeding~~, information from an unrepresented person ~~that is protected from disclosure by a legally cognizable duty owed by~~through the ~~unrepresented person, where the person to whom the duty is owed is present~~use of discovery in litigation or ~~is represented by counsel~~interrogation at the proceedingtrial.

[6] ~~Paragraph (a) is not intended to apply to covert criminal and civil enforcement investigations. Paragraph (a) is also not intended to apply to the exceptional situation where a lawyer supervises an investigator posing as a consumer or other person engaged in an otherwise lawful transaction for the purpose of gathering evidence that~~

~~is not otherwise available where the lawyer reasonably believes that a violation of civil rights or intellectual property rights exists and the conduct of the lawyer and the conduct of the investigator the lawyer is supervising does not otherwise violate this Rules or the State Bar Act.~~

[6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.

## **Rule 4.3 Dealing With Unrepresented Person Rules Revision Commission — Minority Dissent**

This Rule should not be adopted. The Rule creates a special burden on lawyers in communicating with unrepresented person that does not exist when communicating with other lawyers. In so doing, the Rule creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client.

The proposed Rule has three significant flaws. The term "disinterested" is ambiguous. Because of its ambiguity, lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons, and related Comment [3] are unclear and do not clarify the difference between merely stating a client's legal position and advice that would subject a lawyer to discipline. Paragraph (b) is overbroad and would chill communications with unrepresented persons on behalf of a client.

California law historically has avoided imposing duties on lawyers to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such conflicts. It will permit discipline of lawyers for saying things that are not improper, are not misleading, might be in the best interests of lawyers' clients, and

might be in the best interests of unrepresented persons. This rule contains oversimplifications that do not apply in the day to day practice of law and will be wrong as disciplinary standards.

### **The Disinterested Standard in Paragraph (a) Is Ambiguous**

We would have no objection if the Rule stated that, in communicating with an unrepresented person, a lawyer shall not represent that the lawyer is not communicating on behalf of a client, when that is not the case. Lawyers cannot engage in a fraud when dealing with other lawyers or an unrepresented person. However, this proposed rule does not say that. Instead, it creates a special prohibition with respect to an unrepresented person that would discipline a lawyer for implying that he or she is "disinterested."

The word "disinterested" is ambiguous because it has no established meaning. It can have multiple meanings to different people on different occasions. For example, it might mean impartiality, or it might mean that the lawyer does not own an interest in the matter at hand. The rule increases the ambiguity of the word "disinterested" by coupling that word with the word "imply." The rule does not prohibit a lawyer from telling an unrepresented party that the lawyer has no client. Instead, it forbids a lawyer from "implying" that the lawyer is "disinterested."

As a result, the rule creates a situation where a lawyer acts at his or her peril in communicating with an unrepresented person on behalf of a client. No one can tell from the rule what statement is sufficient to “imply” that he or she is “disinterested” and lead to disciplinary proceedings. A totally innocent statement can be interpreted to “imply” that a lawyer is “disinterested.” Consequently, a legitimate statement may lead to a disciplinary complaint.

For example, an attorney for an employee may tell his client’s employer that he represents the employee, that the employer is subject to the Fair Employment and Housing Act, and that racial discrimination is prohibited under FEHA. That comment may be totally correct and not misleading; it may even be in the best interests of the lawyer’s client. But if the employer thinks the lawyer is being objective, that innocent statement is prohibited because it “implies” that the lawyer is disinterested.

Conversely, the lawyer may tell the employer that the lawyer does not have a stake in the dispute between the employee and the employer. That statement may literally be true because the lawyer does not have a contingent fee. However, the statement can be argued to “imply” that the lawyer is “disinterested.” Therefore, it would be a violation of this ambiguous rule.

Comment [1] furthers the problem with the Rule by suggesting that a lawyer may be disciplined for implying that he or she “is a disinterested authority on the law.” Suppose a lawyer is recognized as an expert in employment law. She truthfully states that “I lecture to

employers, law schools, and business schools on wage and hours laws. In my opinion, you have violated those laws, but I want to try to reach an agreement with you to head off a lawsuit that you and my client should want to avoid.” It violates both proposed rule 4.3(a) and its Comment [1]. It is a violation, even if it is the literal truth, even if the employer knows who the lawyer’s client is, even though the employer knows the lawyer is not representing the employer, and even if both the client employee and the unrepresented employer would both be benefitted by a settlement instead of litigation. The rule prohibits a lawyer from expressing objectivity.

All of this impacts the representation of clients. In ways that would be detrimental to the client, it impedes the role of lawyers who communicate with unrepresented persons on behalf of clients. Proposed Rule 3.4(a) would make totally truthful statements, that cause no harm, disciplinable offenses.

### **The Prohibition on Giving Legal Advice Is Ambiguous and Improper**

Paragraph (a)’s prohibition on giving legal advice also is problematic. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person’s dispute with the client is inevitable. The Rule does not define what constitutes giving legal advice. While Comment [3] allows lawyers “merely” to state a client’s legal position to an unrepresented person, the Comment does not explain what distinguishes a “mere” statement of a client’s legal

position from advice that would subject the lawyer to discipline.

The lack of clarity in this Rule creates a conflict between a lawyer's duty to represent a client's interests and a new duty to an unrepresented adverse party, which inevitably will impact the representation of clients. The Rule creates this conflict by creating a situation in which a lawyer communicates with an unrepresented person at his or her peril.

For example, assume a lawyer is communicating with an unrepresented person who is trespassing on a client's property. We presume that writing a letter to an unrepresented person saying you are trespassing is merely stating the client's legal position. But does the Rule apply if the lawyer goes on to say, "your actions are a violation of the Penal Code and may subject you to arrest and prosecution." How about if the lawyer goes on to say, "if you continue, my client will sue you and you could be liable for damages in excess of \$\$\$." That arguably exceeds "merely" stating the client's legal position. How about if the lawyer says, "If you want to avoid incurring any further liability, we advise you to take the following steps." Does using the word "advise" subject the lawyer to discipline? Would the result be different if the lawyer says, "My client is willing to drop this matter if you take the following steps." How is a lawyer, who is not steeped in these rules and who will have no precedent as guidance for interpreting them, going to understand the differences?

Another example would be settling a matter with an unrepresented person. Assume the settlement requires the unrepresented person to take certain legal steps to effectuate the settlement. Suppose the lawyer needs to explain how to perform those legal steps to the unrepresented person in order to assure that the client's interests in an effective settlement are achieved. Is that giving legal advice? Is that just a "mere" statement of a client's legal position? What distinguishes "merely stating a client's legal position" from non-mere statements of a client's legal position that get the lawyer disciplined?

Furthermore, there often are situations where lawyers should give legal advice to unrepresented persons, even if they do not represent that person. Such advice often benefits both the lawyer's client and the unrepresented person.

For example, if the client and the other person have conflicts of interest, but the client might be vicariously liable for the acts of the unrepresented person, this rule would forbid the lawyer from telling the unrepresented person that she should file an answer to the complaint a third person filed against both the client and the unrepresented person. Even if the client is not vicariously liable for the conduct of the unrepresented person, if they are both defendants in the same case, there is nothing improper about a lawyer warning the unrepresented defendant that she "should file an answer to the complaint." However, that innocent advice would violate both the first sentence of paragraph (a) [because the defendant can interpret the statement as "implying"

that the lawyer is disinterested because it hints that the lawyer is impartial], and it also violates the last sentence of paragraph (a), because it is legal advice given when the lawyer knows there is a conflict of interest.

Even if the lawyer knows the unrepresented person has no money with which to hire a lawyer, all the lawyer will be permitted to say is the unhelpful statement, “Hire a lawyer.” If a lawyer helps a *pro se* party avoid a default, and that advice does not harm the lawyer’s client, why should the lawyer be disciplined for doing so?

Many states have declined to adopt the second sentence in paragraph (a) to the Model Rule. California would be well served to join those states. The last sentence in paragraph (a) is not necessary and should be deleted along with the related discussion in Comment [3].

### **Paragraph (b) Would Interfere with Proper Representation of Clients**

Paragraph (b) of this rule is also wrong. It prohibits a lawyer from asking for information that might help the lawyer’s client and, if interpreted literally, prohibits asking questions that should be permissible.

There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The “knows or reasonably should know” standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not provide

any exception for situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer’s client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented.

For example, suppose an opposing party has fired his lawyer. In conversation with that party, the lawyer asks whether the unrepresented party was ever told about the wage and hours laws. The unrepresented party has a choice: answer or refuse to answer. The question is permissible. The *pro se* litigant knows that the lawyer is not representing him. Not hiring a lawyer inherently places the unrepresented party in the position of having to decide for himself whether to answer questions asked by an opposing lawyer. The lawyer who asks the question is not doing anything improper, is not deceiving the unrepresented party, and is properly representing his client. However, the lawyer will have violated paragraph (b) because she has asked the other party a question that might elicit privileged information. That should not be a disciplinable offense. Yet it could be under the proposed Rule.

Suppose a lawyer represents a shareholder, interviews a corporation’s unrepresented former employee, and asks her why options were backdated. She might reply that they were backdated “. . . because our lawyer told me and the chief financial officer that we could and should do

so.” The lawyer asked a legitimate question but has violated paragraph (b) of the proposed rule because the question asks that person to reveal information that arguably violates a duty to the former employer.

Suppose a lawyer doing tax or estate planning for an adult child asks a parent questions that elicit information that the parent could be privileged not to disclose, such as tax return information, but which is relevant estate planning for the child (such as whether gift tax returns were filed and, if so, the value used for an asset in the return, or whether the parent has depreciated an asset, and, if so, what depreciation has been claimed on the parent’s income tax return). The lawyer is asking an unrepresented party for information that is privileged because the tax or gift tax returns are confidential. Those innocent questions would be disciplinable under paragraph (b) of this rule.

These examples show that paragraph (b) would do more harm than good. Paragraph (b) is not in the Model Rule. The new requirement in paragraph (b) is overbroad and would produce results that are unwarranted.

## **Conclusion**

As shown by the examples above, this rule would apply in infinite numbers of situations in which it should not apply. It is overbroad, poorly worded, inconsistent with lawyers’ duties to their clients in many circumstances, and forbids lawyers from saying words that might benefit both their own clients and unrepresented persons.

This proposed Rule will impose special duties on lawyers to unrepresented persons that will conflict with the lawyer’s duties to their clients. Its ambiguities will cause lawyers to communicate with unrepresented persons at their peril and at the cost of effective client representation. It should not be adopted.

### **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.

## Rule 4.3: Dealing with Unrepresented Person

### STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**California** has no comparable provision.

**District of Columbia:** Rule 4.3 contains the same words as ABA Model Rule 4.3, but D.C. divides the rule into paragraphs and subparagraphs.

**Florida:** The last sentence of Rule 4.3 provides only that a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel.” Florida also adds a new Rule 4.3(b) that provides as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written note of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida’s version of Rule 1.2(c) provides, in part) that “a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.”)

**Georgia** adds that a lawyer shall not:

(c) initiate any contact with a potentially adverse party in a matter concerning personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the contact is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the contact.

**Kansas, Maryland, and Michigan** retain the pre-2002 version of Rule 4.3,

**New Jersey:** Rule 4.3 deletes the last sentence of ABA Model Rule 4.3 and adds the following new sentence:

If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer’s representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization’s attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization’s attorney.

New Jersey Rule 4.3 must be read in conjunction with New Jersey Rule 1.13(a), which provides that, for purposes of Rules 4.2 and 4.3, a lawyer employed or retained to represent an organization represents not only the organization but also the members of its “litigation control group,” which includes “current agents and employees responsible for, or significantly involved in, the determination of the organization’s legal position in the matter....” Former employees who were members of the litigation control group “shall presumptively be deemed to be represented in the matter by the organization’s lawyer but may at any time disavow said representation.”

**New York:** DR 7-104(A)(2) provides that a lawyer, while representing a client shall not give advice to a “party” who is not represented by a lawyer, other than the advice to secure counsel, “if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.”

**North Carolina and Pennsylvania:** Rule 4.3 tracks the substance of ABA Model Rule 4.3, but reorders the language and divides the rule into subparagraphs.

**Utah** adds Rule 4.3(b), which provides that if a person’s counsel does not represent the person in all aspects of a particular matter, a lawyer may consider the person to be entirely “unrepresented” for purposes of this Rule and Rule 4.2, “unless that person’s counsel has provided written notice, to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.”

**Washington:** Washington adds the following new Comment to Rule 4.3: “Government lawyers are frequently called upon by unrepresented persons, and in some

instances by the courts, to provide general information on laws and procedures relating to claims against the government. The provision of such general information by government lawyers is not a violation of this Rule.”

**Wisconsin:** The first sentence of Rule 4.3 provides that in dealings on behalf of a client with a person who is not represented by counsel, “a lawyer shall inform such person of the lawyer’s role in the matter.”

**Rule 4.3 Dealing with Unrepresented Person.  
[Sorted by Commenter]**

**TOTAL = 5    Agree = 2  
Disagree = 1  
Modify = 2  
NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			Comment [6]: what is the basis for excluding the intellectual property situation from the rule.	Commission deleted the discussion of intellectual property situations.
2	Lombard, Matthew	D			none	
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			<p>Comment [6] should only refer to “lawful covert criminal and civil enforcement investigations”.</p> <p>Make clear that Comment [6] applies both to governmental and private investigations.</p> <p>Delete words “exceptional situation” from Comment [6]; exception should not be limited to civil rights or intellectual property rights, but rather should include consumer protection and the list should be by way of example, not limitation.</p>	<p>Commission revised the language to refer to “lawful covert criminal or civil investigations by government or private lawyers.”</p> <p>See above</p> <p>Commission deleted the discussion of intellectual property situations.</p>
4	Orange County Bar Association (Trudy Levindofske)	A			None.	No response necessary.

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

**Rule 4.3 Dealing with Unrepresented Person.  
[Sorted by Commenter]**

**TOTAL = 5    Agree = 2  
Disagree = 1  
Modify = 2  
NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	San Diego County Bar Association (Heather L. Rosing)	D			<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>