

Rule 4.3 Communicating with an Unrepresented Person
(Commission's Proposed Rule Adopted on August 14, 2015 – Clean Version)

- (a) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.
- (b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. 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 legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.3
(No Current Rule)
Communicating with an Unrepresented Person

EXECUTIVE SUMMARY

In connection with the consideration of current Rule 2-100 (Communication with a Represented Party), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 4.3 (Dealing With an Unrepresented Person), the Restatement of the Law of Lawyering, section 103 (Communications with Unrepresented Nonclient). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although the proposed rule has no direct counterpart in the current California rules, much of its concept is found in current rule 3-600(D) concerning how a lawyer for an organization must deal with the organization’s constituents. The result of the evaluation is proposed rule 4.3 (Communicating with an Unrepresented Person). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The key concept of the proposed rule is in **paragraph (a)**, which prohibits a lawyer when communicating on behalf of a client with an unrepresented person from doing three things: (i) stating or implying the lawyer is disinterested; (ii) correcting the person’s misconception if the lawyer knows or reasonably should know the person incorrectly believes the lawyer is disinterested; and (iii) providing legal advice, other than to obtain counsel, if the interests of the person are in conflict with the client’s interests. By including the first two objectives, the proposed rule will extend the principles found in current rule 3-600(D) beyond the organizational context.¹ The Commission concluded the provision provides important public protection and critical guidance to lawyers interacting with unrepresented persons by clarifying the conduct that is prohibited rather than requiring them to parse and interpret more general prohibitions in the State Bar Act. Further, proposed Rule 4.3 complements proposed Rule 4.2’s prohibitions on communicating with a represented party when such communications are permitted under that rule. Moreover, Rule 4.3 would provide an alternative basis for discipline to Business & Professions Code §§ 6068(a) and 6106 that would not require the establishment of a fiduciary relationship or proof of an act of moral turpitude. Finally, a version of Model Rule 4.3 has been adopted in every other jurisdiction in the country.

¹ Rule 3-600(D) provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

The major concern with paragraph (a) is the third prohibition concerning the giving of legal advice. Unless the person retains counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the lawyer's client's legal positions. There is a fine line between providing legal advice and giving legal information and a lawyer arguably should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer's client. The Commission has addressed this concern by including proposed Comment [2], discussed below.

Paragraph (b) has no counterpart in jurisdictions that have adopted Model Rule 4.3. Nevertheless, the provision is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. A concern expressed regarding paragraph (b) is that it imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do. The Commission, however, concluded that a lawyer should not be permitted to engage in conduct that is prejudicial to the administration of justice simply because a layperson might not have the same duties as a lawyer.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the model rule numbering system and the substitution of the term "lawyer" for "member."

There are three comments to the Rule. Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved function of a rule comment. Comment [2] is a substantial revision of the corresponding Model Rule comment and clarifies the prohibition on giving "legal advice" in the third sentence of paragraph (a). In particular, it includes the important point that a lawyer does not give legal advice to an unrepresented person when the lawyer states a legal position on behalf of his or her client. Comment [3] was a placeholder when the Commission adopted the rule and in fact, has been moved to different rule.

National Background – Adoption of Model Rule 4.3

As California does not presently have a direct counterpart to Model Rule 4.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed rule 4.3 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf

28 states have adopted Model Rule 4.3 verbatim (AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, LA, MA, MS, MO, NE, NV, NH, NM, ND, OH, OK, RI, SC, SD, TN, VT, WV, WY); 22 jurisdictions have adopted a rule that is substantially similar to 4.3 (AL, CT, DC, FL, GA, KS, KY, ME, MD, MI, MN, MT, NJ, NY, NC, OR, PA, TX, UT, VA, WA, WI); only California has not adopted a rule derived from Model Rule 4.3 (CA).

**Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) In ~~dealing~~communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* ~~misunderstands the lawyer's role~~incorrectly believes* the lawyer is disinterested 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 the 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.~~the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.
- (b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

~~[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(f).~~

~~[2] The Rule~~Paragraph (a) distinguishes between situations ~~involving unrepresented persons whose~~in which a lawyer knows* or reasonably should know* that the interests ~~may be adverse to those of an unrepresented person* are in conflict with the interests of the lawyer's client and those in which the person's interests are not in conflict with the client's~~situations in which the lawyer does not. 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 legal 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. 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~~discloses 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~~the agreement or settle ~~a~~the 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~~and the underlying legal obligations.