

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

Draft 5.1 (10/15/09)

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. Virtually every jurisdiction except California has a version of Model Rule 4.3 with approximately 12 states adding to or modifying the rule.

Comparison with ABA Counterpart	
Rule	Comment
<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

Statute

Case law

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

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

624321.1

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.

Current California Law and Variations in Other Jurisdictions. 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 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 misunderstands <u>incorrectly believes</u> the lawyer's role <u>lawyer is disinterested</u> 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 <u>if</u> the lawyer knows or reasonably should know that the interests of such an unrepresented <u>such an unrepresented</u> person are or have a reasonable possibility of being <u>in</u> 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.</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 (10/15/09). Redline/strikeout showing changes to the ABA Model Rule

<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>(b) <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></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"><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>[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 order<u>acting to avoid</u>correct a misunderstanding <u>about the lawyer's role</u>, a lawyer will typically need to identify<u>may disclose the client's identity if it is not confidential.</u> <u>Whether the lawyer identifies</u> the lawyer's client and, <u>the lawyer shall explain</u>, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise<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 subparagraph 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">Rule 4.3 Dealing With Unrepresented Person</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 4.3 Dealing With Unrepresented Person</p> <p align="center">Comment</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>[23] The Rule Paragraph (a) distinguishes between situations involving <u>the situation in which a lawyer knows or reasonably should know that an unrepresented person whose person has interests may be that are</u> adverse to those of the lawyer's client and those the situation in which the person's interests are <u>lawyer does not in conflict with the client's have that actual or presumed knowledge</u>. 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 <u>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</u> 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 Comment [2]. 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 provides additional guidance 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>[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).</p>	<p>Comment [4] is new and explains the restriction in paragraph (b) in 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 is 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.</p>
	<p>[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.</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>[6] Paragraph (a) does not apply to lawful government or private covert criminal and civil enforcement investigations.</p>	<p>Comment [6] is new and points out that paragraph (a) does not apply to lawful government or private covert criminal and civil enforcement investigations.</p>

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	Agree			Comment [6]: what is the basis for excluding the intellectual property situation from the rule.	Commission deleted the discussion of intellectual property situations.
2	Los Angeles County Bar Association (Toby J. Rothschild)	Agree, only if modified			<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 government or private covert criminal and civil enforcement investigations.”</p> <p>See above</p> <p>Commission deleted the discussion of intellectual property situations.</p>
3	Matthew Lombard	Disagree			none	
4	Orange County Bar Association (Trudy Levindofske)	Agree			none	
5	San Diego County Bar Association (Heather L. Rosing)	Disagree			Common law provides sufficient protection against the abuses of lawyers toward the unrepresented without adding a rule of	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

¹ 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 = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					discipline. Comment [4] and [5] state exceptions not found in the Rule itself. Unclear what "reasonable possibility of being in conflict" means and whether it is limited to the present or foreseeable future.	is afforded by having a rule of professional conduct

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.”

**RRC – Rule 4.3 [2-100]
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**RRC – Rule 4.3 [2-100]
E-mails, etc. – Revised (10/13/2009)**

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August 27, 2009 McCurdy E-mail to Martinez, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100] (Post Public Comment Draft #17.4 dated 1/5/09) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a] (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e)) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
3. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
4. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
5. **IV.M. Possible Rule re: Law Firm Discipline (no counterpart rules) (possible rule last considered at the April 2006 meeting; see also New Jersey and New York rules) Codrafters: Mohr; Peck; Ruvolo; Tuft**
Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

August 27, 2009 McCurdy E-mail to Tuft, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission’s upcoming September, October and November meetings. A “rolling assignments agenda” is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered “rolling” because, for example, any rule that is not completed at the

September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.A. Rule 1.0 Purpose and Scope of the Rules [1-100]** (Post Public Comment Rule Draft #7 dated 6/18/07)

Codrafters: Julien, Lamport, Melchior, Ruvolo

Assignment: (1) a chart comparing proposed Rule 1.0 to relevant parts of the MR Preamble and Scope; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.M. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers [N/A]** (June 2009 Comparison Chart - Post Public Comment Rule Draft #9 dated 6/1/09)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.1 to MR 5.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.N. Rule 5.2 Responsibilities of a Subordinate Lawyer [N/A]** (Post Public Comment Rule Draft #5.2 dated 6/16/07)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.2 to MR 5.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.O. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants [N/A]** (Post Public Comment Rule Draft #9.1 dated 6/16/07)
Codrafters: Martinez, Peck
Assignment: (1) a chart comparing proposed Rule 5.3 to MR 5.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100]** (Post Public Comment Draft #17.4 dated 1/5/09)
Codrafters: MARTINEZ (Co-lead), Voogd
Assignment: (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a]** (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e))
Codrafters: MARTINEZ (co-lead), Voogd
Assignment: (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
3. **III.SS. Rule 5.4 Professional Independence [1-310][1-320][1-600]** (Post Public Comment Draft #13.2 dated 1/8/09 to be revised following the January 2009 meeting)
Codrafters: Martinez, Peck
Assignment: (1) a chart comparing proposed Rule 5.4 to MR 5.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
4. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)
Codrafters: MARTINEZ, Voogd

Assignment: (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

5. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

Codrafters: MARTINEZ (co-lead), Voogd

Assignment: (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

6. **IV.R. Rule 3-410 Insurance Disclosure** [adopted by the Sup. Ct. operative 1/1/10)

Codrafters: Foy, Julien, Kehr, Martinez

Assignment: (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Tuft, Martinez & Voogd), cc RRC:

Mark & Codrafters (Raul & Tony):

This message provides the assignment background materials for Rule 4.2 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 19, 2009 KEM E-mail to Drafters, cc RRC:

I've attached a revised Introduction template for Rule 4.3 (all I did was add the rule title and draft number & date in the footnote on the first page).

September 25, 2009 Tuft E-mail to McCurdy & KEM:

I am sorry to ask this of you, but could one of you send me the templates, rules, comments, dashboards and public comments for these two rules in Word. I have what you sent earlier on rule 1.0, but every time I try to open the word document for some reason it switches to rule 5.2. I am sure the problem is at my end, but I am unable to solve it. I hope to work on these rules this weekend. Thanks and sorry to bother you.

September 25, 2009 KEM E-mail to Tuft, cc McCurdy:

Here are the 4.3 templates (in Word) and my meeting notes (in PDF) for 4.3. Please let us know if you have any further problems opening them. I'll get you 1.0 presently.

Attached:

- Dashboard Template (9/18/09)
- Introduction Template (9/18/09)
- Rule & Comment Template (9/20/09)KEM
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)
- KEM Cumulative Notes for 4.3 (10/31/08)

September 29, 2009 Tuft E-mail to Drafters (Martinez & Voogd), cc Difuntorum & KEM:

Attached for your approval are the comparison chart, the Introduction and the ever popular "Dashboard" to proposed Rule 4.3.

Attachments:

- Dashboard, Draft 1 (9/29/09)MLT
- Introduction, Draft 1 (9/29/09)MLT
- Rule & Comment Chart, Draft 1 (9/29/09)MLT

October 3, 2009 KEM Memo to File:

I've revised Mark's submissions slightly. The draft numbers, etc., are:

- Dashboard, Draft 2 (10/03/09)MLT-KEM
- Introduction, Draft 2 (10/03/09)MLT-KEM
- Rule & Comment Chart, Draft 2 (10/03/09)MLT-KEM

October 9, 2009 Kehr E-mail to RRC:

I agree with sending these materials on to the Board but suggest the following modest changes:

1. No response is given to the S.D. County Bar comment that Comments [4] and [5] state exceptions not found in the Rule. I suggest adding the following explanation: "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)."

2. There also is no response to the final S.D. comment. I suggest: "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 doesn't believe that any meaningful refinement of the language is possible."

3. Assuming the Rule comes back to us, I would suggest that we omit the first sentence of Comment [4] as being nothing more than a repetition of Rule paragraph (b).³

October 11, 2009 Tuft E-mail to RRC:

I have no problem with Bob's first and second suggestions. I would retain the first sentence in Comment [4].

October 11, 2009 Sapiro E-mail to RRC List:

1. I still think we should not adopt this rule. I vote "no" on the rule itself and vote "no" on forwarding it to the Board.

³ **KEM:** This was raised & rejected at the 11/2007 meeting.

2. This rule is full of oversimplifications that do not apply in the day to day practice of law and will be wrong as disciplinary standards. For example, paragraph (a) forbids a lawyer from giving legal advice to an unrepresented person if the interests of the lawyer's client and those of the unrepresented person conflict. This cannot be a universal rule that would subject the lawyer to discipline. If I represent defendant A, and there is a conflict of interest that precludes me from representing co-defendant B in defense of the same lawsuit, and client B cannot afford a lawyer, this rule would prohibit me from saying anything to B more than, "Get a lawyer," even if giving additional advice might protect my client and be in my client's best interests. If my client might be vicariously liable for the conduct of B, and B does not file an answer, B's default can be taken in the litigation. However, under this proposed rule I could not tell B to file an answer; could not give B a form of answer to copy from; and could not advise B of the consequences to B or to my own client if B defaults. Similarly, at deposition, if the lawyer taking the deposition asks B a question that invades a privilege, such as the lawyer-client privilege, I could not speak up and tell B that the question is improper and that he or she should object and refuse to answer. All of this, even if my client might be aided by my giving such advice to B.
3. Paragraph (b) is too vague. Suppose a lawyer interviews a non-party witness who is not represented by counsel and makes an innocent remark such as, "I don't know what the defendant was thinking, but if I had been in his position I would have done the following" That statement, in the wording of paragraph (b) of the proposed rule, can be interpreted to "imply" that the lawyer is disinterested. The statement may be absolutely truthful and not misleading, but will be prohibited. If the defendant later finds out that the comment was made, the defendant could complain to OCTC under Rule 4.3, even though the unrepresented witness was not harmed, not offended, and did not complain to the State Bar.
4. In a non-litigation situation, a client might instruct the lawyer to be fair with the unrepresented opposite party. If, in negotiations with that unrepresented person, the lawyer says, "I think that a fair approach would be," that remark, no matter how fair the lawyer's recommendation was, would be a violation of paragraph (a) because it "implies" that the lawyer is disinterested.
5. Under paragraph (b), if I represent a shareholder and interview a corporation's unrepresented former employee, and I ask that former employee whether he or she knows why options were backdated, and she might tell me that it was, "Because our lawyer told me and the chief financial officer that we could and should do so." I have then violated this rule because I have asked a question that I arguably reasonably should have known calls for that person to reveal information that violates a duty to the former employer.
6. In estate planning, if I represent an adult child, and I speak with the parent and ask questions that the parent could be privileged not to disclose, such as tax return information, but which is relevant to my work for 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, I am asking the unrepresented party information that I am not entitled to receive because that party's income tax or gift tax returns are confidential. For that, I could be disciplined if this rule is adopted.
7. The list of situations in which this rule applies but should not is virtually unlimited. It is overbroad, poorly worded, and inconsistent with lawyers' duties to their clients in many circumstances.

8. I request that this statement be added as a dissent to the rule.

October 11, 2009 Sondheim E-mail to RRC:

Dashboard does not indicate if there is a Minority Position and Stakeholders. Since one county bar association (Orange Co.) opposes this rule, should it be "moderately controversial."

In the Introduction, third paragraph, the heading includes "Current California Law, but there is nothing in the Introduction which describes current California Law.

October 12, 2009 Lampport E-mail to RRC:

1. I join in Jerry's objection to this Rule and hope that one more member will join us so that we can discuss this at the next meeting. In addition to Jerry's concerns with paragraph (b), I would like to add my concerns with paragraph (a).
2. I continue to object to the last sentence in paragraph (a). If the Commission will not agree to remove the sentence, I would like my objection included in the introduction and comparison table. My objection relates to the prohibition on giving "advice" to an unrepresented person if a lawyer knows or should know that the unrepresented person's interests conflict with the client. For the tables, my objection is as follows:

"Some members of the Commission object to the Rule's prohibition on 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 are inevitable. The Rule does not define what constitutes giving legal advice. As a result, the Rule creates a situation in which lawyers may act at their peril when dealing with an unrepresented person on behalf of a client, which would limit the lawyer's ability to represent the client. 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. The prohibition on giving legal advice in the Rule would create such a conflict. 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 public protection purposes of the Rule are met by assuring that an unrepresented person knows that the lawyer represents a client with an adverse interest. Adding a prohibition on giving legal advice is unnecessary and will create a conflict of interest for lawyers dealing with unrepresented persons on a client's behalf."

3. Let me give a couple of examples of what concerns me. First, assume a lawyer is communicating with an unrepresented person who is trespassing on a client's property. I presume that writing a letter to an unrepresented person saying you are trespassing is merely stating the client's legal position. How about 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 \$\$\$\$." 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 going to understand the difference?

4. 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 effect 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?
5. As the introductory statement shows, we would not be going it alone here by not including the prohibition on legal advice. I hope you will agree with me that the last sentence in paragraph (a) is not necessary and should be deleted along with the related discussion in Comment [3].

October 12, 2009 Melchior E-mail to RRC List:

Rule 4.3: **Comment 1** certainly " does not materially add to an understanding of the Rule," to repeat our comment at p. 421, supra, and **should be deleted**

P. 459, comment 6, contains **six** qualifying terms in a row, making it one of the most awkward formulations I can recall.

How about: "does not apply to covert criminal or civil investigations by government or private lawyers"?