

Rule 4.3 Communicating with an Unrepresented Person
(Commission’s Proposed Rule – Black Letter Rule Text (already approved) and
Proposed Amended Comments to Be Presented at 8/14/15 Meeting in L.A.)

- (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 those of the lawyer’s client and those in which the lawyer does not.¹ 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.

[3] [PLACEHOLDER] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.²

¹ Staff offers the following longer, but perhaps easier to read, version of this sentence:

“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~~those~~ of the lawyer’s client and other situations~~those~~ in which the lawyer does not.

² Comment [3] is designated as a “placeholder” pending the Commission’s consideration of ABA Model Rule 8.4. If the Commission adopts a version of Model Rule 8.4, then Comment [3] might be revised to become a cross-reference to that rule.

Rule 4.3 Communicating with an Unrepresented Person

(Commission’s Proposed Rule – Black Letter Rule Text (already approved) and
Proposed Amended Comments to Be Presented at 8/14/15 Meeting in L.A. Markings
Show Changes to the Version included in the Drafting Team’s Report and Recommendation)

- (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~~it is apparent~~ that the interests of an unrepresented person are in conflict with those of the lawyer’s client and those in which the lawyer does not~~the persons’ interests are not in conflict with the client’s interests.~~¹ 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.

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