

**September 23, 2016 Cardona Email re 4.3 to Difuntorum, Mohr & McCurdy:**

A quick comment on Rule 4.3: I think we need a comment that parallels that in 4.1, cross-referencing to 8.4 with respect to covert investigations, to cover those situations in which, for example, an undercover agent working with a government prosecutor is contacting an unrepresented person and will not be disclosing that he is an undercover agent working for the government. I propose the following, which mirrors comment 4 from proposed Rule 4.1:

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

**September 23, 2016 Difuntorum Email re 4.3 to Cardona, cc Mohr, McCurdy:**

George & Kevin: If desired, the attached revised draft of proposed Rule 4.3 can be available to project on the screen at the San Diego meeting.

**Mimi:** Please add this the files that are being collected for possible projection at the meeting.

Attached:

RRC2 - [4.3][2-100] - Rule – XDFT1 (09-23-16)GSC - Cf. to DFT4 (08-14-15)

**September 23, 2016 Cardona Email re 4.3 to Difuntorum, Mohr & McCurdy:**

Thanks. That looks good to me.

### **Proposed Rule 4.3**

#### **Public Comment Version Amended to Address Covert Investigations**

(rev. 9/23/16)

#### **Rule 4.3 Communicating with an Unrepresented Person**

- (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.

[\[3\] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment \[5\].<sup>1</sup>](#)

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<sup>1</sup> In a 9/23/16 email message from George Cardona to staff, it is recommended that proposed Rule 4.3 include a comment that parallels Comment [4] in proposed Rule 4.1 to address covert investigations (for example, a situation where an undercover agent working with a government prosecutor is contacting an unrepresented person and will not be disclosing that he is an undercover agent working for the government). This language used in new Comment [3] is identical to the language used for clarifying Rule 4.1.