

### **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.<sup>1</sup>

[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.

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<sup>1</sup> OCTC suggested that this comment be deleted as unnecessary by only providing a philosophical basis for the rule, but a majority of the drafting team recommends retaining it.



**Proposed Rule 4.3 Communication with an Unrepresented Person  
Synopsis of Public Comments**

**TOTAL = 10**    **A = 4**  
**D = 2**  
**M = 4**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bo	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Y	A		<p>COPRAC supports the proposed rule and comments.</p> <p>COPRAC agrees that Rule 4.3 provides important public protection and guidance to lawyers in dealing with an unrepresented person and that adoption of Rule 4.3 will promote consistency across jurisdictions, all of which have adopted some form of Rule 4.3.</p> <p>COPRAC also agrees that imposing upon lawyers additional obligations in communicating with unrepresented persons may be appropriate, even if a “gap” is created between what a lawyer and a client may do. Lawyers are fiduciaries and may be held to a higher standard and prohibited from engaging in conduct their clients may engage in, and, in fact, already are in numerous contexts.</p>	No response required.
X-2016-68u	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We commend and support the adoption of this proposed rule as an important corollary to proposed Rule 4.1.	No response required.
X-2016-75d	Kerins, Steve (09-25-16)	N	M	(b)	Paragraph (b) intrudes into a lawyer’s representation of his or her own client, and should be	The Commission disagrees that Rule 4.3 improperly intrudes into a lawyer’s

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

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					omitted.	representation of the lawyer client. Current case law does not permit a lawyer to -engage in conduct with the intent to obtain a non-client person's privileged or confidential information.
X-2016-83c	Garrett, Christopher (09-26-16)	N	D		<p>Proposed Rule 4.2 seeks to replace current Rule 2-100 and adds a new subsection (d) that requires compliance with the proposed Rule 4.3. The proposed Rule 4.3 regulates not only what the lawyer "state[s] or impl[ies]" but also requires the lawyer to evaluate what the unrepresented person believes and the interests of the unrepresented person as against the lawyer's own client.</p> <p>1. Whether the unrepresented person believes the lawyer is "disinterested" is left undefined, and the standards by which the lawyer is supposed to evaluate the unrepresented person's interests and conflicts as against the lawyer's client is similarly</p>	<p>With respect to commenter's comments regarding proposed Rule 4.2, see Commission's response to Garrett, X-2016-83b, in Rule 4.2 Public Comment Synopsis Table.</p> <p>1. The Commission disagrees. The terms "knows" and "reasonably should know" are both defined terms in the proposed Rules. See proposed Rule 1.0.1(f)<sup>2</sup> and (j),<sup>3</sup> respectively. Both require that the lawyer not turn a blind</p>

<sup>2</sup> (f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

<sup>3</sup> (j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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					<p>undefined. The vagueness of the proposed rule 4.2 and 4.3 places legal practitioners at special and unreasonable risk for discipline due to an inability to assess an unrepresented person's unstated beliefs and interests.</p> <p>2. In addition, the prohibition against a lawyer's "implications" of "disinterestedness" is a vague restriction that potentially constitutes impermissible infringement on the right to free speech and the right to petition the government guaranteed by the California Constitution.</p>	<p>eye to the obvious. The lawyer must draw reasonable<sup>4</sup> inferences from the unrepresented person's words and conduct.</p> <p>2. The Commission does not agree that paragraph (a) is impermissibly vague. The term "disinterested" has not been shown to be vague in the many jurisdictions that have adopted this rule. Dictionary terms include "free from selfish motive or interest,"<sup>5</sup> "free of bias and self-interest; impartial,"<sup>6</sup> and "unbiased by personal interest or advantage; not influenced by selfish motives."<sup>7</sup> The Commission also does not believe that such a term, which is intended to preclude a lawyer from engaging in misleading conduct in communications with an</p>

<sup>4</sup> "Reasonable" is also a defined term in the proposed Rules. See Rule 1.0.1(h) ("Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.)

<sup>5</sup> See <http://www.merriam-webster.com/dictionary/disinterested>

<sup>6</sup> See <http://www.thefreedictionary.com/disinterested>

<sup>7</sup> See <http://www.dictionary.com/browse/disinterested>

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						unrepresented person, runs afoul of Constitutional protections.
X-2016-97g	Freedman, Daniel (09-27-16)	N	D		<p>1. Although the spirit of proposed rules 4.2 and 4.3 are commendable, as drafted, these rules create unacceptable risks to attorneys engaging with administrative agencies and government officials on political issues. Again, in many informal settings, defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear, and a lawyer's profession should not be placed at risk as a result of their personal interests in engaging in the political process. Moreover, in this setting, there is inherent vagueness in the term "disinterested," that would require an investigation into an attorney's subjective intent for engaging an unrepresented party.</p> <p>2. The same is true with respect to the rule's prohibition on giving "legal advice." In dealing with governmental agencies, the line between "legal advice" and political opinion is almost impossible to define. Accordingly, the rule creates an unacceptable</p>	<p>1. The Commission is not aware that Rules 4.2 and 4.3 have create unacceptable risks for lawyers in other jurisdictions who engage in communicating with government agencies and officials on behalf of clients. The Commission does not understand the commenter's statement that "defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear." Proposed Rule 4.3 applies when the lawyer is "communicating <i>on behalf of</i> a client." To suggest that the word "disinterest" applies to the lawyer's personal disinterest in the matter unreasonably stretches the bounds of rule interpretation. See also response 2 to Garrett, X-2016-83c, above.</p>

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					risk that an attorney's engagement and involvement with government agencies may stifle and chill an attorney's constitutionally protected right to engage in the political process, and will create the unacceptable risk that an attorney's livelihood may be attacked through state bar complaints based on political motivations and interests.	2. The Commission disagrees and believes that Comment [2] to the rule succinctly draws a distinction between giving "legal advice" to an unrepresented person whose interests are in conflict with the interests of the lawyer's client and stating a legal position on behalf of a client or providing information. The Commission does not believe that communication to an unrepresented person an interpretation of a statute, regulation or other law should be characterized as a "political opinion."
X-2016-104au	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. OCTC supports this rule.  2. OCTC is concerned that Comments 1 and 2 are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule.	1. No response required.  2. The Commission has not made the requested change. Comment [1] identifies the public policy underlying the rule and thus provides insight into how the rule should be applied and interpreted. Comment [2] provides important interpretative guidance as to the rule's application by distinguishing "legal advice," which a lawyer is prohibited from giving to an unrepresented person under the rule and "legal

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						information,” which the lawyer is permitted to give.
X-2016-115i	Lamport, Stanley (09-29-16)	N	M		<p>Proposed Rule 4.3 exposes lawyers to unique risks in communicating with an unrepresented person on a client’s behalf. As a result, it creates the potential to compromise a lawyer’s ability to represent a client that is not justified.</p> <p>1. As a general rule, we want to maintain an identity between what a client lawfully can say and what a lawyer can say on a client’s behalf. That identity is a fundamental quality of representation. We start to lose that identity when we expose lawyers to risks in connection with communicating on a client’s behalf that are not shared by the client.</p> <p>Rule 4.3 would subject a lawyer to discipline (and potentially other consequences) for communications with an unrepresented person on a client’s behalf with respect to matters that the client can communicate without any penalty.</p>	<p>The Commission disagrees. Rule 4.3 provides important public protection and has not exposed lawyers to unique risks in other jurisdictions, all of which have adopted a version of this rule.</p> <p>1. The Commission disagrees that a lawyer is able to do whatever a client can personally do under the rules of professional conduct. . This suggestion neglects the lawyer’s role and duties to third parties as an officer of the legal system. See COPRAC’s comment, X-2016- 43bo, above, in support of the rule.</p>



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					<p>2. The rule not only limits a lawyer's ability to represent a client vis-à-vis someone who chooses not to be represented, but it can interfere with a lawyer's exercise of independent judgment on a client's behalf, as the lawyer weighs the lawyer-unique risks created by the rule in advising a client about communicating with an unrepresented party.</p> <p>3. If the Commission adopts the Proposed Rule 4.3, the Proposed Rule should be revised as shown on the attached redline.</p>	<p>2. The Commission disagrees with the commenter's characterization that the rule creates unique risks and is intended to protect a person who "chooses" to not be represented. It is beyond dispute that there is a problem of access to justice in California because persons of moderate means cannot afford legal representation.</p> <p>3. The Commission has not made the suggested changes. The revised rule as proposed by the commenter would remove the protections afforded by the proposed rule, which tracks the rule adopted by other jurisdictions.</p>
X-2016-121f	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		<p>The Access Commission is in favor of proposed Rule 4.3, which is particularly important for low and moderate income persons given the high number of them who are unrepresented in legal matters. Unrepresented parties can be vulnerable to inappropriate communications. We support the proposed Rule's requirement that lawyers who communicate with unrepresented parties not imply that the lawyers are disinterested. We also</p>	<p>The Commission appreciates that many persons of moderate means are unrepresented not because they have chosen to do so but because they cannot afford to retain a lawyer.</p>

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					support the proposed Rule's prohibition on lawyers seeking or obtaining privileged or confidential information from unrepresented parties.	
X-2016-126f	Ivester, David (09-27-16)	N	M		<p>1. Proposed Rule 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and indirect communications with a represented "public official, board, committee, or body" on a client's behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf would chill a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law.</p> <p>2. These unwarranted extensions of trial rules to sundry administrative processes may not only limit and inhibit lawyers in their efforts to represent their clients, but could lead as well to strategic claims of ethical violations against lawyers with the aim of interfering with the legal representation of a party in such administrative processes.</p>	<p>1. Concerning the commenter's reference to Rule 4.2(d), see response Lampport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table.</p> <p>Concerning the commenter's discussion of Rule 4.3, see responses to Garrett, X-2016-83c, Freedman, X-2016-97g, and Lampport, X-2016-115i, above.</p> <p>2. The Commission does not understand the commenter's reference to "unwarranted extensions of trial rules" in relation to Rules 4.2 and 4.3, which are not limited to litigation. If the commenter's reference is to Rules 3.3 through 3.5, please see response to commenter in the Rule 1.0.1 Public Comment Synopsis Table. If the</p>

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					These proposed rules would unnecessarily burden the fundamental and constitutional rights to speak with and petition public agencies and officials by interfering with an individual's right to engage counsel who can effectively represent his or her interests with public agencies and officials.	commenter is referring to Rules 4.2 and 4.3, regarding the comment re "fundamental and constitutional rights," see responses to Garrett, X-2016-83c, Freedman, X-2016-97g, and Lamport, X-2016-115i, above.
X-2016-129f	California Building Industry Association (Cammarota) (09-27-16)	Y	M		<p>1. Proposed Rule 4.3 is problematic when applied to lawyer communications with a represented government agency.</p> <p>1. In the first instance, Proposed Rule 4.3 concerns when a lawyer communicates directly with an unrepresented person. However, Proposed Rule 4.2 concerns a lawyer's direct or <i>indirect</i> communications with represented persons and organizations. Proposed Rule 4.2(d) makes proposed Rule 4.3 applicable to "any communication" not prohibited by Proposed Rule 4.2.</p> <p>Proposed Rule 4.2 permits direct and indirect communications with represented "public officials, boards, committees and bodies." However, Proposed Rule 4.2 does not explain how proposed Rule 4.3, which applies only to direct communications, would</p>	<p>1. The commenter's submission is concerned primarily with the interaction of proposed Rules 4.2 and 4.3, as provided in Rule 4.2(d). As explained in the response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table, the Commission has decided to delete proposed Rule 4.2(d).</p>

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					<p>apply to indirect communications. The difference in the scope of the communications covered in Proposed Rule 4.2 (direct and indirect) and the scope of communications in Proposed Rule 4.3 (direct only) makes the application of proposed Rule 4.3 to proposed Rule 4.2 complicated and confusing to the average practitioner.</p> <p>2. In addition, proposed Rule 4.3, as currently drafted, contains three vague and imprecise requirements that would chill lawyer communications with government on a client's behalf.</p> <p>As applied to Proposed Rule 4.2, proposed Rule 4.3 would prohibit a lawyer directly or indirectly communicating with a represented "public official, board, committee or body" from (i) stating or implying that the lawyer is disinterested, (ii) giving legal advice, or (iii) seeking to obtain confidential or privileged information. All of these terms are undefined, imprecise and open to interpretation.</p> <p>a. Proposed Rule 4.3 does not explain what it means to state or imply in a direct or indirect</p>	<p>2. The Commission disagrees with the commenter's assessment of the provisions of proposed Rule 4.3 which track Model Rule 4.3 and which have been adopted in some form in every jurisdiction.</p> <p>a. See response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis</p>

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					<p>communication that a lawyer is disinterested. If it means that the lawyer cannot misrepresent that the lawyer is acting in a representative capacity, then Proposed Rule 3.9 is a much clearer statement. The term “disinterested” is not defined and has no established meaning under California law. As a result, there is a possibility that it could be interpreted in the future to have another meaning.</p> <p>b. Proposed Rule 4.3 does not explain what it means to directly or indirectly give legal advice. Comment [2] to Proposed Rule 4.3 states that “[a] lawyer does not give legal advice <i>merely</i> by stating a legal position on behalf of the lawyer’s client.” (Emphasis added.) However, the Comment does not explain when directly or indirectly communicating a client’s legal position would be legal advice. Communications with government frequently involve advocacy of a client’s legal position. Such advocacy could be construed as being beyond “merely” stating a legal position.</p> <p>c. Proposed Rule 4.3 does not explain what it means to “seek to</p>	<p>Table, regarding the Commission’s decision to delete proposed Rule 4.2(d). See also response 2 to Garrett, X-2016-83c, above.</p> <p>b. See response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table, regarding the Commission’s decision to delete proposed Rule 4.2(d).</p> <p>c. See response to Lamport, X-2016-115a, in the Rule 4.2</p>

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					<p>obtain privileged or other confidential information” when directly or indirectly communicating with a represented “public official, board, committee or body” on a client’s behalf.</p> <p>Leaving the answers to the ambiguities in the definition to future litigation in State Bar proceedings is not the answer. These ambiguities chill the conduct of lawyers who are not interested in being the test case in ways that can affect the lawyer’s loyal representation of a client with respect to government, which should not be the case. The “public official, board, committee or body” exception in Rule 4.2(c)(1) exists to allow lawyers to freely communicate with government on a client’s behalf. Under Article 1, Sec. 3(a) of the California Constitution, “The people have the right to instruct their representatives [and] petition government for redress of grievances.” Under Article 1, Section 3(b) of the California Constitution, “The people have the right of access to information concerning the conduct of the people’s business.”</p>	Public Comment Synopsis Table, regarding the Commission’s decision to delete proposed Rule 4.2(d).

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					<p>The purpose of the exception in Proposed Rule 4.2(c)(1) is to allow lawyers the ability to communicate with government on a client's behalf to the same extent that a client is permitted to communicate with government under the California Constitution.</p> <p>Accordingly, in addition to deleting Proposed Rule 4.2(d), Proposed Rule 4.3(b) and comment [2] should be deleted. Additionally, Proposed Rule 4.3(a) should be amended as shown in the included redline.</p>	

