

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 4.3**

### **Commission Drafting Team Information**

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### **I. CURRENT ABA MODEL RULE 4.3**

**[There is no California Rule that corresponds to Model Rule 4.3,  
from which proposed Rule 4.3 is derived.]**

#### **Rule 4.3 Dealing With Unrepresented Person**

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.

#### **Comment**

[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 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.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.3

Vote: 13 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 4.3

Vote: X (yes) – X (no) – X (abstain)

## **III. COMMISSION'S PROPOSED RULE 4.3 (CLEAN)**

### **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].

#### IV. COMMISSION'S PROPOSED RULE 4.3 (REDLINE TO ABA MODEL RULE 4.3)

##### Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person

- (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~~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.
- (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 ~~at~~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.

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

## V. RULE HISTORY

Although the origin and history of Model Rule 4.3 was not the primary factor in the Commission's consideration of proposed Rule 4.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 571 – 576, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
(In response to 90-day public comment circulation):

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.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted the same comments as for the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same. See 90-Day and 45-Day Public Comment Synopsis Tables, Attachments \_\_\_\_\_ and \_\_\_\_\_.

- **State Bar Court:** No comment was received from the State Bar Court.

## VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Two comments, including the above comment from OCTC, were received. One agreed with the proposed rule. One agreed only if modified, and one did not indicate. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf)
- 28 jurisdictions 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.

## IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

### A. Concepts Accepted (Pros and Cons):

1. General: Recommendation that a version of ABA Model Rule 4.3, as amended, be adopted.
  - Pros: Notwithstanding objections to the adoption of such a rule on the ground that "overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act," the Commission believes the proposed rule is necessary to protect the public. The Rule is intended to ensure that unrepresented persons, whatever their interests may be, are not being misled when communicating with a lawyer who is acting on behalf of a client. The rule provides important public protection and critical guidance to lawyers interacting with represented 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 rule 4.2's prohibitions on communicating with a represented party. Moreover, Rule 4.3 would provide an alternative basis for discipline to Bus. & Prof. Code §§ 6068(a) and 6106 that does 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. There is no reason for California to remain the only state not to have the Rule.

- Cons: “A revision to rule 2-100 governing contact with one who is not represented by counsel is unnecessary. Again, overreaching and other improper conduct that may arise in this context is addressed in other rules and the State Bar Act.”
2. In title and rule, change “dealing with” to “communicating with”.
- Pros: The change will clarify precisely what conduct is being reached and make Rule parallel with proposed rule 4.2 [2-100] (Communicating With Represented Person).
  - Cons: None identified.
3. In paragraph (a), second sentence, substitute “incorrectly believes the lawyer is disinterested” for “misunderstands the lawyer’s role” in Model Rule 4.3.
- Pros: The change will more precisely identify the concern the proposed rule is intended to address. It conforms to the RRC1 language. Note: The use of the word “believe” has been used in anticipation that the terminology rule drafting team will recommend adoption of a term similar to Model Rule 1.0(a) (“Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.)
  - Cons: None identified.
4. Retain the concept of paragraph (a), third sentence, i.e., when the client’s and unrepresented person’s interests are adverse, a lawyer shall not give legal advice to the person except to secure counsel.
- Pros: A lawyer who represents a client with interests adverse to an unrepresented person should not provide legal advice to that person. The danger of the lawyer overreaching and compromising the interests of the unrepresented person are too great. The rule does not prohibit a lawyer from stating a legal position on behalf of the lawyer’s client. (See proposed Comment [2].) Moreover, appropriate disclaimers when stating the client’s legal position could avoid a misunderstanding on the part of the unrepresented person that the lawyer is providing legal advice.
  - Cons: Unless the person were to retain counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the client’s legal positions. There is a fine line between providing legal advice and giving legal information and a lawyer should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer’s client.

5. In paragraph (a), third sentence, delete the Model Rule 4.3 phrase “might have a reasonable possibility of being”.
- Pros: Requiring a lawyer not only to recognize when an unrepresented person’s interests are adverse to the lawyer’s client’s interests but also to anticipate when their interests might become adverse in the future places too great a burden on a lawyer and would interfere with the lawyer’s ability to advocate effectively on behalf of his or her client. On balance, the likely interference with effective advocacy warrants deleting the clause.
  - Cons: A lawyer should reasonably be able to anticipate when there is a “reasonable possibility” that the interests of the person and the lawyer’s client will become adverse.
6. In paragraph (a), reverse the sentence structure of the third sentence of ABA Model Rule 4.3, so that the qualifying clause comes first.
- Pros: The clause reversal emphasizes that the prohibition and duty described in the sentence are triggered when the lawyer “knows” the interests of client and unrepresented person conflict.
  - Cons: None identified.
7. Add paragraph (b), which prohibits a lawyer from seeking to obtain from an unrepresented person information that is privileged or confidential.
- Pros: Although proposed paragraph (b) is not found in Model Rule 4.3, there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third person. 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 in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. Including the provision in this Rule is appropriate because the Commission has not recommended that Model Rule 4.4(a) be adopted. Finally, that the lawyer’s client might have the ability to engage in such conduct is no reason to permit a lawyer to do so; lawyers who are trained advocates should be held to a higher standard of conduct.
  - Cons: The provision imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do.
8. Add Comment [1], not found in Model Rule 4.3, and delete Model Rule Comment [1].
- Pros: Comment [1] succinctly states the policy underlying the rule and its intent, and so explains how the rule will likely be applied to a contemplated

course of conduct. The Model Rule comment merely repeats the rule and is thus unnecessary.

- Cons: None identified.

9. Retain but substantially revise Model Rule 4.3, Comment [2].

- Pros: The comment contains important guidance that clarifies the prohibition on giving “legal advice” in the third sentence of paragraph (a). In particular, it makes the important point that in negotiating with an unrepresented person, a lawyer does not give legal advice when the lawyer states a legal position on behalf of the lawyer’s client.
- Cons: None identified.

10. Add Comment [3], which has no counterpart in Model Rule 4.3, and which provides a cross-reference to Rule 8.4, Comment [5] concerning lawful covert investigative activities.

- Pros: By referencing proposed Rule 8.4, Comment [5], this Rule’s Comment [3] provides guidance and assurance to both government and private lawyers who engage in lawful covert investigative activities. Comment [3] is identical to a comment recommended by RRC1, which in turn was developed from Oregon Rule 8.4(b), a rule that was adopted in Oregon following the Oregon Supreme Court’s decision in *In re Gatti* (2000) 8 P.3d 966, in which the court sanctioned a lawyer for a covert investigation he conducted on behalf of a client in violation of the Oregon DR 1-102(A)(3) [conduct involving dishonesty, fraud, deceit or misrepresentation] and DR 7-102(A)(5) [knowingly making false statement of law or fact]. Subsequently, the Oregon Code was amended to permit the conduct and this was carried forward when Oregon converted to rules based on the ABA Model Rules as Oregon Rule 8.4(b).<sup>1</sup> Use of the qualification “lawful” should prevent the comment from swallowing the rule.
- Cons: Some questions/concerns were raised about including comment [3]:  
(1) This exception encompasses actions taken by both governmental and non-governmental/private lawyers and might be construed to be so broad that

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<sup>1</sup> Oregon Rule 8.4(b) provides:

(b) Notwithstanding paragraphs (a) (1), (3) and (4) and Rule 3.3 (a)(1) , it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct . “Covert activity,” as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. “Covert activity” may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.



it “swallows the general prohibition” insofar as covert investigations are involved.

(2) Even with the limitation that the covert activity be “lawful,” deciding what is a “lawful” covert investigation in the private sector would still leave a great deal of uncertainty in the rule.

(3) Even if it is determined that the comment is not too broad, it belongs in the blackletter because creates an exception to the rule.

(4) Even if it is determined that the comment is not too broad and is appropriate either as a comment or a black letter exception, whether rule 4.3 is the appropriate rule in which to place a comment providing that a lawyer who conducts a lawful covert investigation is not in violation of the Rules. Alternative rules would include proposed rule 8.4, should the Commission recommend adoption of a counterpart to MR 8.4 or a rule counterpart to MR 4.1 (Truthfulness in Statements to Others).

## **B. Concepts Rejected (Pros and Cons):**

None.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

## **C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:**

1. California has similar provisions, (see, e.g., rule 3-600(D) and Business & Professions Code §§ 6068(a) and 6106), so the adoption of proposed rule 4.3 arguably would not create any new duties but instead would provide lawyers with guidance in communicating with unrepresented persons.

## **D. Non-Substantive Changes to the Current Rule:**

None.

## **E. Alternatives Considered:**

None.

## **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

### **Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 4.3 in the form attached to this Rule and Recommendation.

### **Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 4.3 in the form attached to this Report and Recommendation.