

**Rule 4.3 Communicating with an Unrepresented Person  
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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].



**PROPOSED RULE OF PROFESSIONAL CONDUCT 4.3  
(No Current Rule)  
Communicating with an Unrepresented Person**

**EXECUTIVE SUMMARY**

In connection with the consideration of current rule 2-100 (Communication with a Represented Party), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) reviewed and evaluated ABA Model Rule 4.3 (Dealing With an Unrepresented Person), the Restatement of the Law of Lawyering, section 103 (Communications with Unrepresented Nonclient). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. Although the proposed rule has no direct counterpart in the current California rules, much of its concept is found in current rule 3-600(D) concerning how a lawyer for an organization must deal with the organization’s constituents. The result of the evaluation is proposed rule 4.3 (Communicating with an Unrepresented Person).

**Rule As Issued For 90-day Public Comment**

The key concept of the proposed rule is in paragraph (a), which prohibits a lawyer when communicating on behalf of a client with an unrepresented person from doing three things: (i) stating or implying the lawyer is disinterested; (ii) correcting the person’s misconception if the lawyer knows or reasonably should know the person incorrectly believes the lawyer is disinterested; and (iii) providing legal advice, other than to obtain counsel, if the interests of the person are in conflict with the client’s interests. By including the first two objectives, the proposed rule will extend the principles found in current rule 3-600(D) beyond the organizational context.<sup>1</sup> The Commission concluded the provision provides important public protection and critical guidance to lawyers interacting with unrepresented 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 proposed rule 4.2’s prohibitions on communicating with a represented party when such communications are permitted under that rule. Moreover, rule 4.3 would provide an alternative basis for discipline to Business & Professions Code §§ 6068(a) and 6106 that would 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.

The major concern with paragraph (a) is the third prohibition concerning the giving of legal advice. Unless the person retains counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the lawyer’s client’s legal positions. There is a fine line between providing legal advice and giving legal information and a lawyer arguably should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer’s client. The Commission has addressed this concern by including proposed Comment [2], discussed below.

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<sup>1</sup> Rule 3-600(D) provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Paragraph (b) has no counterpart in jurisdictions that have adopted Model Rule 4.3. Nevertheless, the provision is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. A concern expressed regarding paragraph (b) is that it imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do. The Commission, however, concluded that a lawyer should not be permitted to engage in conduct that is prejudicial to the administration of justice simply because a layperson might not have the same duties as a lawyer.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the model rule numbering system and the substitution of the term "lawyer" for "member."

There are three comments to the rule. Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved function of a rule comment. Comment [2] is a substantial revision of the corresponding Model Rule comment and clarifies the prohibition on giving "legal advice" in the third sentence of paragraph (a). In particular, it includes the important point that a lawyer does not give legal advice to an unrepresented person when the lawyer states a legal position on behalf of his or her client. Comment [3] was a placeholder when the Commission adopted the rule and in fact, has been moved to different rule.

### **National Background – Adoption of Model Rule 4.3**

As California does not presently have a direct counterpart to Model Rule 4.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

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)
- Twenty-eight states have adopted Model Rule 4.3 verbatim; twenty-two jurisdictions have adopted a rule that is substantially similar to 4.3; only California has not adopted a rule derived from Model Rule 4.3.

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [3] which provides a cross-reference to proposed rule 8.4, Comment [5], regarding a lawyer's involvement in lawful covert activity when investigating violations of law. Comment [5] to proposed rule 8.4 (Misconduct) states a lawyer does not engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation when a lawyer "advises clients or others about, or supervises, 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 and the State Bar Act."

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

### **Final Modifications to the Proposed Rule**

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.



## COMMISSION REPORT AND RECOMMENDATION: RULE 4.3

### Commission Drafting Team Information

**Lead Drafter:** Mark Tuft

**Co-Drafters:** George Cardona, Danny Chou, Joan Croker, Raul Martinez,  
Dean Zipser

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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, 2017

Action: Recommend Board Adoption of Proposed Rule 4.3

Vote: 13 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 4.3

Vote: 11 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION'S PROPOSED RULE (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 (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.~~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. OFFICE OF CHIEF TRIAL COUNSEL / 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.

Commission Response: No response required.

2. OCTC is concerned that Comments [1] and [2] are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule.

Commission Response: The Commission continues to believe that Comments [1] and [2] provide important guidance with respect to the application of the Rule.

3. Comment [3] is unnecessary, as this subject is covered in Rule 4.4.

Commission Response: The Commission continues to believe it is important to have a cross-reference to provide guidance with respect to a situation in which all the requirements of the Rule will not apply.

- **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.

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

## **VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, ten public comments were received. Four comments agreed with the proposed Rule, two comments disagreed, and four comments agreed only if modified. During the 45-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

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

### **A. Related California Law**

A provision analogous to the first sentence of Model Rule 4.3 is found in the second sentence of current rule 3-600(D), which provides:

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Model Rule 4.3 applies the prohibition in 3-600(D) more generally, so that it is not limited to contexts involving a constituent of an organization.<sup>1</sup>

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<sup>1</sup> Conduct analogous to that prohibited in Model Rule 4.3 appeared in a Court of Appeal decision, *Furia v. Helm* (2003) 111 Cal.App.4th 945, 955 (In dispute between contractor and homeowners, homeowner's lawyer, who had agreed to mediate the dispute, breached the duty to exercise reasonable care the lawyer assumed towards contractor when the lawyer did not fully and fairly disclose to contractor that he did not intend to be entirely impartial as a mediator.)

The second sentence of Model Rule 4.3, which requires a lawyer to take reasonable steps to correct a misunderstanding when the unrepresented person incorrectly believes the lawyer is disinterested, has an analogous provision in the first sentence of current rule 3-600(D), above. Again, Model Rule 4.3 applies the prohibition more generally.

The concept in the third sentence of Model Rule 4.3, which prohibits the lawyer from giving the unrepresented person legal advice – except the advice to seek independent counsel – also has a predicate in case law. (See *In re Marriage of Bonds* (2000) 24 Cal.4th 1 [99 Cal.Rptr.2d 252]. But compare *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].)

## **B. ABA Model Rule Adoptions**

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed Rule 4.3 is derived, revised September 15, 20116, 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) [Last visited 2/6/17]
- Twenty-eight jurisdictions have adopted Model Rule 4.3 verbatim.<sup>2</sup> Twenty-two jurisdictions have adopted a rule that is substantially similar to 4.3.<sup>3</sup> 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

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<sup>2</sup> The twenty-eight jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.

<sup>3</sup> The twenty-two jurisdictions are: Alabama, Connecticut, District of Columbia, Florida, Georgia, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, and Wisconsin.

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 current Rule 2-100 governing contact with one who is not represented by counsel is unnecessary. 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 the rule parallel with proposed Rule 4.2 (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. In addition, unlike the word “misunderstands,” the term “believes” is a term defined in the terminology rule, proposed Rule 1.0.1(a).
    - 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 derived 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>4</sup> Use of the qualification “lawful” should prevent the Comment from swallowing the rule.

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<sup>4</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.

- 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 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 Model Rule 8.4 or a rule counterpart to Model Rule 4.1 (Truthfulness in Statements to Others).

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

None. However, 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:**

The Commission recommends adoption of 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.