

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.3 [2-100]

Lead Drafter: Tuft
Co-Drafters: Cardona, Chou, Martinez, Peters, Zipser
Meeting Date: June 26, 2015

I. CURRENT CALIFORNIA RULE

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

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. 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 or may become 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 it is apparent that the interests of an unrepresented persons are in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. 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.

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

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IV. PROPOSED RULE (REDLINE TO MODEL RULE 4.3)

Rule 4.3 ~~Dealing With~~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~~may become 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] 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 4.13(f).~~

[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] The Rule Paragraph (a) distinguishes between situations involving in which it is apparent that the interests of an unrepresented persons whose interests may be are adverse to in conflict with those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. 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~~

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~~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~~ 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.

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

V. PUBLIC COMMENTS SUMMARY

- Commenter Name, Organization (if any), Date: Summary of Comments
- Commenter Name, Organization (if any), Date: Summary of Comments

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 6/4/2015:**

* * *

A. Rule 2-100 Communication with a Represented Party

4. 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.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 4.3. Dealing with Unrepresented Person.

1. OCTC supports this rule, but believes that there are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.

- **Commenter Name, State Bar Court:** No comments received from State Bar Court.

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VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Massachusetts Rule 4.3** is identical to Model Rule 4.3:

Massachusetts 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.

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
- 28 states 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 something 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 (CA).

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

A. Concepts Accepted (Pros and Cons):

1. General: Drafting Team consensus that a version of ABA Model Rule 4.3, as amended, be recommended to the Board for adoption.
 - Pros: Notwithstanding OCTC's objection 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," (see 6/4/15 Memo from OCTC to Commission, at page 3, 2-100 comment no. 4), the proposed 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 for a client. The rule provides important public protection and critical guidance to lawyers interacting with in 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

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- 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." (See 6/4/15 OCTC Memo to Chair & Commission, at page 3, #4.)
2. In title and rule, change "dealing with" to "communicating with". Drafting Team consensus.
 - Pros: The change will clarify what conduct is being reached and make rule parallel with proposed rule 4.2 [2-100].
 - Cons: None identified.
 3. In paragraph (a), substitute "incorrectly believes the lawyer is disinterested" for "misunderstands the lawyer's role" in Model Rule 4.3. Drafting Team consensus.
 - 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 adopt 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. In paragraph (a), substitute the phrase "may become" for the Model Rule 4.3 phrase "might have a reasonable possibility of being". Drafting Team consensus.
 - Pros: The substituted phrase is more definite regarding what will trigger a lawyer's duty. A similar phrase is found in current rule 3-600(D) and Model Rule 1.13 (Organization As Client).
 - Cons: None identified.
 5. In paragraph (a), reverse the sentence structure of the third sentence of ABA Model Rule 4.3, so that the qualifying clause comes first. Drafting Team consensus.
 - Pros: The clause reversal emphasizes that the prohibition and duty identified in the sentence are triggered when the lawyer "knows" the interests of client and unrepresented person conflict.
 - Cons: None identified.
 6. Add paragraph (b), which corresponds to paragraph (e) in proposed Rule 4.2, and prohibits a lawyer from seeking to obtain from an unrepresented privileged or confidential information. Drafting Team consensus.

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- 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.
 - Cons: None identified.
7. Add Comment [1], not found in Model Rule 4.3, and delete model rule comment [1]. Drafting Team consensus.
- Pros: Added comment [1] succinctly states the policy underlying the rule and its intent. The model rule comment repeats the rule and is thus unnecessary.
 - Cons: None identified.
8. Retain and substantially revise Model Rule 4.3, comment [2]. Drafting Team consensus.
- Pros: The comment contains important guidance that clarifies the prohibition on giving “legal advice” in the third sentence of paragraph (a).
 - Cons: None identified.
9. Add comment [3], which has no counterpart in Model Rule 4.3, which would permit lawyers to conduct lawful covert investigations. Drafting Team consensus.
- Pros: 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).¹ Use of the qualification “lawful” should prevent the

¹ 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,

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- comment from swallowing the rule.
- **Cons:** Some questions/concerns were raised re 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. See Open Issues discussion in Section IX.
 - (2) Even with the limitation that the covert activity be lawful,” deciding what is a “lawful” covert investigation in the private sector would 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):

Not Applicable.

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 critical guidance in communicating with unrepresented persons.

D. Non-Substantive Changes to the Current Rule:

Not Applicable.

E. Alternatives Considered:

None.

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.

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IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Comment [3]. Regarding the exception for covert investigations, the drafting team did not reach a strong consensus on the inclusion of non-governmental/private covert investigations. Instead, the team agreed that this issue should be discussed and resolved following full Commission consideration. It was understood that the prior Commission identified the same possible overbreadth issue with this language but ultimately determined that the qualification of “lawful” would serve as a limiting factor for both governmental and private covert investigations. Nevertheless, one member of the drafting teams remains convinced that Comment [3] should be limited to governmental investigations citing the actions taken by some other states that have addressed this issue (e.g., Florida² and Utah³) and a 2007 study by American Prosecutors Research Institute (Vol. 4, No. 2, 2007, copy on file with the State Bar).
Several issues have been identified: whether to (i) include comment [3] in Rule 4.3, (ii) make comment [3] into a black letter provision because it creates an exception; (iii) refer the comment [3] concept to the rule 8.4 [1-120] Drafting Team or a Drafting Team that would consider MR 4.1 (Truthfulness in Statements to Others), or (iv) not include the comment [3] concept in the Rules at all.
See VIII.A.9. Pros & Cons.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

Cardona

- [Date]: Email Comment
- [Date]: Email Comment

Chou

² See Florida Rule 8.4(c), which provides that it is misconduct for a lawyer:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule

³ See Utah Ethics Advisory Op. 02-05 (3/18/02), available at: <http://www.utahbar.org/ethics-advisory-opinions/eaoc-02-05/> [Last visited 6/8/15].

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- [Date]: Email Comment
- [Date]: Email Comment

Martinez

- [Date]: Email Comment
- [Date]: Email Comment

Peters

- [Date]: Email Comment
- [Date]: Email Comment

Zipser

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 4.3, derived from ABA Model Rule 4.3 as amended, in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4.3, derived from ABA Model Rule 4.3 as amended, in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]