RRC2 – Rule 2-100 [4.2][4.3]
Post-Agenda E-mails, etc. – Revised (August 10, 2015)
Drafting Team: Tuft (Lead), Cardona, Chou, Martinez, Peters, Zipser

Table of Contents

June 14, 2015 Kehr Email re 4.3 to Drafting Team, cc Difuntorum, McCurdy & Lee:

I have the following thoughts and suggestions on this proposed Rule (my references are to the red-lined version on p. 2 of 9) ---

1) Proposed Comment [1] is not consistent with the Rule. While it seems plain, as this Comment would say, that one of the purposes of the Rule is to prevent unrepresented persons from being misled in the circumstances the Rule addresses, the third sentence of proposed paragraph (a) would apply even when the unrepresented person is not misled. The third sentence is a blanket prohibition on providing legal advice to the unrepresented person if that person and the client are or could be in conflict. One can imagine situations in which: (i) the unrepresented person understands the lawyer is not disinterested; (ii) it is in the client's interest that the lawyer provide legal information to the unrepresented person; and (iii) that information is not misleading. Why should that be prohibited? Two possibilities occur to me for dealing with this. First, that sentence could be limited to a prohibition on giving misleading advice, not all advice and not all discussion regarding legal matters that might in retrospect be labelled as having been advice. Second, the third sentence could be removed.

a. Of the two alternatives I've suggested, I prefer the latter. Keeping the third sentence in a more limited form strikes me as being aspirational. Because of the difficulty of knowing what is misleading, and of knowing from what perspective that standard would be measured, the third sentence would be unpredictable as a disciplinary standard but irrefutable as an aspirational goal. If limited to misleading advice, the lawyer also would be in jeopardy for saying anything of a legal nature that turned out not to be correct. This could create a standard of competence higher in communications with non-clients than the standard for a lawyer's representation of a client under 3-110/1.1

b. The third sentence of (a) is defended by the second sentence of proposed Comment [2]. It argues that the prohibition on giving any legal advice to the unrepresented person is needed b/c "the possibility that the lawyer will compromise the unrepresented person's interests is so great". That notion has as an unstated premise that the typical unrepresented person is so weak minded as to be easily mislead or confused. I don't agree with this. One can think of countless situations in which a lawyer will communicate with unrepresented persons in the course of representing a client. This could occur, for example, in estate planning, in probate and conservatorship proceedings, in trust administration, in business and real estate transactions, in litigation in conversation with an unrepresented co-party, and in litigation with a pro per adversary. I will restrict myself to two examples and then three general comments:

i. Lawyer is hired by X, Y, Z, LLC. to serve as counsel for the LLC but not to represent any of the three eponymous investors, and is asked to prepare an Operating Agreement for the LLC. Investor X asks Lawyer whether the investors would be bound by fiduciary duties and if so, in what respects. Would Lawyer violate the third sentence of proposed paragraph (a) by answering the question? By suggesting alternative provisions? Is it reasonably foreseeable that the LLC later would seek to enforce fiduciary duties against X? Communications of this sort should be permitted, even encouraged in order to minimize the number of lawyers and of legal expense. In some situations, considerations of time or cost might make it impossible for Investor X to obtain independent legal advice, so Lawyer's failure to answer X's questions could be a deal killer or lead to a deal that is less protective of Investor X than otherwise might have been the case.

ii. Lawyer represents client as a potential tenant in negotiating a commercial lease. The potential Landlord owns many properties, has negotiated many commercial leases, and is highly sophisticated in this particular area. Lawyer and Landlord discuss the legality of a provision in the lease offered by Landlord, the two of them exchange views on the contested provision and how it might be modified in conformity with applicable legal authority. Would Lawyer be subject to professional discipline? (Cf. the final sentence of proposed Comment [2] - Lawyer is not merely stating the client's position.)

iii. More generally, I disagree with the condescending presumption that unrepresented persons generally are unable to participate in legal communications with lawyers. A lawyer who communicates dishonestly with an unrepresented person already is subject to discipline under Bus. & Prof. C. § 6106, and perhaps later will be subject to discipline under a version of MR 8.4(c).

iv. The removal of the third sentence of (a) also would avoid the problem of whether a person is deemed to be unrepresented when represented for some purposes but not others. There are some state variations that wrestle with this difficulty.

2) If the Commission were to decide to retain the third sentence of proposed paragraph (a), it should be edited b/c the use of "may" at line 8 is incorrect. That word means "is permitted to". See Guidelines for Drafting and Editing Court Rules, § 4.2.A. Paragraph (a) is not intended to say "... the unrepresented person [is permitted to] become in conflict with the interests of the client ...." Substituting "might" or "could" in the third sentence of (a), as often works when wishing to say "could happen" rather than "is permitted to happen", would not be adequate here. The MR language at that point is "reasonable possibility of being in conflict", and that interjects a standard of likelihood or foreseeability. If we were to change "may" to "might", the result would be a sentence that would mean: "If the lawyers knows or reasonably should know that there is any possibility that the interests of the unrepresented person are or could become in conflict with the interest of the client, ..." Even the MR's aspirational perspective doesn't go that far. If retained, I would suggest revising and reordering that sentence in one of the following ways: "If the lawyer knows or reasonably should know that there is a reasonable possibility that the interests of the unrepresented person are or might become in conflict with the interests of the client, ..." Here is an alternative: "The lawyer shall not give legal advice to the unrepresented person if it is reasonably foreseeable that the interests of the unrepresented person are or might become in conflict with the interests of the client, except that ...." I prefer the latter as being more direct and declarative and avoiding the close use of "reasonable" and "reasonably".

a. The first Commission attempted to deal with the foreseeability issue by removing from the third sentence the entire phrase "or have a reasonable possibility of being", thus limiting the third sentence to a current difference in interests. I think that would improve the MR language, but that change would not address the concerns I discussed in paragraph 1) of this message.

3) I believe the use of "may" in paragraph (b) also is not correct. I would substitute "can". The point is that it is not possible for the unrepresented person to disclose the information without violating a duty owed to someone else.

4) The use of "apparent" in the first line of proposed Comment [2] contradicts any version of the third sentence of the Rule. The meaning of "reasonable possibility" or "reasonably foreseeable" are not the same as "apparent".

5) To the extent the Commission decides to retain Comments [1] and [2], the word "rule" should be capitalized in both of them.

6) I support the first two sentences of paragraph (a) of the proposed Rule. However, because our directions are to be guided by the current California Rules, and b/c this Rule might be seen as inconsistent with that charge (there being no such current rule), I would minimize any suggestion that proposed Rule 4.3 is inconsistent with California law. For example, the idea that a lawyer can have an obligation to communicate with non-clients is the basis for the line of published court opinions and advisory ethics opinions that begin with Butler v. State Bar, 42 Cal.3d 323, 329 (1986). I see Rule 4.3 an important aspect of that duty to communicate.

July 16, 2015 Lamport Email re 4.3 to Tuft & Cardona, cc Drafting Team, Chair, Difuntorum & Mohr:

After the last meeting, you suggested that I attempt to draft comments for this rule that would address the concerns I have expressed. I have taken the liberty of conferring with Bob Kehr about this. What follows includes Bob's input.

1. It would helpful to break paragraph (a) into to two paragraphs. One paragraph would contain the first two sentences of paragraph (a) and one paragraph would consist of the last sentence in paragraph (a). As currently drafted paragraph (a) encompasses two concepts which I am addressing in separate comments, both of which now refer to paragraph (a). It would be easier to understand the comments if they were referring to separate paragraphs.

2. With respect the first two sentences in paragraph (a), I propose the following comment:

[1] A lawyer communicating on behalf of a client with a person who is not represented would violate the standard of disinterestedness under paragraph (a) when either (i) the lawyer states or implies to the unrepresented person that the lawyer is not communicating with that person on behalf of the lawyer's client or (ii) the lawyer knows or reasonably should know that the unrepresented person believes that the lawyer in not communicating with that person on behalf of the lawyer's client.

3. With respect to the last sentence in paragraph (a), I propose the following comment, which is patterned after Comment [2] in the Model Rule:

[2] A lawyer gives legal advice within the meaning of paragraph (a) when the lawyer communicates a view about the unrepresented person's rights or duties under the law in circumstances or in a manner that would cause the unrepresented person to reasonably believe that the lawyer is not speaking on behalf of or advocating for the interests of the lawyer's client. A lawyer does not give legal advice under paragraph (a) merely by advocating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice within the meaning of paragraph (a) by negotiating the terms of a transaction or of a settlement of a dispute with the unrepresented person or by explaining to the unrepresented person the lawyer's view of the meaning of a document or the lawyer's view of the underlying legal obligations, so long as the

lawyer has informed the unrepresented person that the lawyer represents the lawyer's client and that the lawyer does not represent the unrepresented person.

4. I think you should retain Comment [3] in the current draft rule.

5. I have not yet attempted to draft a comment about what it means to seek to obtain privileged or confidential information in paragraph (b); but I think a comment is warranted. I am heading out for a Yosemite backpacking trip today, so I will not have a chance to work on a comment until I am back next week. My concern is that in practice, unrepresented people will reveal privileged or confidential information without being prompted. The line between whether the lawyer sought to obtain the information is not as clear as some may think. As one of many possible hypos, if an unrepresented person announces that he or she is about to reveal confidential information and the lawyer does not tell the person to refrain from doing so, did the lawyer "seek to obtain" the information by not remonstrating? There needs to be a clear line here. A murky standard creates a broad zone of risk that chills lawyer communication on behalf of a client with unrepresented persons. It would be useful to have a conversation about the circumstances in which you envision the rule applying before attempting a comment.

Notwithstanding the foregoing, I still think (b) should not be in this rule. It is not in the Model Rule. It creates unique risks for a lawyer who is communicating on behalf of a client with an unrepresented person that the client does not share. In other words, a client can hear an unrepresented person's revelation of the privileged or confidential information without facing significant legal consequences, whereas that client's lawyer risks his license to practice being in that conversation. We should not create gaps between what a client can lawfully do and what a lawyer can do on the client's behalf. Nor should we be chilling the legal profession's ability to represent clients' lawful interests by imposing unique risks on the lawyer. I don't think the law in this area has evolved enough to justify a rule that would extend to many more situations than have been addressed in the case law to date.

POST AUGUST 14, 2015 AGENDA MAILING:

August 6, 2015 Tuft Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

In advance of (or possibly in lieu of) our telephone conference on Wednesday, August 12, at 9:15 a.m., I am outlining the remaining issues regarding Rule 4.3. My understanding is that the Commission approved the provisions of the rule at the June 25 meeting and that we are taking up the comments at the meeting on August 14. Let me know that is not correct.

Comment 1

1. Bob Kehr believes that the comment is not consistent with the rule because it speaks only to preventing unrepresented persons from being misled, while the third sentence in paragraph (a) prohibits lawyers from giving legal advice to unrepresented persons whose interests are in conflict with the interests of the lawyer's client even if the person is not misled. [Kehr's 6/14/2015 e-mail ¶1]

I do not believe the comment needs to be changed. The risk of misleading an unrepresented lay person exists in giving legal advice where the person's interests are in conflict with the client's even if the lawyer discloses his role in the matter.

Comment 2

1. Bob Kehr believes that the use of "apparent" in the first line contradicts paragraph (a) of the rule. [Kehr 6/14/2015 e-mail ¶4]. I believe the Commission's revision of paragraph (a) resolves this concern.

2. In view of Bob Kehr and Stan Lamport's comments (discussed below), we should consider restoring the fourth sentence and a shorter version of the fifth sentence in Comment [2] to ABA Model Rule 4.3 along the following lines:

   "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."

Comment [3]

1. Comment [3] should be considered a "placeholder" until we take up Rule 8.4. Preferably, this issue will be addressed in a comment to rule 8.4 and comment [3] will be a cross reference to that comment.

Stan Lamport's July 16 e-mail

1. We do not need to break paragraph (a) into two paragraphs to accommodate the comments to the rule.

2. Stan's proposed comment [1] is more properly the subject of an ethics opinion rather than a comment. If a comment is need to explain what "disinterested" means, Rest. §103 affords better guidance. Although I do not believe a comment is needed, here is proposal derived from §103:

> "In communicating with an unrepresented person, a lawyer may not mislead the person concerning the identity and interests of the person the lawyer represents such as, for example, falsely stating or implying that the lawyer represents no one, that the lawyer is impartially protecting the interests of both the client and the unrepresented person or than the person will suffer no harm by speaking freely with the lawyer."

3. Stan's proposed comment [2]. I do not believe we need a comment on what constitutes legal advice for purposes of paragraph (a). If there is a consensus that we should have a comment, the proposed additional sentences to comment [2] I drafted above should suffice.

4. In regard the Stan's concern in paragraph 5 of his 7/13/2015 e-mail regarding "seek to obtain," I think the language of the rule is fine. If there is a consensus that a comment is needed, I prefer instead to simply change the phrase "seek to obtain" in paragraph (b) to "seek to persuade or induce person to produce or disclose privilege or other confidential information . . . ."

Again, I am not recommending that the rule (which has already been approved) be changed.

August 6, 2015 Cardona Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

See August 7, 2015 Chou Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

August 6, 2015 Chou Email re 4.3 to Cardona, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

I am reluctant to depart from the language of the rule, which has already been approved and which conforms rather well to the rules of other states.

In other words, I would rather do without the comments than make major revisions to the rule.

August 7, 2015 Chou Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

For some reason, I could not find Bob's comments so I based my response on Mark's description of Bob's comments. My comments are interlineated in red below.

NOTE: Interlineated below are comments of Cardona & Chou in response to 8/6/15 Tuft Email.
Cardona comments interlineated in blue.
Chou comments interlineated in red.

In advance of (or possibly in lieu of) our telephone conference on Wednesday, August 12, at 9:15 a.m., I am outlining the remaining issues regarding Rule 4.3. My understanding is that the

Commission approved the provisions of the rule at the June 25 meeting and that we are taking up the comments at the meeting on August 14. Let me know that is not correct.

Comment 1

1. Bob Kehr believes that the comment is not consistent with the rule because it speaks only to preventing unrepresented persons from being misled, while the third sentence in paragraph (a) prohibits lawyers from giving legal advice to unrepresented persons whose interests are in conflict with the interests of the lawyer's client even if the person is not misled. [Kehr's 6/14/2015 e-mail ¶1]

   I do not believe the comment needs to be changed. The risk of misleading an unrepresented lay person exists in giving legal advice where the person's interests are in conflict with the client's even if the lawyer discloses his role in the matter. [Agree – I do not see a need to change comment 1.] [I agree]

Comment 2

1. Bob Kehr believes that the use of "apparent" in the first line contradicts paragraph (a) of the rule. [Kehr 6/14/2015 e-mail ¶4]. I believe the Commission's revision of paragraph (a) resolves this concern. [I would suggest changing the first line of the comment to read "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 those of the lawyer's client and those in which the lawyer does not."] [I am fine with George's proposal – which is the safer approach since it copies the language of the rule]

2. In view of Bob Kehr and Stan Lamport's comments (discussed below), we should consider restoring the fourth sentence and a shorter version of the fifth sentence in Comment [2] to ABA Model Rule 4.3 along the following lines:

   "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." [Agree.] [I agree]

Comment [3]

1. Comment [3] should be considered a "placeholder" until we take up Rule 8.4. Preferably, this issue will be addressed in a comment to rule 8.4 and comment [3] will be a cross reference to that comment. [Agree – I am assigned rule 8.4 and anticipate that this will be addressed there.] [I agree]

Stan Lamport's July 16 e-mail

1. We do not need to break paragraph (a) into two paragraphs to accommodate the comments to the rule. [Agree.] [I agree]

2. Stan's proposed comment [1] is more properly the subject of an ethics opinion rather than a comment. If a comment is need to explain what "disinterested" means, Rest. §103 affords

better guidance. Although I do not believe a comment is needed, here is proposal derived from §103:

> "In communicating with an unrepresented person, a lawyer may not mislead the person concerning the identity and interests of the person the lawyer represents such as, for example, falsely stating or implying that the lawyer represents no one, that the lawyer is impartially protecting the interests of both the client and the unrepresented person or than the person will suffer no harm by speaking freely with the lawyer." [I like this formulation of what is prohibited, and would suggest that we work it into the rule, rather than simply into the comment. Thus, I would suggest that we consider changing the first two sentences of the rule to read: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not mislead the person concerning the identity and interests of the person the lawyer represents. When the lawyer knows or reasonably should know that the unrepresented misunderstands the identity or interests of the person the lawyer represents, the lawyer shall make reasonable efforts to correct the misunderstanding." The comment would then read: "Misleading an unrepresented person concerning the identify and interests of the person the lawyer represents includes, for example, falsely stating or implying that the lawyer represents no one, that the lawyer is impartially protecting the interest of both the client and the unrepresented person or that the person will suffer no harm by speaking freely with the lawyer."] [I am reluctant to change the language of the rule or to include a comment here. I prefer the use of the term "disinterested" so we can give room to the courts to interpret this restriction to address situations that we have not imagined (and probably could not imagine) right now. Given that this rule is new to California, my preference is to leave the black letter of the rule (which has already been approved) the way it is and let the courts develop its meaning using concrete cases without the comment.]

3. Stan's proposed comment [2]. I do not believe we need a comment on what constitutes legal advice for purposes of paragraph (a). If there is a consensus that we should have a comment, the proposed additional sentences to comment [2] I drafted above should suffice. [Agree.] [I agree]

4. In regard the Stan's concern in paragraph 5 of his 7/13/2015 e-mail regarding "seek to obtain," I think the language of the rule is fine. If there is a consensus that a comment is needed, I prefer instead to simply change the phrase "seek to obtain" in paragraph (b) to "seek to persuade or induce person to produce or disclose privilege or other confidential information . . . ." [I like the change in language to the rule, which I think makes clearer that what we are prohibiting is some action on the part of the lawyer to seek to cause the person to produce privileged or other confidential information, and would propose that we make this change. With this change, I agree no comment would be needed.] [I agree that Stan raises a valid concern. I'd like to think about it some more, but I do see reasons why we would want to limit paragraph (b) to situations where the lawyer takes some sort of affirmative action to obtain the information. I assume we will discuss this next week. If we are going to propose a change in the rule, I would prefer to make it minimal and change "seek to obtain" to "seek to induce the person to disclose." I think "induce" adequately covers "persuade." With this change, I agree no comment is necessary]

Again, I am not recommending that the rule (which has already been approved) be changed.

August 8, 2015 Martinez Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I am persuaded by Bob Kehr that the third sentence of paragraph (a) should be deleted. If the vice is misleading unrepresented persons, then the rule goes too far. In a litigation setting, lawyers frequently sue or file cross-complaints against persons who are unrepresented. In a typical scenario, the lawyer will "advise" the unrepresented person to seek counsel, but frequently they can't afford one. The lawyer will then "advise" the nonclient that they need to respond to the complaint in 30 days. The person is also advised to tender the complaint to his or her insurer. The conversation devolves into a discussion of the type of coverage they have. This kind of advice is in the interest of the client and the opposing party. Under the third sentence of paragraph (a) the attorney would be hand-cuffed –being limited to advising the opposing unrepresented party to obtain counsel (which in many cases they can't afford). Also, plaintiff's attorneys in their cover letter that accompanies the summons and complaint will typically advise the unrepresented defendant to tender the lawsuit to their insurer. This too is arguably legal advice.

I can also envision problems in transactional matters where the constituents of a to-be-created partnership or corporation who are non-clients and are unrepresented solicit the lawyer's advice on a host of issues. Under the third sentence, the lawyer will not be allowed to answer even routine questions posed by the non-client. In all these situations, the unrepresented person will not be misled.

The third sentence also seems to run counter to a well-established body of case law in California holding that an attorney has no duty to protect the interests of an adverse party with whom the client deals with at arm's length. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344 [attorney owes no duty to adverse party to a stock sales transaction who bargained with attorney's clients at arm's length]; *Major Clients Agency v. Diemer* (1998) 67 Cal.App.4th 1116, 1124-1125 ["If an attorney is saddled with a duty to a potentially adverse party, then his loyalty to the client cannot be undivided."].) The reason for this rule is that an attorney's undivided loyalty belongs to the client and imposing such a duty to opposing parties would impermissibly intrude upon the attorney-client relationship.

At the same time, the case law has its limits in that a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient. (*Cicone v. URS Corp*. (1986) 183 Cal. App. 3d 194, 202 ["the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length"].) This approach focuses on whether the opposing party is unfairly misled.

Therefore, I agree with Bob that the rule should limit the prohibition to giving misleading legal advice and that a flat bar on giving all legal advice goes too far.

Interestingly, the Restatement does not contain the restriction on giving legal advice but focuses on whether the nonclient is misled. (See Restatement 3d of the Law Governing Lawyers, § 103 ["(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents. ...(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to o so would materially prejudice the nonclient."].)

August 10, 2015 Tuft Email re 4.3 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

In response to Raul's e-mail, I do not think the drafting team should revisit the Commission's decision in response to Bob's concerns to limit the prohibition in the third sentence in paragraph (a) to situations where the interests of the unrepresented person are in conflict with the interests of the lawyer's client. Raul is certainly entitled to raise the issue again if he desires. In that regard, I have a few observations:

1. The prohibition in the third sentence has been a part of Rule 4.3 since 1983. It was originally a broader comment to the rule and was moved to the black letter text in 2002. The wording was changed at that time to limit the prohibition to "legal advice" to allow counsel to convey certain information to an adverse unrepresented party (such as when a response is due or suggest that a party notify their carrier). The annotations to the model rule and the discussion in Hazard, Hodes and Jarvis indicate that the type of legal advice prohibited by the rule typically involves advising or persuading an unsophisticated law person to waive or compromise certain rights or make unintended statements against interest.

2. The concerns raised in the second paragraph in Raul's e-mail are addressed in the two sentences in Comment [2] to the ABA rule that my August 6 e-mail recommended we include in proposed Comment [2].

3. I do not believe the third sentence contradicts current California case law. For example, the court of appeals specially raised the issue in Marriage of Bonds, where counsel for Barry Bonds allegedly gave legal advice to Sun Bonds regarding her rights under a prenuptial agreement. The Supreme Court reversed on the grounds that the lower court erred in holding there was presumption of undue influence under the Family Code. At the same time, the Court cautioned lawyers against giving advice to an adverse unrepresented party about their rights.

4. One reason in favor of having this provision is the dramatic increase in the number pro-se litigants in the judicial system and the acceptance of task based representation which is now authorized under the Code of Civil Procedure and the Family Code.

August 10, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

In response to Mark's points:

1. My understanding is that the prohibition in the third sentence goes back to DR 7-104(a)(2) as early as 1969. The Restatement, § 103, com. d, parts company with it in stating:

> Formerly, a lawyer-code rule prohibited a lawyer from giving "legal advice" to an unrepresented nonclient. That restriction has now been omitted from most lawyer codes in recognition of the implicit representations that a lawyer necessarily makes in such functions as providing transaction documents to an unrepresented nonclient for signature, seeking originals or copies of documents and other information from the nonclient, and describing the legal effect of actions taken or requested.

If so, then our rule should be in line with the Restatement which focuses on whether the nonclient is misled ("the lawyer may not mislead the nonclient, to the prejudice of the nonclient,

concerning the identity and interests of the person the lawyer represents"), rather than adopting a broad prohibition against giving any legal advice.

2. I don't read the last two sentences in Comment [2] to the ABA rule as addressing giving legal advice. Those sentences allow the lawyer to inform the nonrepresented person of the lawyer's own views of the meaning of a document and the underlying legal obligations, etc. But they do not allow giving legal advice.

3. I don't read *Marriage of Bonds* as espousing a duty to an opposing party. See *In re Marriage of Bonds* (2000) 24 Cal.4th 1 ,21 ["We do not believe that the case before us presents an appropriate occasion to delineate the duties that must guide an attorney in drafting a premarital agreement. The issue before us is the enforceability of a premarital agreement, not the extent, if any, of counsel's duty to an unrepresented party to the agreement, or the imposition of discipline upon an attorney who does not comply with that duty. We do observe, however, that it is consistent with an attorney's duty to further the interest of his or her client for the attorney to take steps to ensure that the premarital agreement will be enforceable. After discussing the matter with his or her client, an attorney may convey such information to the other party as will assist in having the agreement upheld, as long as he or she does not violate the duty of loyalty to the client or undertake to represent both parties without an appropriate waiver of the conflict of interest."]

4. The number pro se litigants does support the need for a rule. But the question is whether the third sentence goes too far in prohibiting all legal advice even where the nonclient is not misled or disadvantaged and might even benefit from the lawyer's advice. Also, Rules 4.1 and 4.4 address any concern of overreaching.

August 10, 2015 Tuft Email to Drafting Team, cc Difuntorum & Mohr:

The Supreme Court did not impose an affirmative duty of disclosure on counsel in Marriage of Bonds. As I said, the issue regarding counsel's duties of disclosure to Sun Bond was raised, briefed and discussed in the court of appeals decision. The dissent claimed the majority opinion violated the third sentence in Rule 4.3. See, e.g., 83 Cal. Rptr. 2d 783, 822. The Supreme Court chose not to address the issue except to say parties to premarital agreements are better off having separate counsel. The point is that the law is California is not contrary to the rule.

The last two sentences in comment [2] to the Model Rule allow the lawyer to negotiate legal terms, prepare operative documents, and explain the lawyer's views of their legal meaning and underlying obligation without fear of violating the rule. That is helpful if we keep the third sentence in paragraph (a).

It would help if we knew we would have rules 4.1 and 4.4, but the first RRC did not recommend either of those rules.