Federal Bar Association San Diego Chapter

ICLA Imperial County Lawyers Association presents:

NINTH ANNUAL ALL-DAY ETHICS, COMPETENCE, AND ELIMINATION OF BIAS MCLE EVENT

January 25, 2023, from 9:00 a.m. to 3:35 p.m.

Cost (per course):	San Diego FBA & ICLA Members – FREE FBA National Members – $10.00 Non-FBA Members – $40.00
Location:	Webinar (Zoom)
MCLE:	4.0 hours Ethics; 1 hour Competence; 1 hour Elimination of Bias

The San Diego FBA invites you to attend its ninth annual all-day California MCLE event.

California MCLE credits are available separately for each of the sessions listed below. The meeting link and written materials will be sent to all participants one day prior to the event.

9:00 a.m. – 10:00 a.m.: *Duties to Current, Former and Prospective Clients, Including with Regard to the Safekeeping of Funds (Ethics 1 of 4)*
Anne Rudolph and Eric Deitz
San Diego County Bar Association Ethics Committee

10:05 a.m. – 11:05 a.m.: *Lawyers, Substance Use Disorders and Wellbeing (Competence)*
Greg Dorst, The Other Bar

11:15 a.m. – 12:15 p.m.: *Engagement Agreements, Candor in Mediation, and More (Ethics 2 of 4)*
Deborah Wolfe and Charles Berwanger
San Diego County Bar Association Ethics Committee

12:20 p.m. – 1:20 p.m.: *Communications with Represented and Unrepresented Persons (Ethics 3 of 4)*
Michael Crowley and Richard Hendlin
San Diego County Bar Association Ethics Committee

1:30 p.m. – 2:30 p.m.: *Civility and Candor (Ethics 4 of 4)*
Irean Swan and Andrew Servais
San Diego County Bar Association Ethics Committee

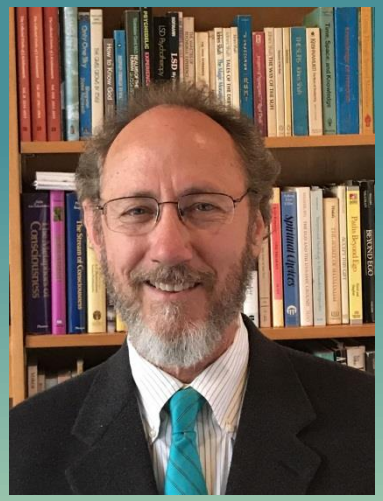
2:35 p.m. – 3:35 p.m.: *Microaggressions (Elimination of Bias)*
Carolina Bravo-Karimi, Wilson Turner Kosmo LLP

Federal Bar Association of San Diego Ethics Presentation January 25, 2023

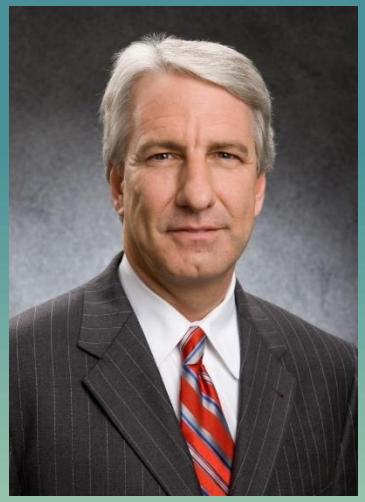
Ethical Considerations in Communicating with Represented Persons and Unrepresented Persons Under CRPC Rules 4.2 and 4.3

Richard Hendlin
Michael Crowley

Presenters



Richard D. Hendlin



Michael L. Crowley

CRPC Rule 4.2(a)
"No Contact Rule"

Communication With a Represented Person*

"(a) In representing a client, a lawyer shall not communicate *directly or indirectly* about the subject of the representation with a person* the lawyer knows* to be *represented* by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."

Rule 4.2
The "No Contact" Rule
Context, Amendment and Purpose

- **Origin in the first rules promulgated in 1928**
- **Part of Chapter 4's "Transactions with Persons Other Than Clients" rules are interrelated; at its core, rule 4.3 prohibits a lawyer from misleading an unrepresented person, the subject of rule 4.1. If a person is represented, rule 4.2 – and not rule 4.3 – applies.**
- The "substance of former rule 2-100(A) ... became rule 4.2(a)" in 11-1-2018 (*City of San Diego v. Superior Court* (2018) 30 Cal.App.5th 457, 462, fn. 1)
- **New language: Substitutes the broader term "person*" for "party" defined CRPC Rule 1.0.1(g) Evid. Code 175 "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."**
- **"Knows" means "actual knowledge of the fact in question" (1.0.1.(f)**
- ***This rule [predecessor of Rule 4.2] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice. It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role.* Abeles v. State Bar (1973) 9 Cal.3d 603, 609**
- **Provides protection of the represented person against overreaching by adverse counsel and reduces the likelihood that clients will disclose privileged or other information that might harm their interests. (ABA Formal Op. 95-396.)**

Rule 4.2
"In Representing a Client[1]"

- Rule 4.2(a) applies to an attorney "representing a client."
- Its purpose is to prevent an attorney representing one person in a matter from communicating with another represented person about the matter without the consent of that person's attorney. (***Mitton v. State Bar of Cal.*** **(1969) 71 Cal.2d 525, 534**; **Graham v. United States (9th Cir. 1996) 96 F3d 446, 449** (former rule).
- If a lawyer doesn't represent a client in a matter, Rule 4.2 is inapplicable. Examples:
- ***Bowen v. Lin*** **(2022) 80 Cal.App.5th 155**;** ***HTC Corp. v. Technology Properties Ltd.*** **(N.D. Cal. 2010) 715 F.Supp.2d 968, 972.****

Rule 4.2
"In Representing a Client"[2]
Recent ABA Formal Opinion 502

- **CRPC 4.2 Comment [3]** **". . .The rule also does not prohibit a lawyer who is a party to legal matter from communicating on his or her own behalf with a represented person in that matter." [PP*]**
-
- **Cf. Recent ABA Formal Opinion 502** (9-28-2022) majority **concluded** that **a lawyer proceeding in a matter pro se is "*representing a client*," namely himself or herself, and therefore, the "no contact rule" applies. "**The Rule applies to a pro se lawyer because **pro se individuals represent themselves and lawyers are no exception to this principle**." (ABA Formal Op. 502, at 1.) **Note: ABA Opn. 502 "does not address the related question *of applicability of Rule 4.2 when a* lawyer is represented by another lawyer *and the represented lawyer wishes to communicate with another represented person about the matter*." (***Id.***, at 3, n. 10.)

- **ABA 502 Dissenting Opn.:** "While the *purpose* of the rule would clearly be served by extending it to self-represented lawyers, **its language clearly prohibits such application." "Self-representation is simply not "representing a client." "… This is an ingenious bit of legal fiction." "a trap**" ABA Formal Op. 502, dissenting op. at 6–7 (noting ABA 4.2 Comment {4} assures attorney that "**Parties to a matter may communicate directly with each other.")**

Rule 4.2

"Represented by Another Lawyer"[1]

- **There is no ban on a lawyer communicating with a person not represented by counsel**, including a *pro per* who is being assisted by an attorney *not of record*. (Tuft, Peck & Mohr, *Cal. Prac. Guide: Professional Responsibility & Liability*, ¶¶8-794 – 8-795 [pgs. 8-155 and 8-156] (The Rutter Group 2021); ***McMillan v. Shadow Ridge at Oak Park Homeowner's Ass'n*** (2008) 165 CA4th 960, 966-967 (decided under former rule)

- Then must comply with **Rule 4.3** which requires, among other things, that a lawyer in communicating on behalf of a client with a person who is not represented by counsel, shall not state or imply that the lawyer is disinterested.

Rule 4.2

"Represented by Another Lawyer" 2-MC

- Rule 4.2 "does not prohibit communications *initiated* by a represented person seeking advice or representation from an *independent* lawyer of the person's choice." (Rule 4.2, **Comment [5]**

- An independent lawyer could **not** be covered by the rule, which applies only to communications by a lawyer **in the course of representing a client in the matter,** which would make the lawyer making those communications **not independent**.

Rule 4.2

"Consent of the Other Lawyer[1]"

- Applies even though the represented person **initiates or consents** to the communication. (CRPC 4.2, **Comment [1]**.)

- "A lawyer must **immediately terminate communication** with a person if, after commencing communication, the lawyer learns that the person is represented." (**Comment [1]**.)

- **"A common misconception is that the rule prohibits communication outside the *presence* of the other lawyer**. However, **the *presence* of the other lawyer is not necessarily sufficient to satisfy the requi**rements of (predecessor rule **2-100.) The rule specifies that** the *consent* of the other lawyer is required in order for a member to be permitted to communicate with a represented party about the subject of the representation**."(Cal. State Bar Formal Opn. No. 2011-181)**

Rule 4.2

"Consent of the Other Lawyer" 2MC

- Prohibits a lawyer from simultaneously sending a **letter or email directly** to a represented person and to her counsel, without first obtaining consent to the direct communication or unless otherwise authorized by law. (**Cal. State Bar Formal Opn. No. 2011-181**; **New York City Bar Formal Opinion 2009-01**, but see **ABA Formal Opn 503**.)

- Sending a **settlement offer** directly to the represented person is improper, absent the other lawyer's consent. (**ABA Formal Op. 92-362)**

- An offering party's lawyer is prohibited from sending opposing party a "**CC**" **co**py of a settlement offer sent to opposing party's lawyer. (**ABA Informal Opn. 1348.)**

Rule 4.2

"Consent of the Other Lawyer" 3MC

- Not limited to *opposing* parties, but also **applies to co-parties and other non-opposing parties** regarding the subject matter of the representation. (***Hernandez v. Vitamin Shoppe Indus., Inc.*** (2009) 174 CA4th 1441, 1460 (decided under former rule, finding the **conditional class certification triggered the "no contact" rule with co-parties in class action**.)

Rule 4.2
Question 1 re: Email "cc"[1]

- **Factual Background**: Lawyer A sends an email to Lawyer B and copies several people, including Lawyer A's client. Lawyer A has not previously consented to Lawyer B contacting Lawyer A's client and does not expressly do so in the email.
- **Question**: If Lawyer B receives an email from Lawyer A on which Lawyer A's client is copied**, may the lawyer "reply to all" – copying Lawyer A's client with the response – without the express consent of Lawyer A**?

Rule 4.2
Question 1 - Discussion 2MC

- Copying an opposing party on an email or letter is **communication** for purposes of CRPC Rule 4.2. Absent Lawyer A's consent, Lawyer B **may not** communicate with Lawyer A's client about the subject of the representation either directly or by copying Lawyer A's client in an email sent in response to Lawyer A's email on which the client was copied. L***awyer A's copying his own client on an email does not, without more, constitute implied consent to a "reply to all" responsive email.***
- **Southern Carolina Bar Association Ethics Advisory Opinion 18-04; N.C. State Bar Formal Eth. Op. 2012-7 Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1**; ***In re Uttermohlen,*** 768 N.E.2d 449 (Ind. 2002) (lawyer violated the no-contact rule by sending a letter to represented person with a copy to the person's lawyer without the lawyer's prior consent).

Rule 4.2
Question 1 Discussion[2]

- **Implied Consent? CA <u>Formal Op. 2011-181</u>, consent under that state's no-contact rule <u>need not be express but may be implied by the facts</u> and circumstances surrounding the communication with the represented person.** The Committee set out **nine factors to be considered**:
- (1) whether the communication is in the presence of the other lawyer;
- (2) prior course of conduct;
- (3) the nature of the matters;
- (4) how the communication is initiated and by whom;
- (5) the formality of the communication;
- (6) the extent to which the communication might interfere with the lawyer-client relationship;
- (7) whether there exists a common interest or joint defense privilege between the parties;
- (8) whether the other lawyer will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and
- (9) the instructions of the represented party's lawyer. Id. at 5-7.

Rule 4.2
Applicability of Implied Consent[2]

- **State Bar Formal Opinion No. 2011-181 cont.:**

- "W]e do not mean to suggest that the consent requirement of the rule be taken lightly nor that it is appropriate for attorneys to stretch improperly to find implied consent. Further, even where consent may be implied, it is **good practice to expressly confirm the existence of the other attorney's consent**, and to do so **in writing**. . . . Given the purpose and strictness of the rule, **it is highly perilous to engage in otherwise prohibited communication solely in reliance on an 'implied' consent of the opposing counsel**. A lawyer doing so should immediately seek written ratification from opposing counsel, but recognize that counsel may not at all agree such consent was implied."

Rule 4.2
ABA Formal Opn. 503 "Reply All"

- **ABA Formal Opinion 503 (11-2-2022)** "'Reply All' in Electronic Communications" addresses the ethical propriety of an opposing counsel recipient ("receiving counsel") sending a **"reply all"** email when the originating attorney ("sending counsel") **copies their client on the original email**.
- While acknowledging that a number of jurisdictions (including CA **Formal Op. 2011-181; Wa. State Bar Ass'n Advisory Op. 202201 (2022); S.C. Bar Advisory Op. 18-04 (2018))** take the position that the sending counsel has *not* impliedly consented to a "reply all" response under these circumstances, the Committee concluded:

- "Given the nature of the lawyer-initiated group electronic communication, a **sending lawyer impliedly consents to receiving counsel's 'reply all' response that includes the sending lawyer's client, subject to certain exceptions** [discussed therein]." ABA Formal Op. 503, at 2.*

Rule 4.2
ABA Formal Opn. 503 "Reply All" 2

- ABA Formal Opn. 503 (cont.)
- The ABA Committee also **placed responsibility on the sending counsel for initially including their client on the communication,** noting that such placement of responsibility on the sending counsel was **fairer, especially if the list of recipients in the group email is large and especially where the sending counsel can avoid this issue altogether** (and likewise avoid the **possibility of the client also sending a "reply all" which may disclose "sensitive or compromising information"**) by *forwarding* the client the original email in a separate email solely between the client and the **lawyer. *Id.*, at 3–4. ****
- **The Committee noted that forwarding** the email to the client—**as opposed to "bcc'ing" a client—may be safer** "because in certain email systems, the client's reply all to that email would still reach the receiving counsel." *Id.*, at 4, n. 14.

Rule 4.2
ABA Formal Opn. 503 "Reply All"

- *"In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter* ***impliedly consent to receiving counsel's "reply all" to the communication.*** *Thus,* ***unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients****. Alternatively, lawyers may communicate* ***in advance to receiving counsel that they do not consent to receiving counsel replying all, which*** *would* ***override the presumption of implied consent****."*

- Some jurisdictions follow ABA Formal Opinion **503** and maintain that, generally speaking, a sending counsel who copies their client on an email has impliedly authorized the receiving counsel to send a "reply all" response email* **N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021); Va. Legal Ethics Op. 1897 (2022)** ("A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel."); **N.Y.C. Bar Formal Ethics Op. 2022-3** (similar), while other jurisdictions do not. .* *

- In such grey areas**, it is important to determine how the applicable jurisdiction applies Rule 4.2**. The lawyer can always attempt to secure the explicit consent of opposing counsel to allow for direct communication with opposing counsel's client, with such consent preferably confirmed in writing to eliminate any confusion.

Rule 4.2
Communicating "Indirectly"[1]

The prohibition against communicating "indirectly" with a represented person a**ddresses situations where a lawyer seeks to communicate "through an intermediary such as an agent, investigator or the lawyer's client." (Rule 4.2, Comment [3].**

"Does not prohibit a *lawyer who is party to a matter* from communicating on his or her own behalf with a represented person in that matter." (Comment [3])

The lawyer's independent rights as a party are not abrogated because of his or her professional status. (Former Rule 2-100, **Discussion.**)

Rule 4.2
Communicating "Indirectly"2

- *San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, at 1234-1237 [***Contreras***], with seeming approval, quoted from **California State Bar Formal Opinion No. 1993-131 (1993**):

- Attorneys '**need not discourage clients from direct communication with one another**' and '**[i]nformation obtained by a client** from an opposing party represented by counsel where there has been no prohibited direct or indirect communication under [former rule 2-100] **may properly be communicated by the client to the attorney and used** by the attorney as is otherwise appropriate.

- [But] **when the content of the communication to be had with the opposing party originates with or is directed by the attorney, [the communication] is prohibited**

Rule 4.2
Communicating "Indirectly"

Contreras 213 Cal.App.4th 1212, at 1234-1235**:**

Atty prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney….

Also prohibited from **scripting the questions to be asked or statements to be made** in the communications or **otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney**.'

Rule 4.2
Communicating "Indirectly"

- *Contreras*

- reviewed **ABA Opinion No. 11-461** which interpreted then rule 2-100's ABA counterpart Model Rule 4.2 which it found takes **a "more liberal approach" as to where the line must be drawn.** ABA Opinion No. 11-461 allows attorneys to **actively counsel their clients about planned communications with represented parties and to draft some documents for use in the communications.**

Rule 4.2
Communicating "Indirectly" 5MC

- *CONTRERAS*

After reviewing several cases from other jurisdictions which **precluded a lawyer from preparing legally binding documents such as an affidavit or drafting a release of liability for the client to present to a party, stated:**

"These decisions are consistent with the general principle that attorneys should not advise their clients regarding party communications in a manner that violated the underlying purpose of the rule: **preparing legally binding documents for an opposing party to sign takes advantage of the fact that the party is being contacted without knowledge, consent or presence of her legal representative.**

(*Contreras*, at 1236.)

Rule 4.2

No Contact Rule Limits Use of Social Media

- Concerning a lawyer's Facebook "friend request," the **San Diego County Bar Association Legal Ethics Committee in Opinion 2011-2**, construing former rule 2-100, concluded:

- *An attorney's ex parte communication* ***to a represented party intended to elicit information about the subject matter of the representation*** *is* ***impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party.*** *We have further concluded that the attorney's duty not to deceive [citing ABA Model Rules 4.1(a) and 8.4(c) which have since been adopted in California]* ***prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request.*** *Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship.*

Rule 4.2

"About the Subject of the Representation"

- Rule 4.2, **Comment [4]**: Rule 4.2 does **not** prohibit communications with a represented person concerning matters *outside* the representation.

- **Comment [6]** If a **current constituent** of the organization is **represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this rule.**

- A lawyer who knows that a person is being provided with **limited scope representation** is **not** prohibited from communicating with that person regarding matters outside the scope of the limited representation.

Rule 4.2**(b)**

- "(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule **prohibits communications with**:
- (1) A **current** officer, director, partner,*or managing agent of the organization; **or**
- (2) A **current employee**, member, agent, or other constituent of the organization, **if** the subject of the communication is **any act or omission of such person*** in connection with the matter **which may be binding upon or imputed to the organization for purposes of civil or criminal liabilit**y."

Rule 4.2(c) and (d)

- "(c) This rule shall **not** prohibit:
- (1) communications with a public official, board, committee, or body; or
- (2) communications **otherwise authorized by law or a court order**.
- (d) For purposes of this rule:
- (1) "**Managing agent**" means an employee, member, agent, or other constituent of an organization with **substantial* discretionary authority over decisions** that determine organizational policy.
- (2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1)."

Rule 4.2(c)(1)
Public official/body exception

- **U.S. v. Sierra Pacific Industries** (E.D. Cal. 2011) 759 F.Supp.2d 1215:
- Magistrate held that former CRPC Rule 2-100 (now Rule 4.2 (c)(1)) was violated by SPI's counsel's communication with Forest Service employees during a public tour.
- United States Forest Service invited the public to a series of seven tours of a Forest Service Project on the Plumas National Forest. Lawyer for SPI attended the public tour along with other members of the public. During the tour, he communicated with a number of Forest Service employees. At no time did he inform those employees that he was a lawyer with the law firm representing SPI in pending litigation.
- Magistrate found that the **public officer exception of subsection (C)(1) did not apply. Lawyer's** actions were not an exercise of a First Amendment right to seek redress of a particular grievance, but were rather an attempt to obtain evidence from these employees." He "**asked questions that went well beyond attending a public information tour of a project site**. "he was **attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery.**" *Id.* Additionally, the court found no evidence to support a conclusion that lawyer was communicating with a policy-making official or persons with authority to change a policy or grant some specific request for redress that lawyer was presenting. *Id.* at 11. Accordingly, the court found that the " **public officer" exception of Rule 2-100(C)(1) has no application in this case** and granted the government's motion for a **protective order and discovery sanctions**.

Rule 4.2(c)(2)
Comment [8] "Statutory Schemes" Exceptions[1]

- **Comment [8]**: Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this rule. Examples … include those protecting the **right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity**.

Rule 4.2(c)(2)
Comment [8] "Prosecutors" Exception[2MC]

- **Comment [8]**:
- The law also recognizes that **prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of 3 investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., United States v. Carona (9th Cir. 2011) 630 F.3d 917; United States v. Talao (9th Cir. 2000) 222 F.3d 1133.)**

Rule 4.2(c)(2)

Comment [8] "Criminal Defense Lawyer" Exception[3MC]

- **<u>Comment [8]:</u>** The rule is **not** intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This rule also is **not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, <u>by lawyers representing persons* whom the government has accused of or is investigating for crimes</u>, to the extent those investigative activities are authorized by law.**

Rule 4.2
Consequences of Rule Violation

- **State Bar Discipline:** varies. 3 month suspension is typical (See ***Levin v. State Bar*** (1989) 47 C3d 1140 (decided under prior rule; 3-year suspension.)
- **Court-imposed remedie**s may include disqualification of offending counsel and/or firm, gag order to offending counsel. **Federal approach**: some cases suggests that "**any doubt" be resolved in favor of disqualifying the entire law firm.** Cf. Cal. "**balancing of interests**" approach (*Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 CA3d 116 (decided under former CRPC as stated in *La Jolla Cove Motel & Hotel Apartments, Inc. v. Sup.Ct. (Jackman)* (2004) 121 CA4th 773, 788-789.

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."**

Rule 4.3
"Communicating with an Unrepresented Person"

- Rule 4.3 comprises two paragraphs, both of which apply **only** if a lawyer is communicating (1) "**on behalf of a client**" with (2) **an unrepresented person ("U.P.").**

- **Paragraph (a) includes three distinct parts:**

- *1.* **prohibits a lawyer from stating or implying that the lawyer is "disinterested."**

- 2. where the lawyer "knows* or reasonably should know*" that the U.P. **misunderstands** the "lawyer's role in the matter," the lawyer must make "reasonable* efforts to **correct the misunderstanding**."

- 3. the lawyer is **prohibited from giving legal advice** to a U.P. **other than the advice to retain a lawyer**, if "the lawyer knows* or reasonably should know* that the interests of the U.P. **"are in conflict with the interests of the client."**

Rule 4.3
"On Behalf of a Client"

- Examples where a lawyer **might not** be communicating with a U.P. "on a client's behalf":

- 1) **A defendant corporation's CEO was <u>not prohibited</u> from communicating with <u>employees</u> of the plaintiff corporation about settlement where the CEO, although a lawyer, had never litigated on behalf of the defendant corporation.** ***HTC Corp. v. Tech. Props. Ltd.*** **(N.D.Cal. 2010) 715 F.Supp.2d 968**

- 2) Michigan Rule 4.3 **held not to apply to a lawyer representing himself in a real estate transaction.** ***Suck v. Sullivan*** (Mich.App. 8/27/1999), No. 207488, 1999 WL 33437564 (<u>Unpublished</u>);

Rule 4.3

Persons Deemed to be Represented by Counsel."

- Situations where a person might or might not be ***deemed by operation of law*** **to be represented** – depends on the specific circumstances.
- E.g.: W**hen an organization is involved in a legal matter, some constituents of the organization are deemed represented by the organization's lawyer regardless of whether they have explicitly entered into a lawyer-client relationship with that lawyer.****

- **Rule 4.2(b) provide**s:
- "(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule prohibits communications with:
- (1) A **current** officer, director, partner,*or managing agent of the organization; or
- (2) A **current** employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such a person* in connection with the matter which **may be binding upon or imputed to the organization for purposes of civil or criminal liability."**

- **Thus officers, directors, etc. of a corporation would be *deemed* represented regardless of whether such person has formally entered a lawyer-client relationship with the corporation's lawyer.** Absent the consent of the corporation's lawyer**, they are off-limits to other lawyers involved in the matter under rule 4.2**. So are any other **non-managerial constituents of the organization** if the lawyer is seeking to elicit information about any act or omission by the constituent that **"may be binding upon or imputed to the organization."**

Rule 4.3(b)
Pro Se with Limited Scope Representation

- Sometimes parties who represent themselves ***pro se*** **nevertheless will retain a lawyer for** some aspects of a legal matter but not others, i.e., they will employ a lawyer for **limited scope representation**. That means that **some of the time they might be "represented by counsel" but at other times they are "unrepresented."**

- What's a lawyer representing an opposing party to do in those circumstances? Fortunately, the California Court of Appeal has weighed in on this issue.

- In ***McMillan v. Shadow Ridge at Oak Park Homeowners Ass'n*** **(2008) 165 Cal.App.4th 960,** the court held that the lawyer for the defendant did not violate **former CRPC 2-100 [current CRPC 4.2]** by communicating directly with plaintiff, a nonlawyer appearing *pro se* who had engaged a lawyer for assistance on some aspects of the matter, but **where the nonlawyer still remained counsel of record**. Ethics opinions in other jurisdictions are in accord. *See, e.g.,* **Nevada State Bar Ethics Opn. 34 (2009); Kansas Bar Ethics Opn. 09-01 (2009); Utah Bar Ethics Opn. 2008-1** (In a limited scope representation, an "opposing counsel acts **reasonably in proceeding as if the opposing party is not represented**, at least until informed otherwise.") *See also* **ABA Formal Ethics Opn. 472 (2015).**

Rule 4.3(a) "Disinterested"

- CRPC 4.3(a) prohibits a lawyer representing a client from ***stating or implying*** the lawyer is **"disinterested"** when communicating with a U.P. about the matter for which the lawyer was retained.
- **Unlike other terms in CRPC 4.3, the Rules do not define "disinterested" in the Terminology rule 1.0.1.**
- **Comment [1] to ABA Model Rule 4.2 , however, explains "disinterested" to mean disinterested as to loyalties or a disinterested authority on the law.**
- E.g. of improperly **stated or fostered the impression lawyer is "disinterested"** when in fact they are not: ***In re Air Crash Disaster*** **(N.D. Ill. 1995) 909 F.Supp 1116,** where **plaintiffs' lawyers sent survey** questions to unrepresented airline pilots that they described to be part of an "independent survey" of the pilots, whose names they asserted were "provided to us by the FAA." As a result, the survey results were excluded as a sanction for a violation of Illinois Rule 4.3.
- **Implying "disinterest"** ***In re Hansen*** **(Minn. 2015) 868 N.W.2d 55,**** where a lawyer, representing the husband, met with husband and wife, who was unrepresented, to discuss their divorce. The court found that **lawyer never**

Rule 4.3
CA Compared to ABA Model Rule

- **ABA Model Rule 4.3, cmt. [1],** provides in part:
- "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."**

- **Not in CA Rules** which include substantially fewer comments than do the ABA Model Rules or most rules adopted in other jurisdictions, because CA Rules are **intended primarily as disciplinary rules, *not* as a restatement of the law of lawyering** intended to provide guidance as to best practices. See **CRPC 1.0(a) ("The following rules are intended to regulate professional conduct of lawyers through discipline.")**
- **ABA Model Rules may still be consulted for guidance. (See CRPC 1.0, Cmt [4]),** and here is particularly apt.

Rule 4.3
"Negotiating" or "Settling" with an Unrepresented Person" Comment 2

- **Rule 4.3 Comment 2:**
- **". . .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."**

- **However one can overreach in "negotiating" settlement as in** *Yates v. Belli Deli* (N.D.Cal. 8/13/2007) 2007 WL 2318923.**

Rule 4.3(b)

"Privileged or Other Confidential Information"[1]

- Rule 4.3 **paragraph (b) prohibits the lawyer from seeking to obtain from an unrepresented person "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.

- Although the U.P. is unrepresented, he or she might be privy to privileged communications from a prior matter that is related to the current matter. For example, the U.P. might be a **former employee of an organization who has acquired privileged information during the employment. The privilege belongs to the organization, not the individual employees who might have been made privy to it.**

- Another possibility is a **U.P. who has retained a lawyer for limited scope representation**. **A lawyer would be prohibited from seeking to obtain such information during the lawyer's permitted communication with the U.P.**

- "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." Rule 4.3 **Comment [1]**

Rule 4.3(b)
Other Confidential Information

- The **rule also does not explain what kind of "other confidential information" might be intended by paragraph (b).**

- One possibility is information that the person is under a duty to maintain confidential under, for example, **a non-disclosure agreement or computer-use policy (e.g., revealing a password to the employer's server).**

- There are probably **other types of confidential information that are protected by contract.** The duty not to elicit such information would similarly apply.

Rule 4.2
Cases and Opinions[1]

- ***Doe v. Superior Court of San Diego County*** (2019) 36 Cal.App.5th City attorney direct communication with a represented police officer in an action against the city for harassment and retaliation during internal investigation **violated former 2-100.**

- ***City of San Diego v. Superior Court*** (2018) 30 Cal.App.5th 457 Public officer, board, committee or body exception **not applicable** where **questions posed by attorney for opposing party to public employees were designed to obtain evidence for use in litigation that should have been pursued in discovery.**

- ***Snider v. Superior Court of San Diego County*** **(2003, 4thDCA, Div. One) 113 Cal.App.4th 1187**

- United States v. Talao (9th Cir. 2000) 222 F.3d 1133
- Graham v. U.S. (9th Cir. 1996) 96 F.3d 446
- Karnazes v. Ares (2016) 244 Cal.App.4th 344
- Conservatorship of Becerra (2009) 175 Cal.App.4th 1474
- Hernandez v. Vitamin Shoppe Industries Inc. (2009) 174 Cal.App.4th 1441
- McMillan v. Shadow Ridge At Oak Park Homeowners Ass'n (2008) 165 Cal.App.4th 960
- La Jolla Cove Motel and Hotel Apartments Inc. v. Superior Court (2004) 121 Cal.App.4th 773

Rule 4.2
Cases and Opinions[2]

- Koo v. Rubio's Restaurants, Inc. (2003) 109 Cal.App.4th 719;
- Truitt v. Superior Court (1997) 59 Cal.App.4th 1183;
- Jorgensen v. Taco Bell (1996) 50 Cal.App.4th 1398;
- Jackson v. Ingersoll-Rand (1996) 42 Cal.App.4th 1163;
- Continental Insurance Company v. Superior Court (1995) 32 Cal.App.4th 94;
- In the Matter of Dale (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798
- In the Matter of Wyshak (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70 *
- In the Matter of Twitty (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664 CAL 2011-181,
- CAL 2009-178; CAL 1996-145; CAL 1993-133; CAL 1993-131; CAL 1991-125; CAL 1989-110; LA 508 (2002)
- Re: Rule 4.3: Kevin Mohr, ***Ethics Spotlight: The Importance Of Being Disinterested: Treating Unrepresented Persons With Care (Calawyers.Org*** November 2021) (https://calawyers.org/california-lawyers-association/the-importance-of-being-disinterested-treating-unrepresented-persons-with-care/)

Thank you

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