



Your ethical duties in dealing with unrepresented persons

BY SUSAN HUMISTON

[An author's note was added to this article on September 21, 2022. See below.]

It's a fact of legal practice that you will frequently encounter unrepresented individuals in the course of your work for a client. Many litigants or opposing parties in transactions are *pro se* for a variety of reasons, including lack of access to affordable legal representation. Witnesses are often unrepresented. Lately we have seen an uptick in complaints where lawyers have failed to be mindful of their ethical obligations to unrepresented persons. Because of this fact, I thought a refresher on the rules would be helpful.

Rule 4.3, Minnesota Rules of Professional Conduct (MRPC)

Rule 4.3, MRPC, conveniently entitled "Dealing with Unrepresented Person," sets out several requirements that a lawyer must meet. The rule seeks to avoid misunderstandings by the unrepresented person about the lawyer's role, and thus implicitly to prevent any overreaching by the lawyer.

First, Minnesota's Rule 4.3(a) forbids a lawyer to state or imply that the lawyer is disinterested. That last term doesn't mean bored or uncaring; it means, as the comment to the rule explains, that a person not experienced in dealing with legal matters might incorrectly assume that a lawyer is disinterested in his or her loyalties or serves as a disinterested or neutral authority on the law. If the lawyer's client's interests are in fact adverse to the unrepresented person, a lawyer may not falsely state or imply anything to the contrary.

Minnesota's Rule 4.3(b) states that a lawyer shall clearly disclose that her client's interests are adverse to the unrepresented person if the lawyer knows, or reasonably should know, that those interests are adverse. Importantly, the rule is framed as obligatory and the obligation is not only triggered when there may be a misunderstanding about the lawyer's role—but rather is present whenever the interests are adverse. As the plain language of the rule indicates, the obligation is measured objectively and encompasses a lawyer who either actually knows the interests are adverse or *should know* the interests are adverse. If the interests of your client are adverse to those of the unrepresented person, you must clearly state this fact.

Rule 4.3(c) adds that whenever a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts

to correct the misunderstanding. Again the obligation is placed on the lawyer to recognize and correct.

No legal advice

Finally, the rule adds a special obligation concerning legal advice when dealing with an unrepresented person. Rule 4.3(d) prohibits an attorney from giving legal advice to the unrepresented person, except for the limited advice to secure their own legal counsel, if the lawyer knows or reasonably should know that the person's interests conflict with the interests of the lawyer's client. The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel, although since Rule 4.3(c) places the obligation upon a lawyer to reasonably know if the person misunderstands the lawyer's role, caution is advised.

Easy enough, right? These are the professional responsibility rules many of us learned in law school, and they make sense. Do not state or imply you are neutral/disinterested, clearly disclose any adversity in interests, clarify if there may be a misunderstanding, and do not give legal advice other than to advise the unrepresented person to get their own lawyer. Let's review some scenarios in which failing to follow this rule can lead a lawyer astray.

Problem situations

Certain situations lend themselves to misunderstandings more readily than others. Say, for example, a lawyer previously represented two individuals jointly, but the parties then had a falling out and the lawyer chose to represent one of the parties in an unrelated matter. Rule 1.9, MRPC, allows lawyers to represent client interests adverse to a former client unless the matter is the same or substantially related to the prior representation, and informed consent is not needed. The former clients, if now unrepresented, may misunderstand their former lawyer's role, believing the lawyer is neutral/disinterested or even still protecting the former client's rights. A clear statement by the lawyer setting out who they represent, and the nature of any adversity, can avoid confusion.

Other situations present the temptation to give legal advice. Many family law matters, landlord-tenant matters, or consumer collection actions, to name a few, may involve a dispute with an unrepresented person. The difficulty may not be that the adverse party is unaware that the lawyer's client has interests adverse to the unrepresented individual, or that the individual is confused by the lawyer's role. In these situations, the chances are high that you will be asked for your legal advice and inclined to offer an opinion to move the matter along.

What if, for example, the unrepresented person asks questions of the lawyer that involve an explanation of the available rights (Do I have the right to...? What if I...)? While a lawyer may negotiate the resolution of a matter with an unrepresented person, it is a fine line between negotiating and advising about the terms of an agreement. In these situations, it may be permissible to state, for example, "It is my opinion that the law allows XYZ (state client's position regarding the applicable matter), however, I am not your lawyer, this is my client's position, and the only advice I can give you is to secure your own legal counsel." As comment [2] to Rule 4.3, MRPC, states, a lawyer may "explain the lawyer's own view of the meaning of a document or the lawyer's view of the underlying legal obligations."

Similarly, you might be tempted to answer procedural or other legal questions posed by a *pro se* adverse party, or a witness. When is my answer due? Do I need to comply with this subpoena? If I do not want to comply with this subpoena, what can I do? While you might be able to provide general legal information (such as would be provided by the clerk’s office or in the summons as required by rule), when you start providing advice that incorporates legal analysis (applying the law to the facts of a given situation), not only are you likely violating Rule 4.3(d), MRPC, but you run the risk of establishing an attorney-client relationship—which, according to the Court, can be formed whenever a lawyer gives legal advice to an individual seeking advice under circumstances where it is reasonable for the individual to rely upon the advice.* Always double-check your statements to unrepresented persons to ensure you are not providing legal advice. Everyone benefits when you state clearly that you cannot provide legal advice and the unrepresented person should secure counsel of their own choice if they have questions or concerns.

Conclusion

Lawyers often find themselves dealing with an unrepresented adversary or witness. Avoiding misunderstandings is the key component in any such dealing. Following the requirements of Rule 4.3, MRPC, prevents misunderstandings and is your ethical obligation. You can never say “I am not your lawyer” too often—and, where applicable, “my client’s interests are adverse to your interest.” Even if the unrepresented person understands the lawyer’s role, giving legal advice, except the advice to secure counsel, is not allowed. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at www.lprb.mncourts.gov.

* *In re Severson*, 860 N.W.2d 658, 666 (Minn. 2015) (discussing the contract and tort theory of creating an attorney-client relationship).

Author’s Note: This article is an update of Martin Cole’s 2015 article entitled “Dealing with Unrepresented Persons,” published in *Bench & Bar* in July 2015, and available on our website at lprb.mncourts.gov, as are all prior articles written by this Office. My failure to highlight that fact and provide the appropriate attribution was an error, which I regret. Thank you to Mr. Cole for graciously accepting my apology for this mistake. Also, to clarify any potential confusion caused by the statement, “The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel,” Rule 4.3(d), MRPC, permits but does not require a lawyer to advise an unrepresented person to secure counsel. (Posted September 21, 2022.)

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