

Dealing with an unrepresented person
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It is not uncommon for lawyers prosecuting municipal code violations to communicate with pro se defendants for the purpose of transmitting offers of compromise, nor is it uncommon for those lawyers to have some reservations regarding the practice. Although communicating directly with an unrepresented opposing party may be the most expedient way to resolve a minor violation, the lawyer may worry whether such a practice is consistent with the requirements of the Minnesota Rules of Professional Conduct (MRPC). May a lawyer communicate with an unrepresented opposing party? If so, what may she say, and what mustn't she say?

Rule 4.3, MRPC (Dealing with Unrepresented Person), obviously is on point. This rule dictates that a lawyer must not state that she is disinterested; must clearly disclose that her interests are adverse to the unrepresented person; must take reasonable steps to clarify misunderstandings as to the lawyer's role in the matter; and must avoid giving legal advice to the unrepresented person, other than the advice to secure counsel.

The first three requirements are clearly related. The first line of defense against a lawyer taking unfair advantage over an unrepresented opposing party is to ensure that the party understands that the lawyer does not represent him. A person who is unfamiliar with the legal system may not be consciously aware that lawyers are advocates, and that the lawyer standing across from them has interests which diverge from theirs, especially if that lawyer works for the government. Therefore, the rules require that the lawyer disclose her role in the matter, and must correct any overt misunderstandings as to her role. None of these initial requirements prevent a prosecutor from speaking with a pro se litigant, and after making her role in the matter clear, presenting an offer.

In addition, the lawyer must also refrain from giving the unrepresented person legal advice, if the lawyer knows or should know that the interests of the unrepresented person diverge from the interests of the lawyer's client. Rule 4.3(d), MRPC. This requirement may be a pitfall to the unaware prosecutor. It could be a relatively simple matter to drift from simply presenting an offer ("If you plead guilty to the lesser charge and agree to a \$100 fine, we'll dismiss the more severe charge.") to proffering legal advice in regard to the offer ("Take the plea. It's a good offer."). In the former example,

the prosecutor is not giving legal advice. In the latter, the prosecutor is arguably evaluating the value of the plea deal and advising the pro se party. The wording of the latter example invites confusion on the part of the unrepresented opposing party.

The unofficial comment to Rule 4.3, MRPC, further clarifies the intent of the rule. Comment 2 reads, in part:

“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 a party whose interests are adverse and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.”

The final clause of the comment provides additional guidance as to what does and does not constitute legal advice to the unrepresented party. The prosecutor may present her view of the meaning of the document, or the underlying legal obligations. It is unstated in the comment, but still implied that the lawyer’s view should be clearly indicated as such. A minor change in wording (“this is my offer” vs. “this is a good offer”) could result in a blurring of the line between explaining one’s position and offering legal advice.

It is perfectly reasonable for lawyers to be wary when dealing with unrepresented opposing parties. The Rules of Professional Conduct require that the lawyer take reasonable additional steps to protect such parties from confusion over the lawyer’s role. A little knowledge of the applicable rules will allow prosecutors to deal with pro se litigants with confidence. If the prosecutor makes her role clear, and avoids giving the party legal advice, she should be well on her way to resolving the case expediently and within the rules.