

GULLING MURDERERS & UNREPRESENTED PARTIES

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Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse. Like the credulous widow who wakes up one day to find the charming young man and all her savings gone, so the consenting subject of a piece of nonfiction writing learns – when the article or book appears – his hard lesson. Journalists justify their treachery in various ways according to their temperaments. The more pompous talk about freedom of speech and “the public's right to know”; the least talented talk about Art; the seemliest murmur about earning a living.

Janet Malcolm's punchy thesis on journalists' ethics, published in *The New Yorker* in March, is preface to a fascinating legal-journalistic story. Malcolm's statement should lead lawyers to reflect on their own obligations in dealing with the unwary.

Malcolm's story is of Dr. Jeffrey MacDonald, who was convicted of murdering his wife and children. The journalist in the story is Joe McGinniss, whose *Fatal Vision* told MacDonald's story, as McGinniss saw it.

Before MacDonald was tried, he and his lawyer invited McGinniss to be inside the preparation of the defense and trial. In return, MacDonald received a portion of McGinniss' book earnings, useful in paying legal fees. MacDonald and McGinniss developed a close relationship, and McGinniss became privy to the most confidential information and feelings. After the conviction the men maintained a relationship until publication of *Fatal Vision*. During these years, McGinniss led MacDonald to believe that the book would be the story of a good man, unjustly convicted. For example, McGinniss discouraged MacDonald from cooperating with other possible authors by suggesting that the true story would not be told by anyone else: “. . . frankly, the one and only [book] in which you have any interest is the one to which I will be devoting the next two years of my life . . .”

After *Fatal Vision* was published, MacDonald sued McGinniss, alleging breach of an agreement that McGinniss' book would respect “the essential integrity” of MacDonald's life story. Trial of the suit included expert witness testimony on journalists' ethics from William Buckley and others. The result was a hung jury, followed by a settlement of \$325,000.

Before the settlement McGinniss and his lawyer invited various writers to meet with McGinniss, presumably so that his sympathetic story could be told. Malcolm met with McGinniss, but tells far from a sympathetic story.

Malcolm contends that journalists implicitly deceive interviewees by not disabusing them of their belief that it will be *their* story that will be told. Instead, the story is told as the journalist sees it. *MacDonald*

v. McGinniss was a moral assessment of how far this implicit deceit may go without the journalist having turned into a liar.

How far may a lawyer go in dealing with an unrepresented party who may expect what the lawyer does not intend to deliver? The Rules of Professional Conduct, particularly in their Minnesota version, give rather strict answers to this question. Rule 4.3(a) and (b) are the most pertinent rules on the subject:

(a) In dealing on behalf of a client with a person who is not represented by counsel, *a lawyer shall clearly disclose whether the client's interests are adverse to the interests of such person* and shall not state or imply that the lawyer is disinterested.

(b) 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 italicized language is unique to the Minnesota version of Rule 4.3, and further heightens the lawyer's duty. Rule 4.3(a) and (b)[Ftn 1](#) have no counterpart in the predecessor Code of Professional Responsibility. They reflect a philosophy under the newer Rules that at several points softens the adversary system and increases a lawyer's duty to persons other than the client and the court.

Not only is the lawyer forbidden to be misleading about her role, she must correct an unrepresented person who on his own came to misunderstanding her role. In addition, Minnesota lawyers must *prevent* misunderstandings by clearly disclosing adverse interests at the outset. Lawyers' assistants and agents are also governed by these requirements, through Rules 5.3 and 8.4(a).

The expert testimony in the McGinniss trial was that many people will not talk to journalists unless they believe that the journalist is sympathetic to their version of events. One expert, author Joseph Wambaugh, testified that journalists should not lie to a witness, but they may tell an "untruth," defined as "part of a device wherein one can get at the actual truth." Journalists do not have ethics *rules* as such, telling them how far they may lead the credulous on. Lawyers do, and the obligations under Rule 4.3 clearly go much farther than those the experts ascribed to journalists. For Minnesota lawyers disclosing the truth comes before getting the story.

Are lawyers then hampered in getting facts in an adversary setting by having to tell people what they are up to? Yes, but guile in getting the facts is not ruled out generally. The attorney must only refrain from lying, and be up-front about whose side she's on. Moreover, the fact-gathering process is elsewhere subordinated to other social and moral policy concerns – as in the suppression of wrongly obtained evidence of criminal conduct.

The most obvious case covered by Rule 4.3 is that of defense counsel suggesting quick settlement to unrepresented prospective plaintiffs. Rule 4.3 seeks to protect against overreaching, particularly in the form of taking advantage of someone's supposition that a lawyer is not representing adverse interests.

May a lawyer present a settlement document to an unrepresented party? Rule 4.3 and the case law indicate that this may be done, with appropriate disclosures of adverse interests, preferably in writing.[Ftn 2](#)

Rule 4.3 would clearly forbid the conduct described in the leading case on dealing with unrepresented parties, *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976). *Haines* was a disqualification

matter decided under the previous Code. When Grant came to believe that its employee Haines had defrauded the company, it decided to fire him and sue. Grant's counsel informed Haines that an investigation was underway, but intentionally did not disclose information about the intended firing and the suit. Counsel then told Haines (falsely) that he had a chance to clear his name and that producing certain financial documents and a waiver would be to his benefit. Haines was meant to misunderstand the lawyer's role, and in any case the lawyer did not disclose the adversity of interests. Had Rule 4.3 been in effect, it clearly would have been violated.

Arizona Ethics Opinion 87-25, in effect following *Haines*, interprets Rule 4.3 to require plaintiff's counsel to disclose to a defendant-to-be; 1) that she represents plaintiff; 2) that the information sought is connected with the litigation; 3) the nature of the case; and 4) that any disclosure is voluntary.

There is not yet Rule 4.3 case law, but there are prior cases disciplining attorneys for actually misrepresenting their status to unrepresented parties. *In re Luther*, 374 N.W.2d 720 (Minn. 1985), involved reprimand of a collection attorney with various aliases and ingenious but deceitful schemes for tricking debtors into disclosing assets.

Janet Malcolm's reflections on deception and journalism are far richer and more nuanced than this brief summary may suggest. So too are questions of drawing lines for lawyers between artful suggestion and deceit. Whatever the nuances, Rule 4.3 has considerably enhanced the obligation of Minnesota attorneys to deal candidly with unrepresented persons.

NOTES

¹ Rule 4.3(c) also provides: "During the course of representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, on those issues as to which the interests of each person are or have a reasonable possibility of being in conflict with the interests of the client." A counterpart of Rule 4.3(c) under the Code was DR 7-104(A)(2).

² *Dolan v. Hickey*, 431 N.E.2d 229 (Mass. 1982), and *In re Bauer*, 581 P.2d 511, 515 (Or. 1978). For the special duty of a prosecutor dealing with an unrepresented accused. see Rule 3.8(c).