By Martin Cole

Ethics Rules and *Pro Se* Lawyers

Recently, the Minnesota Supreme Court has twice determined that Rule 3.3(a)(1), Minnesota Rules of Professional Conduct (MRPC), did not apply to an attorney appearing *pro se*.[1] Rule 3.3(a)(1) prohibits "a lawyer" from knowingly making a false statement of fact or law to a tribunal or failing to correct such a false statement previously made. This interpretation is a change from the court's prior disciplinary decisions in which Rule 3.3(a)(1) had been applied regardless of the role in which an attorney was appearing before a tribunal—be it as *pro se* party[2] or as counsel. It also was a change based upon application of a comment to the rule, which heretofore had not been done in a disciplinary matter.[3] In neither case was the issue thoroughly briefed or argued before the court. Thus, while the court's pronouncement seems as if it was intended to be a clear precedent, it may yet require further evolution.

This determination also raises the more general issue of which Rules of Professional Conduct apply, and which do not apply, to an attorney who is participating in a proceeding or transaction *pro se* or as a party represented by counsel; that is, in a role other than as a lawyer representing a separate client. Are professional conduct obligations the same in such situations; should they be? Perhaps the way to first analyze this issue is to determine which Rules of Professional Conduct do not apply to a *pro se* or party-litigant attorney, and then figure that whatever rules are left do apply.

In Representing a Client

A large percentage of the Minnesota Rules of Professional Conduct refer to a client in the text of the rule, some explicitly stating that "in representing a client," a lawyer "shall" or "shall not" [engage in a particular conduct]. To the extent the court's recent reasoning is applied to other Rules and remains valid, this would indicate that any such rule will not apply to a *pro se* attorney,[4] since it appears that representing yourself does not count as having a client.[5] Such a literal "text of the rule"-based approach seems straightforward and easy to apply. Not all scholars agree with such an approach, however. In 2011, Prof. Margaret Raymond[6] wrote a thoughtful article on this topic.[7] Prof. Raymond noted that jurisdictions have not applied ethics rules to *pro se* lawyers with any degree of consistency, even those rules that clearly state that they apply to a lawyer "in representing a client." She argues that instead of a literal text-based analysis, courts should apply the rules to *pro se* lawyers by a purpose-based analysis—what purpose or policy interest is this rule intended to serve, and is it served by applying it to a *pro se* lawyer?

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The court's recent analysis of whether Rule 3.3(a)(1) applies to *pro se* attorneys was ultimately a text-based one, albeit text from a comment to the rule. For many disciplinary rules, a textual analysis makes complete, common sense. For example, can a lawyer fail to adequately communicate with herself in violation of Rule 1.4, MRPC, have an improper fee agreement with herself in violation of Rule 1.5, MRPC, or reveal her own confidential information without her consent in violation of Rule 1.6, MRPC, or improperly withdraw from representing herself in violation of Rule 1.16, MRPC? Presumably, the answer to each of these questions is and always has been no. Such a result is both text and purpose based.

Some other rules plainly do apply to lawyers in all capacities. For example, Rule 8.4(b), MRPC, states that it is misconduct to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in some other respect. This is true whether or not such an act is committed by an attorney while acting in a representational capacity. The court has long held that the MRPC (or their predecessors) can be applicable to all aspects of a lawyer's life anywhere in the world. General prohibitions on dishonesty fit this shoe as well. Most of the rules on advertising would not require a particular client in order to be violated. Rules dealing with law firm supervision do not require a specific client, nor do the requirements of Rule 1.15, MRPC, for lawyer trust accounts[8] and business accounts. Requirements for employing a suspended or disbarred lawyer, contained in Rule 5.8, MRPC, apply independent of any particular representation, as might aiding another lawyer in the unauthorized practice of law under Rule 5.5, MRPC. Ironically, since, as a citizen, a lawyer would have the right to represent herself, the basic concept of unauthorized practice of law should not apply to a *pro se* lawyer. These results also fit both text- and purpose-based analysis.

Essentially, what is left are those rules dealing with the lawyer as advocate (Rules 3.1 – 3.9, MRPC) and rules involving transactions with persons other than clients (Rules 4.1 – 4.4, MRPC). Whether to apply these rules to *pro se* lawyers or lawyers as clients is where issues most often will arise and the debate exists. To me, the basic concern is not so much that some of these rules may be limited to apply only in instances when the attorney has a client, but rather whether certain misconduct covered by these rules, if committed by an attorney appearing *pro se* or as a client, will be covered by some other rule instead. Say, what?

Rules 4.1 – 4.4 are perhaps the easier of the two sets of rules to analyze. That is because all four rules begin with some variation of the phrase "in representing a client." That would seem to end the debate as to whether these rules do or can apply to a *pro se* lawyer or to a lawyer acting as a party represented by other counsel. But is that the result we should want in all situations? Do other, more generic rules cover the full range of attorney conduct that will be excluded from coverage under these rules if they do not apply to *pro se* lawyers?

Take, for example, Rule 4.3, MRPC, which deals with an attorney's dealings with an unrepresented person. The rule begins with, "[i]n dealing on behalf of a client with a person who is not represented by counsel ... ."

By the current text-based definition, this rule would not apply to a *pro se* attorney dealing with an unrepresented adversary. Rule 4.3(d) states that "a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client." Does (or should) this requirement depend on whether the lawyer has a client or is representing himself? Even a lawyer appearing *pro se*, it seems, should not be giving legal advice to an adverse party if that person does not clearly understand that adversity. If Rule 4.3(d) is not applicable here, is Rule 8.4(d) (conduct prejudicial to the administration of justice) sufficient to impose discipline for such misconduct? Would a *pro se* lawyer have to engage in actual misrepresentation or deceit (Rule 8.4(c)) in dealing with an unrepresented adverse party before discipline could be imposed? If so, why?

Similarly, Rule 4.4(a) proscribes conduct by a lawyer representing a client that has no substantial purpose other than to embarrass, delay or burden a third person, or methods of obtaining evidence that violate the legal rights of a third person. Should this prohibition be limited to instances when an attorney is representing a client? Again, will Rule 8.4 adequately cover such conduct committed by a *pro se* lawyer?

Advocate Rules

Rules 3.1 – 3.9 (and in particular Rules 3.3, 3.4, and 3.5) have usually been said to define a lawyer's obligations to the legal system, as opposed to a client or a third person. The rules identify these rules under the heading, "Advocate." Is a *pro se* lawyer not an advocate? Historically, portions of these rules were applied to lawyers in whatever role they were appearing before an adjudicator. Most of these rules begin simply, stating that "a lawyer" shall or shall not ... ; only in a limited number of specific instances do they clarify that the rule is intended by the drafters (or adopters) to be limited to situations when the lawyer represents a client. For example, Rule 3.3(b) requires an attorney to take reasonable remedial measures if, in representing a client, the attorney knows the client intends to engage or has engaged or is engaging in a fraud or crime.

Until recently, most of these rules were thought to apply with equal force to *pro se* lawyers or lawyers as parties. Now, that application is certainly in doubt. But as with the "four point" rules discussed above, we can presume that *pro se* lawyers are not permitted to bring frivolous claims (Rule 3.1, MRPC), just as would a lawyer representing a client. Will Rule 8.4(d) (conduct prejudicial to the administration of justice) cover such conduct if Rule 3.1 does not apply?

Conclusion

As this piece indicates, the court's recent rulings related to the application of the ethics rules to *pro se* lawyers raise an issue perhaps too large for a simple column, one that requires more thought and perhaps additional case law development. A literal reading of a rule's language seems to govern at this time, but a more purpose-based review may be more appropriate in future. ▲

Notes

[1] *In re Albrecht*, 845 N.W.2d 184 (Minn. 2014). The court wrote, "Albrecht challenges the referee's conclusions that his false or misleading statements violated Rule[] 3.3 ... . Albrecht invokes a comment to Rule 3.3 ... which refers to a lawyer 'representing a client.' Because Albrecht was not representing a client when he made the statements, we agree that he did not violate Rule[] 3.3." The court clearly reaffirmed this position more recently in *In re Moe*, A13-1611 (Minn., 08/13/2014) fn. 8. *http://mn.gov/lawlib/archive/supct/2014/OPA131611-08132014.pdf*

[2] *See, e.g., In re Scott*, 657 N.W.2d 567 (Minn. 2003); (Rule 3.3(a)(1), MRPC). The court did not address whether the same interpretation applies to Rule 3.3(a)(3), which prohibits a lawyer from knowingly offering false evidence or failing to rectify evidence offered if the lawyer later comes to know of its falsity. The court also had previously applied this rule section to a *pro se* lawyer: *In re Dedefo*, 752 N.W.2d 523 (Minn. 2008).

[3] The court did recently use a comment to Rule 1.9, MRPC, to help define when a current client representation is substantially related to that of a former client. *State of Minnesota v. 3M Company*, 845 N.W.2d 808 (Minn. 2014). The topic of the status of the comments to the MRPC must be left for another day.

[4] The court in the *Moe* decision made an exception for Rule 3.2 (Expediting Litigation), however, because it had applied the rule to a *pro se* attorney previously. The court did not explain why such prior application did not make a difference as to Rule 3.3(a)(1).

[5] This also would make an impossibility of the old adage that "a lawyer who represents himself has a fool for a client."

[6] Prof. Raymond was a professor at the University of Iowa at the time, her scholarship focused on criminal law and professional responsibility. She subsequently became, and currently is, dean of the University of Wisconsin Law School.

[7] Raymond, "Professional Responsibility for the *Pro Se* Attorney," *St. Mary's Journal of Legal Malpractice & Ethics*, Vol. 1:2 (2011).

[8] Presumably, most of the funds held in a lawyer's law office trust account are client funds, so in that sense violations occur in representing a client, but the obligation is not dependent upon representation of any particular client.