

Dealing with Unrepresented Persons

The rules relating to the adversary system in a “perfect world” envision two equal parties represented by competent, diligent counsel who play fair under the rules of professional conduct, civil or criminal procedure, evidence, etc. On some occasions, it turns out that way—but frequently it does not. This may never be truer than when an attorney deals with an unrepresented person. That person may be an opposing party (or potential party), a witness, or some other individual connected with a legal representation.

The Minnesota Rules of Professional Conduct (MRPC) provide guidance to attorneys in their dealings with such an unrepresented person. Principally, Rule 4.3, MRPC, which is conveniently entitled “Dealing With Unrepresented Person,” sets out several requirements that a lawyer must meet. While the specific application of some of these requirements can generate some disagreement, the general parameters are clear. 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.

Shall/Shall Not

First, Minnesota’s Rule 4.3(a)¹ states that a lawyer shall not 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 is a disinterested 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.

Akin to the first requirement, 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. Note that the rule does not require such a disclosure in all instances. There may be times when the lawyer’s role and relationship to the unrepresented person is patently obvious. Nevertheless, Minnesota places the obligation of clarity on the attorney, such that it is usually wiser and safer to make sure that the unrepresented person understands the attorney’s role.

Another basic corollary to the above is contained in Rule 4.3(c), which adds that whenever the lawyers know, or again reasonably should know, that the unrepresented person misunderstands the lawyer’s role, the lawyer shall make reasonable efforts to correct the misunderstanding. Note again that the obligation is placed on the lawyer to recognize and correct.

No Legal Advice

Finally, the rule adds a special obligation on the attorney 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 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 the Rule 4.3(c) places the obligation upon a lawyer to reasonably know if the person misunderstands the lawyer’s role, caution is certainly advised.

Is it meaningful that the rule drafters (at the ABA, and as adopted by the Minnesota Supreme Court) used the phrase that “the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client,” rather than carrying forward the phrase that a “client’s

interests are adverse to the interests of the unrepresented person?” Are they the same? Different? Poor lawyer drafting? I suppose it is possible that the drafters meant something more specific by “in conflict with” than might have been conveyed by “adverse,” but I’ve not seen such a distinction put forward by any authority. For now, I’d assume the phrases are functionally equivalent.

Problem Situations

Certain situations or areas of law lend themselves more readily to misunderstandings by an unrepresented person about the role of a lawyer with whom they find themselves dealing. One situation that frequently can create misunderstanding is in dealing with a former client. Rule 1.9, MRPC, allows lawyers to represent interests adverse to a former client unless the matter is the same or substantially related to the prior representation. But even if that standard is met, former clients, if now unrepresented, may misunderstand their former lawyer’s role or believe the lawyer is at least 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 and a complaint.

One attorney in a matter presently pending before the court made precisely that mistake in a marital dissolution matter in which he had previously represented both husband and wife in a different matter. When the lawyer approached wife (former client) about a settlement with husband (current client), she plainly manifested a misunderstanding as to who the lawyer represented, which the lawyer failed to clarify.²

As to giving legal advice, landlord-tenant situations come to mind as a frequent area of concern. A lawyer may find herself representing a tenant against an unrepresented landlord, or the other way around. A lawyer representing the landlord in dealing with a tenant issue will often be dealing with an unrepresented person, especially in the early stages of any dispute. The difficulty may not be that the tenant is unaware that the lawyer’s client (the landlord) has

interests adverse to the tenant, or that the tenant is confused by the lawyer’s role. The difficulty may be the temptation to provide legal advice. What if, for example, the unrepresented tenant asks questions of the lawyer that involve an explanation of the tenant’s rights (“Do I have the right to . . . ? What if I . . . ?”)? While a lawyer may negotiate a resolution of a matter with an unrepresented tenant if the tenant understands the lawyer’s role, it is a fine line between negotiating and advising about the terms of an agreement.

Questions about the law also can occur when initiating a lawsuit against a pro se adverse party. The unrepresented party may contact the lawyer and inquire about the matter—here again, if the person is unrepresented (it is best

to inquire), the lawyer may discuss the matter, but what if the unrepresented individual starts asking about procedural issues, such as how long they have to serve and file an answer? It may require some legal analysis to determine when the person was served and how long they still have to answer—is it thus giving legal advice to answer the inquiry? And what if the lawyer calculates incorrectly and the unrepresented person relies on the answer to their detriment? As before, caution is advised.

Conclusion

Lawyers often will find themselves dealing with an unrepresented adversary or witness. In general, avoiding misunderstandings is the key component in any such dealing. Even if the unpre-

sented person understands the lawyer’s role, giving legal advice except the advice to secure counsel is not allowed.

Notes

¹ Minnesota’s version of Rule 4.3 differs from the ABA Model Rule, and thus from the rule in many other states. Minnesota has broken down the Model Rule’s single paragraph into lettered subsections (a), (c) and (d). Rule 4.3(b) is unique to Minnesota’s rule.

² *In re Hansen*, A14-2061 (Minn. S.Ct.), in which the wife initially alleged a conflict of interest, believing the lawyer represented both parties; for a similar result, see also, Cole, “Summary of Admonitions,” *Bench & Bar of Minnesota*, February 2010.



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