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Can We Talk: Communicating with Unrepresented Persons

by
Nancy Kaufman

The rising cost of legal services and cutbacks in legal aid have combined to cause a boom in go-it-alone litigants, who have become especially common in divorce, consumer, and housing cases. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations With Unrepresented Poor Persons*, 85 Cal. L. Rev. 79, 123-124 (Jan. 1997) Like it or not, lawyers frequently must communicate on behalf of their clients with unrepresented individuals; what is and what is not allowed is the subject of this article.

Whenever a lawyer communicates with a non-lawyer, there is the potential for misunderstanding and overreaching. Treatises and case law most frequently address communications that circumvent the adverse party's lawyer, but the dangers are even greater when a lawyer communicates with an unrepresented person. Mass. R. Prof. C. 4.3(a) is intended to "restrict[] the ability of counsel to take unfair advantage" of such circumstances 2 Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* § 39.2 (3rd ed. & Supp. 2003) ("The Law of Lawyering").

The lawyer's first obligation to the unrepresented person is to make absolutely clear that the lawyer is not disinterested. Mass. R. Prof. C. 4.3(a) provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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.

Rule 4.3(a) applies whether or not the lawyer's client has interests adverse to the unrepresented individual, who might be, for example, a witness. The lawyer's interest in the matter must be made clear, and any misunderstanding must be addressed and corrected.

Whether or not the lawyer has satisfied the obligation to clarify his or her role will be tested according to an objective standard, taken from the point of view of the unrepresented individual and not from the lawyer's perspective. In collections cases, the Fair Debt Collection Practices Act (FDCPA), 15 U. S. C. § § 1692-1692o, also applies, so that the consumer will be presumed to be "uninformed, naïve, trusting and of below average intelligence." George W. Heintz, *The Fair Debt Collection Practices Act: Update on Heintz: Procedures and Compliance Tools for Collection Attorneys*, 52 Consumer Fin. L.Q. Rep. 38, 44 (Winter 1998) ("Heintz") (citation omitted).

Consequently, the lawyer must take special pains to explain to the unrepresented person his or her role as advocate for another. If the lawyer receives any indication that the unrepresented person is confused about the lawyer's role—the person asks for advice or calls the lawyer with follow-up questions—the lawyer has an affirmative obligation to clear up the misunderstanding.

The second obligation is imposed by Mass. R. Prof. C. 4.3(b), which 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, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.3(b) contains the same prohibition found in Canon Seven, DR 7-104(a)(2), in effect in Massachusetts prior to January 1, 1998. The rule recognizes that the lawyer cannot ethically advise a person with interests that actually or potentially conflict with the lawyer's client's interests and that the best protection for the unrepresented person is to secure independent counsel.

A specific prohibition against giving advice is necessary because, even though a person may be informed that the lawyer is representing only the interests of another, the unrepresented person still "might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law..." Mass. R. Prof. C. 4.3, comment [1]. The lawyer's opinion on the legal issues or what a court might do in the circumstances might be taken as a pronouncement of fact or law uninfluenced by the lawyer's obligations to the represented client and might pressure the person into taking actions that are not in his or her interest.

There is no clear-cut standard for what qualifies as "advice", although there are some areas of general agreement. A lawyer may not opine on the law or advise the unrepresented person on the course that person ought to take. See *State ex rel. Oklahoma Bar Association v. Berry*, 969 P. 2d 975 (Okla. 1998) (lawyer who represented creditor violated Rule 4.3, among other rules, by advising debtor that her bankruptcy papers were inadequate and that she would be better off converting her Chapter 7 bankruptcy to Chapter 13); *W. T. Grant Company v. Haines*, 531 F.2d 671, 676 (2d Cir. 1976) (surveying various ABA opinions on what constitutes "advice"). In *Matter of Gross*, 435 Mass. 445, 447 (2001), a lawyer who represented a client charged with OUI and leaving the scene of an accident was found to have violated DR 7-104(a)(2), among other rules, by counseling the client's friend, who had answered the call of the list for the client at the lawyer's request, to tell the court after the ruse was discovered that she had been "'confused'".

Providing papers for an unrepresented person to sign may or may not constitute the giving of "advice", depending on the circumstances, including the sophistication of the unrepresented party. In *Dolan v. Hickey*, 385 Mass. 234 (1982), the Supreme Judicial Court considered whether a lawyer had violated the Disciplinary Rules by preparing and presenting to the buyers a note secured by mortgage that benefited the lawyer personally. Observing that the buyers understood that the lawyer did not represent them in the transaction but represented other interests, the court held that "[t]he acts of drafting documents and presenting them for execution, without more, do not amount to 'advice,' and are proper as long as the attorney does not engage in misrepresentation or overreaching." *Id.* at 237.

On the other hand, a lawyer did give advice in violation of the rule by preparing various pleadings and having them signed by a woman pursuing a paternity action against the lawyer's client. The pleadings included a motion to appoint a guardian ad litem and a consent judgment finding the client not to be the father of the woman's child. *Office of Disciplinary Counsel v. Rich*, 633 N.E. 2d 1114, 1117 (Ohio 1994). See also *Matter of Levine*, 11 Mass. Att'y Disc. R. 162 (1995) (lawyer for borrower violated DR 7-104(a)(2) by securing lender's signature to a contract without advising her to consult her own attorney), and cases collected at page 433 of the Annotated Model Rules published by the ABA Center for Professional Responsibility (5th ed. 2003).

Intentionally or unintentionally giving advice to unrepresented persons occurs frequently in negotiations, for the nature of negotiation is to opine on the law and the likely outcome of court proceedings. Comment [1] to Mass. R. Prof. C. 4.3 explains that the rule does not

“preclude[] the lawyer from functioning in the normal representational role of advancing the client’s position. Explaining the lawyer’s own view of the meaning of a contract, for example, does not involve the giving of ‘advice’ to an unrepresented person[]”, although lawyers “should be careful...to explain their roles to unrepresented persons to avoid the possibility of misunderstanding.”

The comment should not be taken, however, as license to predict the outcome of court proceedings or parade a list of “horribles” before the unrepresented person should he or she disagree with the lawyer’s view. For example, larding a collections letter to a consumer with predictions that litigation will result in attachment of property or wages might not only be misleading in violation of the FDCPA, as the commencement of litigation alone does not cause any of these consequences, but might also constitute the rendering of legal advice in violation of Rule 4.3. Heintz at 44-45, citing *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990). The rule does allow a lawyer to state the client’s position and the remedies that the lawyer will seek on behalf of the client, but it does not permit pressuring the unrepresented adversary by describing the probable legal consequences of the actions the lawyer plans to take.

Dealing with unrepresented adversaries is a fact of life. To do so ethically, the lawyer must make clear that he or she is representing only the interests of the lawyer’s client and communicate only the client’s proposed course of action without the elaboration of legal or factual advice. Finally, the lawyer should advise the unrepresented person to consult independent counsel.

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