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## What Can You Say? Talking with Unrepresented Persons

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Lawyers frequently cross professional paths with a wide variety of unrepresented persons. Sometimes, they are opposing parties who are “unrepresented” by counsel but who are representing themselves *pro se*. Other times, they are potential occurrence witnesses who don’t have lawyers. Both categories are covered by RPC 4.3, which addresses dealing with unrepresented persons (including *pro se* parties) and is patterned on its ABA Model Rule counterpart. In this column, we’ll examine both sides of that same coin.

### ***Pro Se Opposing Parties***

When dealing with *pro se* opposing parties or other persons whose interests the lawyer either knows or reasonably should know conflict with the lawyer’s client (or the lawyer’s own interests), RPC 4.3 is both specific and succinct: “[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel[.]” Comment 2 to the corresponding ABA Model Rule explains that this strict limitation is intended to prevent lawyers from taking advantage of unrepresented persons whose interests are adverse. OSB Formal Ethics Opinion 2005-16 offers a pair of illustrations, one from the civil context and one from criminal practice. On the former, Opinion 2005-16 concludes that a lawyer for a party injured in an automobile accident cannot write

the driver at fault and advise the driver to instruct the driver's insurance carrier to accept a policy limits demand. On the latter, Opinion 2005-16 concludes that a criminal defense lawyer cannot advise a witness who may share culpability for the crime to assert the Fifth Amendment when called before a grand jury. With both illustrations, the key fact leading to the prohibition is that the lawyers involved are giving advice to an unrepresented person whose interests are adverse.

At the same time, Comment 2 to ABA Model Rule 4.3 also notes that this limitation does not prevent a lawyer from negotiating opposite a *pro se*, preparing documents on behalf of the lawyer's client that the *pro se* signs (such as a settlement agreement or a contract) or "explain[ing] . . . the lawyer's view of the underlying legal obligations" as long as "the lawyer has explained that the lawyer represents an adverse party and is not representing the person[.]" OSB Formal Ethics Opinion 2005-163, for example, concludes that simply suggesting a settlement to an unrepresented party does not violate RPC 4.3. Opinion 2005-163 (at 451) captures the nub of the distinction:

"The mere suggestion of a . . . compromise does not constitute giving advice to a person who is not represented. A . . . lawyer suggesting a . . . compromise, however, must be sensitive to the distinction between making the suggestion and advising . . . about whether to accept the compromise."

***Unrepresented Witnesses***

As Opinion 2005-16 illustrates, witnesses can fall into the strict restriction most often reserved for opposing *pro se* parties under RPC 4.3 if the interests of the witness and those of the lawyer’s conflict. Even if that’s not the case, RPC 4.3 still cautions that lawyers both need to avoid misleading an unrepresented person that the lawyer is disinterested and make “reasonable efforts” to correct any misunderstanding the unrepresented person appears to have in this regard.

A particularly sensitive area is to avoid “inadvertently” creating an attorney-client relationship with an unrepresented person. The Oregon Supreme Court outlined the standard for determining whether an attorney-client relationship has been formed in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). The Supreme Court in *Weidner* articulated a two-part test: (1) does the client subjectively believe the lawyer is representing the client? and (2) is that subjective belief objectively reasonable under the circumstances? *Weidner* notes that neither payment of a fee nor a written retention agreement is necessary to form an attorney-client relationship. With an unrepresented witness, a lawyer needs to take care not to leave the witness with the impression that the lawyer is also representing the witness—or a court might very well find that to be the case later using the *Weidner* test.

The danger of “inadvertently” creating an attorney-client relationship is that it may lead to disqualifying conflicts. In *Admiral Insurance Company v. Mason*,

*Bruce & Girard, Inc.*, 2002 WL 31972159 (D Or 2002) (unpublished), for example, several conversations that a lawyer thought were informal with an officer of a closely-held corporation were deemed sufficient under the *Weidner* test to create an attorney-client relationship between the corporation and the lawyer's firm. That, in turn, led to the firm's disqualification when it then sued the corporation on behalf of another client. By contrast, the local federal district court in *Larmanger v. Kaiser Foundation Health Plan*, 805 F Supp2d 1050 (D Or 2011), dismissed a conflict-based claim by a corporate employee for breach of fiduciary duty against two law firm lawyers who had prepared the employee for her deposition on behalf of the firm's corporate client in an earlier matter. The District Court concluded that the employee had failed to demonstrate that she had an individual attorney-client relationship under the *Weidner* test with the corporate counsel.

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