

Rule 4.3: Dealing With Unrepresented Person

1. Current Kentucky Rule with Official Comments:

SCR 3.130(4.3) Dealing with unrepresented person

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.

Supreme Court Commentary

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(4.3) Dealing with unrepresented person

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. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

~~Supreme Court Commentary~~ Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~ In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For

misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f). Unlike Rule 4.3 of the ABA Model Rules of Professional Conduct (2003), this Rule provides that under no circumstances shall a lawyer give legal advice to an unrepresented person.

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the suggestion to obtain counsel. Whether the discussion of the client's position impermissibly assumes the character of rendering legal advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and Comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the client's position as to the meaning of the document or explain the lawyer's view of the underlying legal obligations.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The Committee's proposed KRPC 4.3 recognizes, as does the MR, that often a lawyer finds herself involved in transactions in which she is the only lawyer present (for example, at a real estate closing), and that, in those situations, the lawyer must be vigilant not to convey the impression that she is neutral or to induce an unrepresented lay person to take certain action in reliance on the lawyer's "disinterestedness." Unlike the MR, however, the Committee's proposed Rule contains a categorical prohibition against rendering legal advice to an unrepresented person (rather than just prohibiting it if the lawyer knows or reasonably should know that the person's interests have a reasonable possibility of being in conflict with the lawyer's client - the MR approach).

(2) Other departures from the MR are of lesser significance and include:

(a) In Comment [2], the Committee's recommended version refers to "the client's position as to the meaning of the document....," rather than the MR reference to "the lawyer's own view of the meaning of the document...." The Committee believes that its language more accurately describes the transactional setting.

(b) In Comment [2], the Committee substituted "whether the discussion of the client's position impermissibly assumes the character of rendering legal advice" for the MR "whether a lawyer is giving impermissible advice." Inasmuch as the Committee's version prohibits giving legal advice to an unrepresented person, there is no "permissible" legal advice under these circumstances.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

(1) In the opinion of the Committee, prohibiting the rendering of legal advice to an unrepresented person is the correct and only enforceable approach. The Committee also believes that its rendition of the Rule provides clearer guidance than does the MR to the practitioner who finds herself acting on behalf of a client in negotiations or otherwise dealing with an unrepresented person.

(2) The standard of a lawyer's "reasonable knowledge" is always problematic, but becomes more so when one deals with a partial or subtle or even contingent adversity of interests between co-parties with interests that are basically harmonious. When these cases are litigated, it becomes a "swearing contest." See, e.g., *Johnson v. Doris*, 933 P.2d 1139 (Alaska 1997), in which the appellate court reopened an estate, finding that the plaintiff's inexperience led him to rely too heavily on what a lawyer for his father's estate told him. See, gen., discussion on Rule 4.3 in *ABA Manual on Model Rules of Professional Responsibility*. Because even the most innocuous setting can contain the seeds of later conflict, the Committee opted to preclude the rendering of legal advice to the unrepresented, while allowing the lawyer to discuss the legal implications and consequences of the transaction always making clear her view reflects the position of the client.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.