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RPC 4.3:
Dealing with Unrepresented Persons

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Dealing with unrepresented persons is so common across practice areas that we rarely stop to think about it. For example, we could be handling a *pro bono* matter for a tenant and are interfacing with an unrepresented landlord. In another circumstance, we may be contacting an unrepresented fact witness. With an unrepresented party or witness, our conduct is guided by RPC 4.3, which is titled "Dealing with Person Not Represented by a Lawyer."

In this column, we'll survey three aspects of Washington RPC 4.3. First, for context, we'll briefly summarize the history of the rule, which differs somewhat from its ABA Model Rule counterpart. Second, we'll examine the broad contours of the rule. Finally, we'll discuss the risks the rule presents to lawyers and their law firms—and how to lessen those risks.

Before we do, two qualifiers are in order.

First, other rules often enter the mix when dealing with unrepresented persons. RPC 4.1, for example, prohibits lawyers from making material misrepresentations in course of representing clients.[1] Similarly, RPC 4.4 addresses the rights of third persons—including those unrepresented.[2]

Second, RPC 4.3 is predicated on a lawyer "dealing on behalf of a client[.]" In other words, it only applies in representational contexts.[3]

History of the Rule

The ABA adopted Model Rule 4.3 in 1983 as a part of the original set of ABA Model Rules.[4] The predecessor ABA Model Code had a rule simply prohibiting lawyers from "[g]iv[ing] 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 his client."[5] In its original formulation, ABA Model Rule 4.3 focused on ensuring that a lawyer did not "state or imply that the lawyer is disinterested" and imposed a duty to correct misunderstandings in that regard "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter[.]"[6] As part of the ABA's comprehensive revisions to the Model Rules developed by the ABA Ethics 2000 Commission, a second concept was added to the rule in 2002: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[7] Accompanying Comments 1 and 2 were adopted in, respectively, 1983 and 2002 reflecting those twin elements.[8]

Washington RPC 4.3 followed a generally similar arc—but with a few Washington-specific modifications.

Washington adopted the then-ABA Model Rule in 1985 when moving from the former Code of Professional Responsibility to RPCs patterned on the ABA Model Rules.[9]

In 2002, Washington added a unique section to the rule addressing limited scope representations—and associated criteria for assessing whether someone in that context was represented—as part of a package of amendments to the RPCs and the Superior Court rules intended to encourage limited scope representations to expand access to legal system.[10] The 2002 amendments generally classified a person being advised in a limited scope representation as "unrepresented" unless the opposing lawyer knew of or had been provided with written notice of representation.[11] If aware of the written notice, the opposing lawyer was required to communicate within the limited scope representation through the lawyer representing the person in that matter.[12]

In 2006, the Washington Supreme Court adopted a comprehensive set of amendments proposed by the WSBA Ethics 2003 Committee that followed on the work of the ABA Ethics 2000 Commission.[13] The 2006 amendments added the ABA Model Rule provision noted earlier addressing legal advice to an

unrepresented person and moved the 2002 Washington amendment on limited scope representation from the text of the rule to a new Comment 3.[14]

Further amendments to the rule and accompanying comments were adopted in 2015 and 2019 to reflect Washington LLLT practice.[15] Most significantly in this regard, Comment 5 was added to clarify that a person assisted by an LLLT is considered "unrepresented" as that term is used in the rule: "For purposes of this Rule, a person who is assisted by an LLLT is not represented by a lawyer and is an unrepresented person."[16] Reflecting this distinction, the title of the Washington rule was changed to "Dealing with Person Not Represented by a Lawyer" from the ABA formulation of "Dealing with Unrepresented Person."[17]

Contours of the Rule

Washington RPC 4.3 reads:

> In dealing on behalf of a client with a person who is not represented by a lawyer, 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, other than the advice to secure the services of another legal practitioner, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

As noted earlier, RPC 4.3 reflects two overarching concepts.

First, a lawyer cannot state or imply that the lawyer is disinterested and must correct an unrepresented person's misunderstanding of the lawyer's role. Comment 1 RPC 4.3 counsels that this element is ordinarily met by "identify[ing] the lawyer's client and, where necessary, explain[ing] that the client has interests opposed to those of the unrepresented person." This facet of the rule is intended to prevent lawyers from taking advantage of unrepresented persons who may be confused about the lawyer's role in a matter.[18]

Second, a lawyer cannot give an unrepresented person legal advice—other than to get a lawyer (or depending on the circumstances, an LLLT)—if "the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Comment 2 to the rule explains that the qualifier reflects "the possibility that the lawyer will compromise the unrepresented person's interests" absent an outright prohibition. That said, Comment 2 goes on to note that a lawyer is not prohibited from negotiating on behalf of a client with an unrepresented person as long as "the lawyer has explained that the lawyer represents an adverse party and is not representing the person[.]"[19, 20] Beyond the qualifier in the rule, prudent risk management counsels against providing legal advice to an unrepresented person to avoid having that person claim later

that an attorney-client relationship was formed and possibly creating a disqualifying conflict or other duties as a result.[21]

Risks

The risks flowing from RPC 4.3 are many and varied.

Lawyers regionally and nationally have been disciplined under both principal elements of the rule.[22] In *In re Klemp*, 418 P.3d 733 (Or. 2018), for example, a lawyer was disciplined for failing to correct an unrepresented person's misunderstanding that the lawyer was also representing that person when obtaining a power of attorney for the sole benefit of the lawyer's client. In *State ex rel. Oklahoma Bar Ass'n v. Berry*, 969 P.2d 975 (Okla. 1998), a lawyer was disciplined for providing legal advice to a *pro se* bankruptcy petitioner that benefited the lawyer's creditor client. *Berry* also illustrates that while disciplinary prosecutions based solely on RPC 4.3 are comparatively rare, those based on alleged violations of RPC 4.3 and rules prohibiting misrepresentation—such as RPCs 4.1 and 8.4 (which the lawyer in *Berry* was also found to have violated)—are more common because there is often an inherent whiff of misrepresentation if a lawyer knowingly fails to a correct an unrepresented person's misperception of the lawyer's role.

Beyond discipline, violations of RPC 4.3 have also led to sanctions and disqualification.[23] Less frequently, transactions have been rescinded citing, in relevant part, RPC 4.3 for what in contractual terms amounts to fraud in the inducement.[24] Although claims for legal malpractice and breach of fiduciary are raised occasionally in this context, they typically face a difficult legal road because those are generally reserved to clients rather than non-clients.[25] By contrast, if an unrepresented person proves that an attorney-client relationship was formed by virtue of the lawyer's advice, that supplies a key element for claims of legal malpractice and breach of fiduciary duty.[26]

Three practical approaches can greatly lessen regulatory and civil risk in this area.

First, clarify at the outset that the person involved is, in fact, unrepresented.[27] While RPC 4.3 may not be a staple of regulatory grievances, the "no contact" rule—RPC 4.2—applicable to represented persons is a frequent source of complaints.[28] Equally important, memorialize the fact the person is unrepresented as circumstances dictate. In some instances, such as a short call with a tangential witness, a quick file note may be sufficient. In others, such as an unrepresented party opponent, a letter or email documenting that fact provides better contemporaneous proof if there are issues later.

Second, as Comment 1 to RPC 4.3 counsels, clearly identify who you are and who you represent at the outset. Again, the method chosen to memorialize that communication will vary with the circumstances and the potential role of the person being contacted. A contemporaneous written document, however, can be a key piece of evidence if an unrepresented person claims confusion later.

Third, as noted earlier, while the prohibition on legal advice in the rule is limited to situations where your client has interests potentially adverse to those of the unrepresented person, a safer practical course is simply not to provide any legal advice to unrepresented persons to avoid both the strictures of the rule and a claim later that an attorney-client relationship was formed as a result.

ABOUT THE AUTHOR

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[1] For a discussion of the interplay between Rules 4.1 and 4.3, including social media contexts, *see* ABA, Annotated Model Rules of Professional Conduct (ABA Annotated Model Rules), at 521-22 (10th ed. 2023) (compiling authorities nationally).

[2] *See* ABA Annotated Model Rules, *supra*, at 530-42 (cataloging interactions that amount to harassment or other improper invasions of third-party legal rights). *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016) addresses the boundaries of the attorney-client privilege when interviewing unrepresented former employees. On this last point, RPCs 4.2 and 4.3 can present complex issues of professional ethics, work product, and privilege when contacting current or former employees of a represented organization (and, relatedly, whether it is permissible to discourage an unrepresented person from talking to opposing counsel). These complicated issues are beyond the scope of this column, and we'll save them for another day.

[3] Interpreting the similar phrase "in representing a client" in RPC 4.2, the Washington Supreme Court in *In re Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006), found that a *pro se* lawyer fell within that term because he was representing his own interests. Nonetheless, this remains an unresolved issue in the context of RPC 4.3 in Washington and there is conflicting authority nationally on this point. *See* ABA Annotated Model Rules at 522.

[4] *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2013 (ABA Legislative History) at 571-73 (2013) (surveying history of the ABA Model Rule). *See also* Restatement (Third) of the Law Governing Lawyers § 103 (2000) (addressing similar considerations).

[5] ABA Model Code of Professional Responsibility DR 7-104(A)(2). *See also* former ABA Canons of Professional Ethics, Canon 9 (counseling lawyers not to advise unrepresented negotiating counterparties on the law).

[6] ABA Legislative History, *supra*, at 571-73.

[7] *Id*. at 573-75.

[8] *Id*. at 571, 573.

[9] *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 877-78 (1986) (discussing Washington's adoption of the ABA Model Rules).

[10] *See* Barrie Althoff, *Ethical Issues Posed by Limited-Scope Representation—The Washington Experience*, 2004 Prof. L. 67, 82-83 (2004) (describing Washington's efforts to expand limited scope representation). Washington Advisory Opinion 202002 (2020) also discusses this history in the context of lawyer "ghostwriting" for *pro se* parties in state court litigation.

[11] *Id*.

[12] *Id*. The ABA took a similar approach in Formal Opinion 472 (2015).

[13] Washington Supreme Court Order 25700-A-851, July 10, 2006.

[14] *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 188-89 (2004) (on file with author).

[15] Washington Supreme Court Orders 25700-A-1096, Mar. 23, 2015, and 25700-A-1258, May 1, 2019. Comment 6 to RPC 4.3 counsels, however, that a lawyer should not improperly invade privilege through this otherwise permitted contact. LLLT RPC 4.3, in turn, addresses this area from the LLLT perspective.

[16] Washington Supreme Court Order 25700-A-1096, *supra*, at App. 57.

[17] *Id*. at 55.

[18] *See* ABA Legislative History, *supra*, at 572.

[19] Comment 2 to RPC 4.3 also observes that the propriety of advising an unrepresented person may depend on the experience and sophistication of the person. The ABA Model Rules Annotated contain an extensive discussion of this point from a national perspective at 523-24.

[20] Comment 4 to RPC 4.3 notes that government lawyers are sometimes called on to provide general information on laws and procedures to unrepresented persons. Comment 4 states that "such general information by a government lawyers is not a violation of this Rule."

[21] *See generally Bohn v. Cody*, 119 Wn. 2d 357, 363, 832 P.2d 71 (1992) (standard for determining whether attorney-client relationship formed); *see also* WSBA Advisory Ops. 201902 (2019) (addressing RPC 4.3 in the context of subrogation claims) and 1601 (1995) (discussing practical constraints on answering a witness's legal questions to avoid disqualifying conflicts).

[22] *See generally* ABA Model Rules Annotated, *supra*, at 520-28 (compiling cases).

[23] *See, e.g., Marino v. Usher*, 673 Fed. Appx. 125, 131-33 (3d Cir. 2016) (sanctions); *Sisk v. Transylvania Community Hosp., Inc.*, 695 S.E.2d 429, 431-37 (N.C. 2010) (disqualification).

[24] *See, e.g., Hopkins v. Troutner*, 4 P.3d 557 (Idaho 2000) (rescinding settlement agreement). *But see DKS Ventures, LLC v. Kalch*, 2011 WL 4829724 at *4 (E.D. Wash. Oct. 12, 2011) (unpublished) (enforcing forum selection clause over objection based on RPC 4.3).

[25] *See, e.g., Dickson-McFerran Properties v. Mackie*, 1997 WL 633947 at *6 (Wn. App. Oct. 10, 1997) (unpublished) (dismissing non-client claims relying on RPC 4.3); *Durante v. Martinez*, 2012 WL 3517592 (Conn. Sup. Ct. July 12, 2012) (unpublished) (same); *see generally Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) (addressing standards for claims by non-clients against lawyers); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999) (same).

[26] *See generally Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) (legal malpractice); *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (breach of fiduciary duty).

[27] *See* WSBA Advisory Op. 1990 (2002) (recommending clarification); *see also In re Carmick*, 146 Wn.2d 582, 597-98, 48 P.3d 311 (2002) (lawyer cannot ignore the obvious in terms of whether a person is represented).

[28] The WSBA has a disciplinary notice database on its website that is searchable by RPC. A simple search of RPC 4.2 yields many results.