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Why It's Best to Have A Lawyer On the Other Side: Dealing With Pro Se Plaintiffs and Lawyer-Less Defendants

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By Michael Twomey, May 2024

As most employment lawyers know, dealing with unrepresented parties is fraught with danger ranging from simple misunderstandings to allegations of outright misrepresentations. This paper will cover the ethical framework for dealing with unrepresented parties and considerations for each.

1. Communications with *Pro Se* Plaintiffs

Texas Disciplinary Rule of Professional Conduct 4.03 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." Relatedly, Rule 4.01 also provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client." The ABA Model Rule contains similar language.

A lawyer also may not give an unrepresented individual party advice other than to seek counsel. ABA MODEL RULE 4.3, cmt. 2; *see, e.g.,* Ky. Ethics Op. KBA E-450 (2020) (attorney representing a client may not give advice, other than the advice to get an attorney, to an unrepresented adverse party). "Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." ABA MODEL RULE 4.3, cmt. 2.

The ABA Model Rule 4.3 comments further explain that—"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 lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." The attorney must always clarify her role and interest in the dispute to unrepresented adverse parties. *See* N.Y.C. Ethics Op. 2009-2 (2009) (lawyer may advise a self-represented person adverse to the lawyer's client to seek her own counsel and may state, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel and must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.); *cf.* N.Y.C. Ethics Op. 2009-5 (2009) (A lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute, but may not advise the witness to evade a subpoena or cause the witness to become unavailable. While lawyers generally are prohibited from giving legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retaining counsel.). An attorney may also suggest legal aid or other referral services approved by the bar. ABA Informal Ethics Op. 1194 (1974).

The purpose of the rule, which should be clear, is articulated in the comment to the ABA Model Rule: "[T]he 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 advice to obtain counsel." ABA Model Rule 4.3 cmt. 2.

Lawyers may not circumvent this rule by using the client or a third party as a medium to give advice to the unrepresented party. ABA Formal Ethics Op. 396 (1995) (lawyer may be responsible for investigator under their supervision); *see also* D.C. Ethics Op. 321 (2003) (lawyer for party may send investigator to interview an unrepresented party, so long as the investigator does not mislead party about the investigator's or the lawyer's role in the matter and that the investigator does not state or imply that unrepresented party must or should sign forms such as personal statements or releases of medical information; counsel should take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding).

Relatedly, when a person known to have been represented by counsel declares that the representation has or will be terminated, the communicating lawyer should not proceed without reasonable assurance that the representation has in fact been terminated. ABA Formal Ethics Op. 95-396; N.Y. Ethics Op. 959 (2013) (A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he/she has retained new counsel or plans to represent himself or herself).

2. Communications with Putative Class Members

Whether an attorney can directly contact putative class members depends on the stage and circumstances of the litigation. Regardless, if contact is permitted with an otherwise unrepresented putative class member, the same ethical rules discussed above will apply when contacting unrepresented individuals. While the certification procedures under Federal Rule of Civil Procedure 23 and the Fair Labor Standards Act are different, the fundamental considerations are the same.

In general, lawyers may contact putative class members pre-certification because they are not considered "represented" by class counsel until the class is certified. ABA Formal Ethics Op. 07-445 (2007) (before a class action has been certified the Rules do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class).

Once a class action certified under Federal Rule of Civil Procedure 23, class members are considered represented by class counsel unless they choose to "opt out." *See Kleiner v. First National Bank of Atlanta,* 751 F.2d 1193, 1207 n. 28 (11th Cir. 1985) (citing *Van Gemert v. Boeing Co.,* 590 F.2d 433, 440 n.15 (2nd Cir. 1978), *aff'd,* 444 U.S. 472 (1980)). As a result, in general, lawyers may contact putative class members pre-certification. *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827 (N.D. Ind. 2002) (to extent individual potential class members had not established attorney-client privilege with EEOC, employer could conduct ex parte interviews with these individuals without violating ex parte communication rules); *Saucedo v. NW Mgmt. and Realty Serv.*, 2013 WL 163425 (E.D. Wash. Jan. 15, 2013) (unless and until class is certified, employer's employees, with exception of the named class representatives, are not represented parties within the meaning of the rule); *Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D.W. Va. 2007) (defendants' communication with putative class members

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