

**Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-450
Issued: May 15, 2020**

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Subject: Proposed ethics opinion on dealing with an unrepresented adversary

Question 1: May an attorney representing a client give advice, other than the advice to get an attorney, to an unrepresented adverse party?

Answer: No. Rule 4.3

Question 2: May an attorney, representing a client, provide information to an unrepresented adverse party?

Answer: Qualified yes, Rule 4.3, comment 2.

DISCUSSION

As amended in 2009, Rule 4.3 provides that an attorney representing a client may not give advice, other than the advice to get an attorney, to an unrepresented party. Comment (2), however provides that:

So long as the lawyer has explained that the lawyer is representing 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 clients' position as to the meaning of the document or explain the lawyer's view of the underlying obligations.

The distinction is between giving the unrepresented party information or explaining (permitted), and suggesting what the unrepresented party should do (not permitted). In this context, "explain" may be defined as making an idea, situation or problem clear by describing it in more detail while legal advice is generally understood as guidance with regard to future action. In E-445, the Committee drew the

distinction between information and advice in the context of state agency lawyers responding to questions by the public.

In some practices (divorce and landlord/tenant for example), lawyers are often faced with the need to deal with an unrepresented adverse party. Lawyers should make sure the unrepresented person understands that the lawyer represents a client with adverse interests, and that the lawyer does not represent the non-client and will not advise the non-client. Rule 4.3, Restatement of the Law Governing Lawyers, sec. 103. In some cases, the attorney should ask the unrepresented party to acknowledge this disclosure in writing. The question of whether a lawyer is giving impermissible advice is evaluated from the perspective of the unrepresented person. Don't use words (for example "should") that could be reasonably interpreted as advice.

The lawyer may explain procedures applicable to the representation (time for filing, mandatory disclosures, etc.) and may, with the client's consent, provide other relevant information to the non-client, including the lawyer's view of applicable law and the meaning of documents prepared by the lawyer. Rule 4.3, comment 2.

The lawyer is not **required** to volunteer helpful information to the unrepresented adversary unless failure to do so would constitute a misrepresentation. The lawyer must not knowingly make, nor assist the client in making, a material misstatement of law or fact (Rule 4.1). For example, in a suit for back rent, an attorney representing the landlord is not obligated to tell the unrepresented tenant that he has a defense based on the landlord's failure to provide adequate heat. On the other hand, going over a proposed property settlement with an unrepresented adversary might require an explanation of marital and non-marital property. In *Professional Responsibility: Duties Owed to an Unrepresented Party*, 44 Fla. L. Rev. 489 (1992), Professor William Hazzard used the case of *Tenneboe v. Tenneboe*, 558 So.2d 470 (Fla App. 1990) to illustrate the danger of explaining documents to an unrepresented party.

Representing the wife, the lawyer presented the unrepresented husband with a one-sided property settlement. The husband signed and later asked for modification. The husband claimed the attorney told him the agreement could be modified but didn't say modification would require changed circumstances. The lawyer couldn't remember saying anything about modification but said, if he had, he would have explained the need for changed circumstances. Finding overreaching by the wife and attorney, the Florida court set aside the agreement.

The attorney may withdraw if the client refuses to consent to a mandatory disclosure (Rule 1.16(b)(1) or the lawyer feels disclosure is necessary to avoid a fundamentally unfair result. Rule 1.16(b)(4) allows a lawyer to withdraw if the client persists in a course of action that the lawyer feels is “repugnant” or is the subject of a fundamental disagreement.

In dealing with an unrepresented adversary, the Committee recommends the following best practices, to be followed to the extent practicable:

- Explain to the unrepresented party who you are, identify your client and your role in representing your client;
- Explain to the unrepresented party your client’s position regarding the subject matter;
- If you communicate further with the unrepresented party, determine if the party has the reasonable capacity to understand the meaning of your comments, and be mindful that an assessment as to whether your communications constitute impermissible advice are made from the perspective of the unrepresented person based on the characteristics and legal sophistication of the unrepresented party, as well as the setting in which the explanation occurs;¹
- If you communicate with the unrepresented party, obtain the party’s consent to continuing the conversation;
- You may recommend that the unrepresented party engage the services of their own lawyer;

Do Not Give Legal Advice

- If the unrepresented person asks questions, answer briefly and do not engage in a conversation with the unrepresented person²;
- Document all conversations with unrepresented party and consider sending a copy of your notes of that conversation to unrepresented party; and
- The following are examples of the types of permitted actions:

¹ An attorney’s statement may have a different effect on an unrepresented litigant at the courthouse immediately prior to trial than in a letter in advance of litigation. More leeway is appropriate for the letter because the letter may serve a legally required purpose and may be distant in time and location from the court action. The unrepresented party has time to ask others about the statement’s meaning. In contrast, statements made in the heat of negotiation, minutes before trial, may be heard as a command which the unrepresented person has no real way of knowing whether she should, or must, comply at that moment. Thus, the setting is critical in analyzing the propriety of the communication.

² Example – An unrepresented party, defendant, asked lawyer whether she should contact her insurance company and attorney advised: “No. Don’t worry about it. Don’t do anything.” This would be inappropriate legal advice.

- Preparation of documents to be sent to an unrepresented party³;
- Explain the documents by a more detailed description or by revealing relevant facts or ideas
- Advise the unrepresented party of the actions the lawyer's client intends to take if there is a resolution of the disputed issues and, on the contrary what actions will occur if a resolution is not achieved; and
- Explain how the unrepresented party is to execute the document, i.e. signing on multiple pages or any requirement for witnesses or acknowledgement in the presence of a notary⁴.

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

³ In Md. Ethics Op. 2002-17 (2002) the Ethics Committee opined: "The landlord's lawyer may send unrepresented tenant notice of default along with draft complaint because the lawyer is merely informing tenant of client's intent to sue unless tenant alters behavior."

⁴ It would not be wise for the lawyer or a member of the lawyer's firm to serve as a witness to the unrepresented person's signature or serve to notarize the unrepresented person's signature.