



The Office of
Minnesota Attorney General Keith Ellison

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“THE PEOPLE’S” LAWYER, NOT *OTHER* PEOPLE’S LAWYER *WORKING WITH PRO SE PARTIES AS A PUBLIC ATTORNEY*

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Minnesota Attorney General’s Office

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Overview

- Introduction
- Goals for today
 - Refresher on the main ethics rules
 - Rule 4.3
 - Rule 4.2 – a little bit
 - Rule 4.4
 - Rule 4.1
 - Rule 3.4
 - Formation of A-C relationship
 - Others here and there
 - Special focus on: public attorneys
 - Common situations public attorneys face
- What isn't covered?
 - Every ethics rule that might be implicated
 - Internal investigations (largely)
 - Prosecutorial rules (largely)
 - Consequences for rule violations

Public Attorneys & Unrepresented Parties

Common Interactions

1) *Pro se* individuals

- Right to proceed *pro se*
 - 28 U.S.C. § 1654
 - Minn. Const. Art. 1 § 8
 - Minn. R. Gen. Prac. 105
- Note: doesn't extend to associations, corporations, etc. Minn. Stat. § 481.02; Minn. R. Gen. Prac. 523.

2) Witnesses

3) Complaints/Reports

4) Informational settings

Common Challenges

- 1) Lack knowledge and training
- 2) Time and resources
- 3) Frequent fliers/emotionally invested
- 4) Mental illness

Public Attorneys & Unrepresented Parties

[The government lawyer] has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies. Thus, a government litigator must take positions with the common public good in mind

Humphrey ex rel. State v. McLaren, 402 N.W.2d535, 543 (Minn. 1987)

Public Attorneys & Unrepresented Parties

[A]n advocate, in the discharge of his duty, knows but one person in the world, and that person is his client.

2 Trial of Queen Caroline 8, J. Nightingale ed. (1821)

Public Attorneys & Unrepresented Parties

A person who is unfamiliar with the legal system may not be consciously aware that lawyers are advocates, and that the lawyer standing across from them has interests which diverge from theirs, especially if that lawyer works for the government.

Robin J. Crabb, *Dealing With An Unrepresented Person*, Minnesota Lawyer (Dec. 5, 2011)*

*Available at: <https://olpr.mncourts.gov/wp-content/uploads/2011/12/Dealing-with-an-unrepresented-person.pdf>

Public Attorneys & Unrepresented Parties

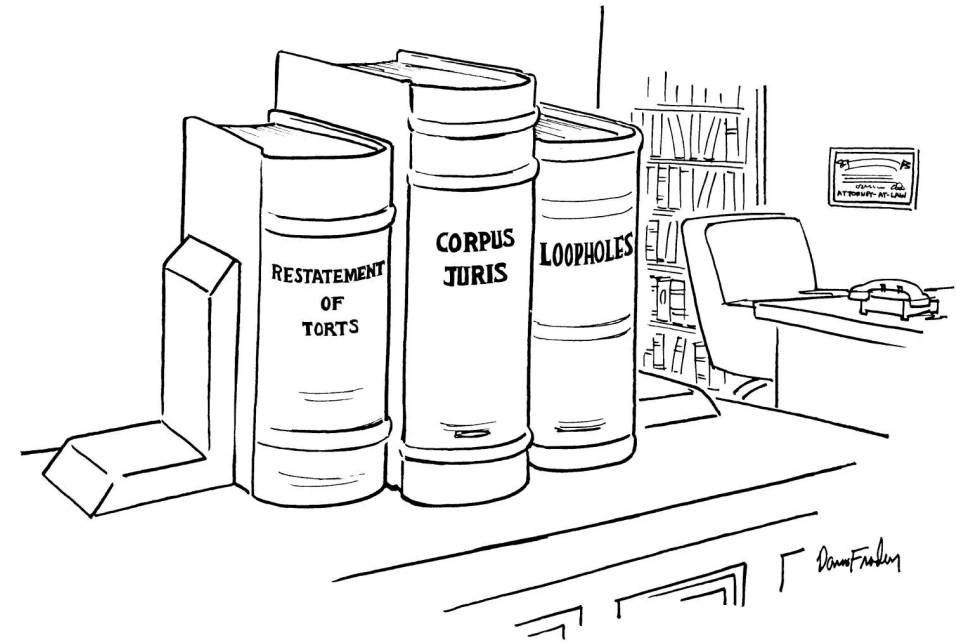
If respondent had been a private attorney during the time in question, his violation of the above disciplinary rules would call for strong sanctions. Accordingly, the fact that respondent was a public official entrusted with the evenhanded administration of justice warrants a very severe sanction.

In re Serstock, 432 N.W.2d 179, 184 (Minn. 1988)

Public Attorneys & Unrepresented Parties

Tensions

- Misunderstandings vs. Advocacy
- Duties to justice, the court, the public
- Duties to client (who is ultimately the public)
 - Diligence (Rule 1.3)
 - Competence (Rule 1.1)
 - Loyalty (Rule 1.7)
- Need for information



Public Attorneys & Unrepresented Parties

A note: Sources of law and guidance

1. Minnesota Rules of Professional Conduct (Rules)
 - Including, also, the Professionalism Aspirations
2. Office of Lawyers Professional Responsibility (OLPR) Opinions
3. ABA Model Rules
 - Not a one-for-one, but commentary and annotations helpful
4. Restatement: The Law Governing Lawyers (Restatement)
 - *Id.*
5. ABA Criminal Justice Standards for the Prosecution Function



Attorney Ethics

A Refresh

Rule 4.3

Dealing with Unrepresented Person

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel:

- (a) a lawyer shall not state or imply that the lawyer is disinterested;
- (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
- (c) when a 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; and
- (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.



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Key concepts:

- “On behalf of a client”
- Disinterest
- Disclose adversity
- Misunderstanding
- Legal Advice

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Key concepts:

- “On behalf of a client”
- Disinterest
- Disclose adversity
- Misunderstanding
- Legal advice
 - Apparent conflict
 - Advice vs. Information?
 - “Get a lawyer” advisory



Rule 4.3

Dealing with Unrepresented Person

Formation of Attorney-Client Relationship

The “Tort” Theory:

“An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.”

Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 n.4 (Minn. 1980)



Basic elements

- Legal advice
- Reliance
- Reasonableness

Rule 4.2

Communications with a Person Represented by Counsel

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.



Rule 4.4(a)

Respect for Rights of Third Persons

Rule 4.4 Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.



Key Concepts:

- Third person
- “Substantial purpose” is improper
- OR method is improper

Rule 4.1

Truthfulness in Statements to Others

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.



Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule [8.4](#).

Key Concepts:

- Truthfulness vs. no duty to inform
- Differences with ABA Model Rule
 - Omissions
 - Materiality

Rule 3.4

Fairness to Opposing Party or Counsel

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- Fairness? Or Lawfulness?
- Focus of Rule 3.4 is evidentiary
- But note (b) and (f)



Common Situations

Common Situations

When do public attorneys encounter unrepresented parties?

- *Civil Litigation*
 - as pro se plaintiffs, defendants, and more
- *Witnesses or complainants*
 - Eyewitnesses, whistleblowers, reporters, consumer complaints, and more
- *Investigations*
 - Witnesses with relationship to one of the parties (e.g. employee)
- *Negotiations*
 - Settlement, contracting, or any dispute resolution

Common Situations – Pro Se Litigation

- Clearly under ambit of Rule 4.3
- Always respectful, but not too helpful
 - Fine line between information & advice
 - “My client’s position . . .”
 - “Get a lawyer” is allowed but not mandated*:
 - “I cannot advise you whether you need counsel”
 - “You have a right to your own counsel”
 - “You should consider securing your own counsel”
- Other rules:
 - Rule 4.1 (truthfulness)
 - Rule 3.4 (fairness/lawfulness)
 - But also, duties to own client:
 - Rule 1.3 (diligence)
 - Rule 1.1 (competence)
 - Rule 1.7 (loyalty)

**William Wernz, Minnesota Legal Ethics – A Treatise, at 1155 (16th ed. 2026)*

Common Situations – Witnesses/Complainants

Unrelated to client:

- Non-party witnesses in contested matters
- Complainants, whistleblowers, victims

Related to client:

- Employees of client agency
- Investigators
- Employees of other state entities?

Common Situations - Investigations

- Internal investigations
 - Not covering in detail here.
 - Ethical issues are nuanced – reminders:
 - Organizational clients vs. individual clients. (Rule 1.13)
 - Protecting privilege – *Upjohn* warning.
- Use of investigators – attorney responsibility

Common Situations - Negotiations

- Scenarios: Dispute resolution, contracting, others?
- Negotiations with unrepresented parties are ethically fraught.
 - Client goals vs. overreaching
 - Legal information vs. advice
 - Posturing vs. misunderstandings



Wrap Up

Wrap Up - Touchstones

- Avoid misunderstandings about your role
- Gain trust through respectful interactions
- Get comfortable with qualifying language -- “My client’s position . . .”
- When in doubt, remind the other party:
 - Who you represent
 - Adversity
 - To secure counsel
- Document
 - Notes, email summary, etc.