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The Client Not Your Own Third Parties and Their Hazards

IN PRIOR ARTICLES, we discussed many of the problems that arise in a lawyer's dealings with opposing counsel, the client and the court. As if we didn't have enough to worry about, ERs 4.1, 4.3 and 4.4¹ set forth the basics concerning how we must conduct ourselves when dealing with unrepresented third parties.

ER 4.1 (truthfulness in statements to others) generally prohibits a lawyer from knowingly making a false statement of fact or law to a third person. ER 4.3 (dealing with an unrepresented person) prohibits a lawyer from stating or implying that he or she is disinterested when a client's interests are actually at stake and from failing to correct any misunderstanding a third party may have concerning the lawyer's role in the matter. ER 4.4 (respect for rights of third persons) generally requires that, in dealing with unrepresented third persons, a lawyer will act professionally and will respect the rights and sensibilities of others. These ERs are intended to operate as a "brake" on the zeal with which a lawyer may represent a client and restrain certain behavior toward others in the course of that representation.

There are situations in which it is easy to see where the intent of these ERs is violated.² There are other situations, however, where the line is not so clear. For instance, take a recent case from Missouri.

There, it was held that a Trans World Airlines staff attorney negotiating with an injured TWA employee had no duty to notify the worker about a looming statute of limitations deadline for filing a worker's compensation claim.³ The court held that the employee was not the lawyer's client and that there had been no proof that the company had hired the lawyer to benefit the employee.

Although this case was essentially a malpractice case against the lawyer, the court used the proscriptions found in ERs 4.1, 4.3 and 4.4 in finding that the lawyer had done nothing wrong. The court acknowledged that a lawyer's silence or nondisclosure may be viewed as an act of fraud if there is a duty to speak. That duty can arise if the unrepresented person obviously misunderstands the lawyer's role in the matter. The court pointed out that a lawyer whose client stands in an adversarial relationship with a third party commits no fraud by remaining silent about facts that may tend to defeat or weaken the client's rights. The court noted that this principle applies with particular force in settlement

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negotiations, where one who is trying to settle a case has an absolute right to keep secret his or her opinion of the merits of the settlement terms. In the Missouri case, the court found that the lawyer represented TWA and owed a fiduciary duty only to TWA, not to the employee. The lawyer did not have a duty to disclose the information concerning the statute of limitations to

the employee, particularly because worker's compensation hearings are adversarial in nature, and the employee was in an adversarial position to TWA.

In dealing with unrepresented third persons, the best course for the lawyer is simple good manners and sensitivity to the legitimate interests of others. There is no duty to assist others who are not your clients except when it is apparent that they do not understand

that you are not a disinterested person or have been misled into thinking that you are trying to help them. Perhaps the best rule to follow in any case is that the only advice you should ever give unrepresented persons is that they consider hiring a lawyer.

Need ethics advice? Call the State Bar's Ethics Counsel at (602) 340-7284.

ENDNOTES

1. Rule 42, ARIZ.R.S.Ct.
2. See *In re Woltman*, 875 P.2d 781 (Ariz. 1994), where a lawyer was disciplined for threatening an adverse party with physical violence.
3. *Wild v. Trans World Airlines*, 2000 WL 103360 (Mo. Ct. App. 2000).

A lawyer's
silence or
nondisclo-
sure may
be viewed
as **an act**
of fraud
if there is
a duty
to **speak**.
