A Fool for a Client

The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.
—*Kay v. Ehrler*, 111 S.Ct. 1435, 1438 (1991).

Why do so many lawyers insist on handling their own legal problems? There are a number of situations where a lawyer may desperately need legal counsel, where any objective observer would agree that self-representation would be foolhardy, yet surprisingly few lawyers recognize the need for independent counsel when their own interests are in jeopardy.

Lawyers often represent themselves in disciplinary matters, fee disputes, legal malpractice claims, law firm breakups, and other litigation or legal disputes. In addition, relatively few lawyers retain independent counsel when they have other personal legal problems, including lease negotiations and drafting, other contract matters, ethical problems in ongoing representation, and so on. It is amazing that so many otherwise intelligent professionals — lawyers who would never dream of allowing a conflict of interest to arise in representing their clients — would choose to put themselves at such dire risk when their own interests are at stake.

For many, the reasons are no doubt primarily financial: "Why should I pay legal fees to another lawyer when I am perfectly capable of practicing law myself?" For others, a misplaced pride may be the motivating factor; it is rarely easy to go to a fellow professional for legal assistance.

Some may wonder why lawyers shouldn't be able to represent themselves in legal matters. After all, accountants have no trouble doing their own tax returns, building contractors do their own remodeling, and car mechanics work on their own cars. Even doctors may occasionally treat themselves for minor ailments (although doing major surgery on oneself is not recommended). What is it about the practice of law that makes one a fool for doing one's own work?

Independent legal counsel is the key. As the U.S. Supreme Court recently noted in the *Kay v. Ehrler* opinion, quoted above, a lawyer *pro se* "is deprived of the judgment of an independent third party"; there is no one to make sure that "reason, rather than emotion, dictates the proper tactical response to unforeseen developments." This recognition is intimately related to the rationale underlying the ethical rule against representing conflicting interests: a lawyer who cannot give truly *independent* legal advice is not doing the client any good at all. When the lawyer *is* the client, independent advice is impossible.

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This is the main reason that self-representation is foolish, but there are others. An examination of the types of matters where independent counsel may be warranted, if not essential, makes the point clear:

Professional Discipline. Disciplinary matters present the paradigm situation where lawyers should almost never try to represent themselves. Emotional responses to charges of professional misconduct seem to be the norm; there is so much at stake that a lawyer *pro se* cannot help but lose objectivity in this context.

Notwithstanding this, only about half of the lawyers who are the subject of formal proceedings before the Lawyers Professional Responsibility Board are represented by counsel, even at the panel hearing level, where the ultimate issue is whether *public* discipline will be sought. The percentage is drastically lower at the district ethics committee level, where absolutely critical investigatory steps are taken, facts are initially found, and critical credibility judgments are made for the first time.

Many lawyers have done themselves substantial damage by proceeding *pro se* in the disciplinary arena. Anyone who has served on the Lawyers Board or on one of the local ethics committees can attest to the fact that a respondent attorney who appears without counsel and self-righteously attempts to defend against an ethical complaint can often end up with self-inflicted wounds. As Lawyers Board Director William Wernz wrote in his column just last year, "The combination of attorneys representing themselves and stubbornly claiming they did no wrong has recently led to severe discipline in several cases."

One key factor here is the fine art of knowing when and how to do a limited *mea culpa*. The Minnesota Supreme Court has recently come down very hard on attorneys who have not demonstrated proper "remorse" or "contrition" for their actions; sometimes a heartfelt and sincere approach to admitted wrongdoing can result in relatively mild discipline. Often the best thing that respondent's counsel can do for the attorney-client is the "visit to the woodshed" for a heart-to-heart talk. There the client is advised, in no uncertain terms, that an ethical line has in fact been crossed and that the lawyer needs to acknowledge that fact and accept the consequences.

Recognizing and owning up to professional misconduct can often allow an attorney to avoid much more serious consequences. It is sometimes possible to forego public discipline altogether by accepting a private admonition or by entering into a stipulation for probation or other private discipline — but only if the lawyer is prepared to forthrightly acknowledge the misconduct. Without the assistance of independent counsel, however, lawyers are often loath to admit such matters.

On the other hand, some *pro se* lawyers err at precisely the opposite extreme, by simply giving up on issues where there may in fact be a basis to oppose discipline. Only independent counsel can provide the measured, dispassionate judgment that is often crucial in analyzing whether to vigorously litigate a matter through the disciplinary process or to work toward a stipulated resolution.

Ethics Issues in Client Matters. One area where astute lawyers have recently sought independent counsel is in the *prospective* handling of arguable ethical difficulties in pending client matters. Confronted with a client's problem that could be favorably resolved, but in a manner which may raise ethical concerns, some attorneys have wisely decided to retain outside counsel experienced in handling ethical issues to render an opinion on the matter.

In such a situation, seeking assistance from independent ethics counsel can be extremely beneficial, for several reasons. Research in the area of legal ethics often requires knowledge of arcane, unfamiliar sources and authorities. An outside opinion from ethics counsel will sometimes turn up a well-reasoned basis for action that might otherwise have been thought to be ethically questionable. A favorable opinion letter from outside counsel can be worth its weight in gold in the event a chosen course of conduct is subsequently challenged; at a minimum, it constitutes exceedingly strong evidence of the lawyer's own good faith and reasonable belief that the conduct was proper. Alternatively, an unfavorable opinion from an independent "expert" may help dissuade an otherwise insistent client from taking an unfortunate step.

While some independent guidance in ethical issues can of course be obtained from the Lawyers Board telephone opinion service, in certain situations — where anonymity is crucial or detailed research is necessary — a private opinion letter from independent ethics counsel can be essential.

Legal Malpractice. While many lawyers have malpractice coverage that will provide defense counsel in the event of a claim by a client, a surprisingly large number of attorneys are "going bare," foregoing any insurance coverage for professional liability claims. If that (questionable) route has been chosen, it is essential that the attorney immediately seek counsel at the first hint of a potential claim. Handling one's own malpractice claim is a recipe for disaster.

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For instance, some lawyers have attempted to settle such claims themselves, only to run afoul of ethical rules of which they were completely unaware. Minn. R. Prof. Cond. 1.8(h), for example, imposes strict limits on a lawyer's ability to settle a malpractice claim with an unrepresented client or former client.

Even those attorneys who have full malpractice coverage can benefit from independent counsel. For example, it may sometimes be very beneficial to retain personal counsel to deal with excess exposure or other coverage issues. Moreover, many lawyers wait entirely too long to report potential claims to their malpractice carrier. Often retaining counsel *before* a claim is made can facilitate a "claim repair" effort to correct the error before any claim is ever asserted.

Law Firm Breakups. When a law firm breaks up, it is like a divorce — only worse. Independent counsel is often essential to avoid many hours of wasted attorney time and the increased emotional response that necessarily results from handling one's own legal problems in such a difficult situation.

Other Legal Matters. There are any number of other legal problems in which lawyers would be well-advised to retain counsel. There is something almost comical, for example, about a trial lawyer attempting to negotiate or draft an office lease for his or her law firm. The same is true of a business lawyer who has never seen the inside of a courtroom trying to handle a suit for unpaid legal fees. Rarely is it possible to effect any real savings in attorney's fees in these situations; lawyers who try to represent themselves in such matters normally end up spending more (otherwise billable) time learning something about an area of the law in which they have no expertise than it would have cost to retain counsel in the first place. There is also the ever-present risk of losing objectivity when a lawyer handles a personal legal matter.

In the long run, attorneys who try to "save expense" by handling their own legal problems often end up paying many times over in lost billable hours and needless frustration, not to mention risking the adverse results that can often follow from an attempt to handle one's own affairs without independent counsel. "Penny wise, pound foolish" accurately describes those lawyers who get themselves even deeper into trouble in a misguided effort to avoid the cost of retaining an attorney to assist them in resolving their own legal difficulties. Lawyers would be wise to recognize that having a fool for a client is rarely either an intelligent or profitable way to proceed when confronted with a personal legal problem.

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