FORMAL OPINION 2017-200

Communications with a Represented Party by a Lawyer Acting Pro Se or by a Lawyer Who is Represented by Counsel

A. Introduction

Lawyers represent clients, but they may also be clients themselves. When they are clients, sometimes lawyers engage other lawyers to represent them; sometimes they represent themselves. When lawyers are clients, may they communicate directly with adverse parties?

This opinion deals with two scenarios. First, when a lawyer is representing herself, i.e., is *pro se*.[1] Second, when a lawyer is represented by another lawyer.

ABA Formal Opinion 11-461 states:

> It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. . . . Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.

B. The Applicable Rule of Professional Conduct

Rule 4.2 of the Pennsylvania Rules of Professional Conduct states:

> **Rule 4.2 Communication with Person Represented by Counsel**
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> *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. (Emphasis added).

C. How Does Rule 4.2 Apply to Pro Se Lawyers?

Courts and attorney disciplinary authorities apply Rule 4.2 to *pro se* attorneys.

[1] Merriam-Webster Dictionary defines pro se as “acting on one’s own behalf.”

1. Cases

In *In re Disciplinary Action Against Lucas,* 789 N.W.2d 73 (N.D. 2010), Lucas was a party to two litigated cases against his condominium association. The association was represented by counsel; Lucas represented himself. While the second case was pending, Lucas sent two letters to the condominium association's board, one letter to a board member and one letter to an officer. Lucas was disciplined for sending these letters. The North Dakota Supreme Court stated:

> The rule [Rule 4.2] does not specify whether it applies to attorneys representing themselves. *Lucas,* 789 N.W.2d at 75.
>
> Lucas argues he did not violate Rule 4.2 because the rule does not apply when an attorney is representing himself. His view is too narrow. The rule protects "a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation. N.D.R. Prof. Conduct 4.2 cmt 1. Most courts have held Rule 4.2 applies to attorneys representing themselves because it is consistent with the purpose of the rule [citing cases]. . . In addition, we have recognized Rule 4.2 "is to prevent lawyers from taking advantage of laypersons." *Lucas,* 789 at 76.

Other courts have also ruled that Rule 4.2 applies to a lawyer representing himself. E.g., *In re Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1120 (Idaho 1996); *Sandstrom v. Sandstrom,* 880 P.2d 103 (Wyo. 1994); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *Fishelson v. Skorpusa*, 2001 WL 888369 (Mass. Super. Ct. July 31, 2001). *Contra in re Moe,* 851 N.W.2d 868 (Minn. 2014) (interpreting Rule 3.3(a)(1)); *Pinsky v. Statewide Grievance Committee,* 578 A.2d 1075, 1079 (Conn. 1990).

2. Ethics Opinions

New York State Bar Association Committee on Professional Ethics Opinion 879 (2011) opined, "When a lawyer is representing himself *pro se* or is being represented by his own counsel with respect to a matter, the lawyer's direct communications with a counterparty are governed by the no-contact rule, Rule 4.2."

Other ethics committees also opined that a lawyer representing himself *pro se* is precluded from communicating directly with a person represented by counsel. *E.g.*, Hawaii Disciplinary Board Formal Opinion 44 (2003); District of Columbia Bar Ethics Opinion 258 (1995); Alaska Bar Association Ethics Opinion 95-7 (1995).

D. The Lawyer as a Client Who is Represented by Counsel

In an article that considers how pro se lawyers should be treated under the Rules of Professional Conduct, Professor Margaret Raymond, now Dean of the University of Wisconsin Law School, divides professional responsibility rules into two categories: rules that apply to lawyers when they are acting in the role of lawyer, and rules that apply to all lawyers at all times, regardless whether those lawyers are engaged in the practice of law. Raymond, "Professional Responsibility for the Pro Se Attorney," *St. Mary's Journal of Legal Malpractice & Ethics*, Vol. 1:2 (2011).

> Rules that apply only to lawyers when they are behaving as lawyers might be called "role rules"—the obligations the rules impose are contingent on the lawyer being in the role of lawyer. These rules can sometimes be identified by language that indicates specifically the preconditions necessary for the rule to apply, typically language like "In the course of representing a client."
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> By contrast, rules that apply to lawyers simply because they are lawyers are "identity rules." The lawyer's identity as an attorney admitted to practice in the jurisdiction imposing the rule suffices to impose the rule on the attorney. Such rules are typically phrased very differently; they might say something like "A lawyer shall not . . ." or "It is professional misconduct for a lawyer to . . . ." *Id.* at 6.

Using these terms, Rule 4.2 is a "role rule" since by its terms it applies to lawyers only when they are representing clients. It does not apply to lawyers simply because they are lawyers.

New York State Bar Association Committee on Professional Ethics, Op. 879 (2011), State of Nevada Standing Committee on Ethics and Professional Ethics Formal Op. 8 (1987), and South Carolina Bar Ethics Advisory Comm., Op. 86-10 (1986), opined that a lawyer must not communicate with represented parties even though the lawyer is himself or herself represented by his or her own counsel in the matter. How do these opinions deal with the introductory phrase to Rule 4.2, "In representing a client"?

New York introduces its discussion as follows:

> The introductory phrase in Rule 4.2(a) - "In representing a client" - is essentially a restatement of the introductory language contained in DR 7-104 of the former New York Lawyer's Code of Professional Responsibility (the "Code") which began: "During the course of the representation of a client. . . ." There is no material difference. But the introductory phrase is problematic. If a lawyer is representing himself in a matter, the text of Rule 4.2 does not provide a clear basis for deciding whether a lawyer who communicates with a represented party to the matter is "representing a client" (himself) or is acting purely as a party (who happens to be a lawyer in his professional life). More troubling, a lawyer who is not representing himself but has instead retained his own counsel in a matter plainly is not "representing a client" when communicating with a represented party. New York Ethics Op. 879.

New York resolved this "problem" by relying on language in a predecessor ethical consideration[2] to DR 7-704[3], not on language in the disciplinary rule itself. EC 7-18 stated:

> A lawyer who is a party or who is otherwise personally involved in a legal matter or transaction, *whether appearing pro se or represented by counsel*, may communicate with a represented person on the subject of the *representation pursuant to the provisions of DR 7-104(A) and (B).*
>
> EC 7-18 thus expressly supported the view that the no-contact rule, in all of its aspects, applied both to a lawyer representing himself in a legal matter and to a lawyer who was involved in a matter as a party represented by counsel. N.Y. Ethics Op. 879.

The New York opinion concluded:

> Our understanding of the introductory phrase in Rule 4.2 also seems fully consistent with Comment [1] to Rule 4.2, which explains that Rule 4.2 "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by *other lawyers who are participating in the matter*, interference by those lawyer with the client-lawyer relationship and uncounseled disclosure of information relating to the representation. (Emphasis added). Those policy reasons apply with equal force whether a lawyer is participating in the matter while representing himself *pro se*, while represented by his own counsel, or "while representing a client." N.Y. Ethics Op. 879.

Nevada opined that "a lawyer personally involved in a dispute should not communicate directly with adversaries who are represented by another lawyer in connection with the specific dispute, unless the other lawyer consents." State Bar of Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion 8 (1987).

The Alaska Bar Association opined to the contrary. It stated in a footnote:

> [I]n the Committee's opinion, an attorney who retains independent counsel and does not act as an attorney in a given matter would not be subject to Rule 4.2 with respect to communications concerning the matter. Alaska Bar Association Ethics Opinion 95-7 at 5.

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[2] Ethical considerations ("EC") "are aspirational in character and represent the objectives toward which every member of the profession should strive." ABA Model Code of Professional Responsibility, originally adopted in 1969. The ECs are not statements of axiomatic norms. *Id.*

[3] Rule 4.2 is essentially a restatement of the introductory language contained in DR 7-104 of the former New York Lawyer's Code of Professional Responsibility.

In *Pinsky v. Statewide Grievance Committee,* 578 A.2d 1075, 1079 (Conn. 1990), an attorney litigant who communicated with an adverse party was represented by counsel. The court held that the attorney was not representing a client and his actions were not governed by Rule 4.2.

In *In re Moe*, 851 N.W.2d 868 (Minn. 2014), the Minnesota Supreme Court concluded that an attorney did not violate Minn. R. Prof. Conduct 3.3(a)(1) when he made a false statement to a tribunal while representing himself.

E. Analysis

1. Pro Se Lawyer

A *pro se* lawyer represents himself or herself as a client. Therefore, the *pro se* lawyer is prohibited by the literal language of Rule 4.2 from communicating with his or her adversary without the prior consent of his or her adversary's lawyer. This reading of Rule 4.2 is consistent with the majority of cases which have dealt with the rule and with all of the ethics opinions which have considered the issue.

2. Lawyer Who is Represented by Counsel

The literal language of Rule 4.2 does *not* prevent a lawyer who has retained counsel to represent him or her in a dispute from communicating directly with his or her adversary without first getting permission from adversary's counsel to do so. Rule 4.2 applies only if the lawyer is *not* represented by counsel.

The New York State Bar Association Committee on Professional Ethics, after conceding that the introductory phrase in Rule 4.2 is problematic, concluded that the rule should nevertheless apply to a lawyer represented by counsel because (i) an ethical consideration to the prior rule had expressly done so and (ii) it was good policy to do so.

Although it may be good policy to apply the no-contact rule to a represented lawyer, this application does not square with the Rule which begins by stating that it applies only "while representing a client." If the lawyer is represented by another lawyer, she is then only a client and is not prohibited by Rule 4.2 from communicating with the adverse party.

Furthermore, application of a Rule in a way that contradicts its plain meaning is a trap for lawyers. Lawyers should be able to rely on the plain meaning of the Rules without fear of disciplinary consequences. Although some ethics authorities have opined that lawyers represented by counsel must not communicate with their adversaries, Rule 4.2 provides otherwise.

F. Conclusion

Rule 4.2 prohibits an attorney who represents himself or herself from contacting his or her adversary if the lawyer knows that the adversary is represented by counsel. It does not prevent the lawyer who is represented by counsel from doing so.

The literal language of Rule 4.2 does not prevent the lawyer who has retained counsel to represent him or her in a dispute from communicating directly with his or her adversary without first getting permission from adversary's counsel to do so. Rule 4.2 applies only if the lawyer is not represented by counsel.