NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 879 (9/27/11)

Topic: No-contact rule as applied to lawyer acting *pro se* and lawyer as represented party.

Digest: Lawyers, whether representing themselves or being represented by their own counsel, are subject to the "no-contact rule," Rule 4.2.

Rules: 4.2(a) & (b), 8.4(c)

QUESTIONS

1. This opinion addresses two closely related questions:

   A. May a lawyer who is representing himself or herself communicate with another party if the lawyer knows that the other party is represented by counsel?

   B. Would the answer be the same if the lawyer were represented by his or her own counsel in the matter?

OPINION

2. Communications with persons represented by counsel are governed by Rule 4.2 ("Communication with Person Represented by Counsel") of the New York Rules of Professional Conduct (the "Rules"). Rule 4.2, sometimes called the "no-contact" rule or "anti-contact" rule, provides, in its entirety (with emphasis added) as follows:

> (a) ***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 prior consent of the other lawyer or is authorized to do so by law.
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> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to

> communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

3. 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.

4. In the Code, the application of the no-contact rule to a lawyer who was a party to a litigation matter or transaction was addressed by EC 7-18, which stated, in relevant part:

> 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 matter of the representation ***pursuant to the provisions of DR 7-104(A) and (B)***. [Emphasis added.]

5. EC 7-18 thus expressly supported the view that the no-contact rule, in all 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. Thus, under EC 7-18, neither a *pro se* lawyer nor a represented lawyer could communicate on the subject of the representation with another party the lawyer knew to be represented by counsel unless the lawyer (a) had the prior consent of the other party's counsel or was authorized by law to do so under DR 7-104(A), or (b) gave reasonable advance notice to the represented party's counsel under DR 7-104(B).

6. The view that DR 7-104 applied to a lawyer engaged in self-representation or participating in a matter as a represented party was further supported by our observation in N.Y. State 160 (1970) that DR 7-104(A) – then newly adopted in New York – was "substantially similar to former Canon 9" of the Canons of Professional Ethics, which the ABA originally adopted in 1908.[1] Canon 9 stated as follows:

[1] Canon 9 of the old Canons of Professional Ethics is totally unrelated to and must not be confused with Canon 9 of the Code of Professional Responsibility ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety"). In the Canons of Professional Ethics, each numbered standard was called a "Canon." In the Code of Professional Responsibility, the Canons were instead broad organizing principles, and only the Disciplinary Rules set forth binding standards. The Canons in the Canons of Professional Ethics were essentially equivalent to the

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should only deal with his counsel. …[2]

7. Thus, Canon 9 of the Canons of Professional Ethics lacked any qualifying introductory phrase similar to that of Rule 4.2 and DR 7-104. Canon 9's application did not depend on whether a lawyer was representing a client or not. Instead, Canon 9 focused on the professional *status* of the lawyer (*i.e.,* the simple fact that the lawyer was a lawyer) rather than on the lawyer's *role* in a particular matter (*i.e.,* representing a client). Canon 9 thus prohibited a lawyer from attempting to communicate with a party represented by counsel whether the lawyer was representing a client or representing himself. The substantial similarity between old Canon 9 and DR 7-104(A) that we noted in N.Y. State 160 made it clear that under the Code – despite the introductory phrase in DR 7-104(A) about "the representation of a client" – the no-contact rule applied with full force to a lawyer/party whether the lawyer was representing himself or was being represented by counsel in a matter.

8. Accordingly, under the Code, neither a represented lawyer nor a *pro se* lawyer could communicate with a counterparty that the lawyer knew to be represented by counsel unless the lawyer either (a) was authorized by law or obtained the "prior consent" of the counterparty's counsel, per DR 7-104(A), or (b) gave "reasonable advance notice" to the counterparty's counsel of his intention to communicate with the counterparty, per DR 7-104(B). The minor change in wording between the introductory phrases of Rule 4.2(a) and its predecessor, DR 7-104 ("In representing a client" vs. "During the course of the representation of a client") did not change the scope of the no-contact rule or its applicability to lawyers as *pro se* or represented parties.

9. When the New York State Bar Association proposed the new Rules of Professional Conduct in 2008, the version of Rule 4.2(b) proposed by the State Bar would have omitted the requirement that a lawyer give "reasonable advance notice" to a represented party's counsel before the lawyer could cause a client to communicate directly with that represented party. As explained by the Reporter's Notes, the proposed omission of the "reasonable advance notice" requirement reflected the belief "that direct client-to-client communications are often helpful in resolving disputes, and that the 'reasonable advance notice' requirement … creates an unnecessary obstacle that might

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Disciplinary Rules, not to the Code's axiomatic Canons.

2 The remaining portion of Canon 9 stated: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party *not* represented by counsel, and he should not undertake to advise him as to the law." (Emphasis added.) This language is substantially similar to DR 7-104(A)(2) ("During the course of the representation of a client a lawyer shall not … [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are … in conflict with the interests of the lawyer's client"). Thus, both subparagraphs of DR 7-104(A) were based closely on old Canon 9, which reinforces our view that DR 7-104(A) and its successors – including Rule 4.2 – should be interpreted in light of Canon 9.

impede such communications."[3] However, the Administrative Board of the Courts rejected the proposed deletion and returned Rule 4.2(b) to the substance of former DR 7-104(B), including the requirement of reasonable advance notice.

10. 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 lawyers 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."[4]

11. In short, DR 7-104(A) traced its origins directly to Canon 9 of the old Canons of Professional Ethics; Rule 4.2 traces its origins directly to DR 7-104; and the Administrative Board of the Courts evidently intended that Rule 4.2 should preserve the operative substance of DR 7-104. We find no indication in the legislative history of New York Rule 4.2 that the drafters or the Courts intended to change its application to lawyers as parties, whether those lawyers were representing themselves or represented

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3 See N.Y. State Bar Ass'n, Proposed Rules of Professional Conduct at 164 (Feb. 1, 2008).

4 In considering the significance of the introductory phrase in Rule 4.2, it is useful to look at Rule 4.1, which uses the same introductory phrase as Rule 4.2 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person"). Another rule that prohibits false statements is Rule 8.4(c) ("A lawyer or law firm shall not … engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). However, Rule 8.4(c) has no introductory phrase about "representing a client" and thus applies even when the lawyer is not representing a client – and, indeed, even when the lawyer is not practicing law. Why do Rules 4.1 and 4.2 include introductory language about representing a client while Rule 8.4(c) does not? The introductory phrases in Rules 4.1 and 4.2 can best be understood in light of their common history. Both rules were derived from principles first expressed in the ABA's 1908 Canons of Professional Ethics, where their application was not limited to the representation of a client.

Decades later, when the 1908 Canons were superseded by the Code of Professional Responsibility, both the rule prohibiting dishonest conduct in litigation and the rule prohibiting communications with represented parties were placed under a newly crafted Canon 7, which provided: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The rules organized under Canon 7 generally explained ways in which a lawyer's zeal in representing a client should be tempered by the lawyer's professional obligations to the system of justice. Seen in this context, the introductory phrases about representing clients merely reflected the essential admonition of Canon 7 that a lawyer should act within the bounds of the law *even* when representing a client – and even when representing the client zealously. The introductory phrases were not intended to limit application of the rules, but rather reflected the tension between zealous representation and the bounds of the law that was the organizing principle of Canon 7.

When the adoption of the new Rules of Professional Conduct eliminated the organizational function of old Canon 7 in the Code of Professional Responsibility, the introductory phrases left over from Canon 7 could have been deleted. Their retention created the ambiguity that gives rise to the issue before us now. *See, e.g., Matter of Haley*, 126 P.3d 1262, 1271-72 (Wash. 2006) (concluding that Rule 4.2(a) prohibits a lawyer who is representing himself from contacting another party the lawyer knows to be represented by counsel, but applying this interpretation "prospectively only" because Rule 4.2(a) is "impermissibly vague" on this point). Our opinion today resolves that ambiguity by making clear that lawyers who are involved in a matter as parties are subject to the no-contact rule.

by other counsel. We conclude that Rule 4.2 should be applied in a manner consistent with DR 7-104 and the policies underlying DR 7-104, which equally underlie Rule 4.2.

12. Thus, all lawyers – whether they are *pro se* parties or represented parties or representatives of other parties in a matter – must (unless authorized by law) secure the "prior consent" of opposing counsel under Rule 4.2(a) or give "reasonable advance notice" to opposing counsel under Rule 4.2(b) before communicating with a counterparty known to be represented by counsel. Under this interpretation of Rule 4.2, the usual rights of nonlawyer parties to engage in direct communications are outweighed by the lawyer's professional obligations to the system of justice and the goal of protecting represented parties. Our view reflects the fact that lawyers, by virtue of their professional status, have a unique responsibility to the system of justice that requires them to subordinate their personal interest in having direct communications with represented individuals unless the exacting conditions stated in Rule 4.2 are satisfied.

13. Our conclusion is consistent with the opinions of most courts and ethics committees that have addressed this issue. The cases have overwhelmingly held that a lawyer engaged in self-representation is bound by the no-contact rule, reasoning that the policies served by the rule require the lawyer to be treated as a lawyer rather than as a nonlawyer party. For example, in *In re Schaefer*, 25 P.3d 191, 199 (Nev. 2001), the court said: "The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se. *See also Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996) (the phrase "in representing a client" applies when an attorney is acting *pro se* "because this interpretation better effectuates the purpose" of Rule 4.2); *In re Segall*, 509 N.E.2d 988 (Ill. 1987) ("an attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex. Ct. App. 1999) ("we hold that an attorney's designation of counsel of record does not … preclude the application of Rule 4.02(a) to his actions in contacting an opposing party"); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation"); *In re Haley*, 126 P.3d 1262 (Wash. 2006) (Rule 4.2 "prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel").

14. Ethics opinions have likewise generally concluded that a lawyer engaged in self-representation is bound by the no-contact rule. *See, e.g.,* D.C. Opinion 258 (1995); Hawaii Opinion 44 (2003); Illinois Opinion 96-09 (1997); Rhode Island Opinion 2002-04 (2002). *See generally* Stephen J. Langs, Note, *Legal Ethics: The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?,* 19 W. New Eng. L. Rev. 421 (1997).

15. Contrary authority is sparse. In New York, we are aware of only one ethics opinion, N.Y. City 81-8 (1981), that refused to apply the no-contact rule to a lawyer

representing himself. That opinion, however, was decided before EC 7-18 was adopted, and the opinion was effectively overruled by N.Y. City 2011-1 (2011), which determined that a lawyer representing herself may not contact a former client to discuss the previous representation without obtaining the prior consent of successor counsel. Another contrary authority is the official "Discussion" following California Rule 2-100, which states that the no-contact rule does not apply to a self-represented lawyer because such a lawyer "has independent rights as a party which should not be abrogated because of his or her professional status." But California is alone in taking that position and we do not agree with it.

16. Regarding case law, we know of only one case disagreeing with our view. That case, *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990), held that a lawyer acting on his own behalf is not "representing a client" and is therefore not subject to Rule 4.2(a). But *Pinsky* has not been followed elsewhere and was expressly rejected by the Supreme Court of North Dakota in *In re Disciplinary Action Against Lucas,* 789 N.W.2d 73 (N.D. 2010). The *Lucas* court, which reviewed the current state of the law, explained as follows:

> … Most courts have rejected *Pinsky,* reasoning "the policies underlying [Rule 4.2] are better served by extending the restriction to lawyers acting pro se." *In re Haley,* 156 Wash.2d 324, 126 P.3d 1262, 1267 (2006) (discussing prior authority); *see also Runsvold v. Idaho State Bar,* 129 Idaho 419, 925 P.2d 1118, 1120 (1996) ("We thus construe the phrase of Rule 4.2, 'in representing a client' to include the situation in which an attorney is acting *pro se* because this interpretation better effectuates the purpose of Rule 4.2."). We join the majority of courts in rejecting the rationale of the court in *Pinsky.*
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> We conclude that the reasoning of courts in *In re Haley* and *Runsvold* is more persuasive than *Pinsky* …. We therefore adopt the hearing panel's conclusion that Rule 4.2 applies to attorneys representing themselves.

17. If a lawyer is discharged, the no-contact rule is similarly applicable to a lawyer's communications with the former client on the lawyer's own behalf once the client has engaged successor counsel. *See* N.Y. City 2011-1 (2011) (Rule 4.2 prohibits a lawyer from contacting a former client to discuss matters concerning the prior representation absent prior consent of successor counsel); Illinois Opinion 96-09 (discharged lawyer seeking fees from former client must comply with Rule 4.2); Rhode Island Opinion 2002-04 (after successor counsel writes to original lawyer asking for file and encloses signed request from client, original lawyer may not contact former client without successor counsel's permission).

18. Even when a lawyer is permitted to communicate with a counterparty (*e.g.,* with the prior consent of opposing counsel or authorized by law to do so), the lawyer should keep in mind the broad goals underlying the no-contact rule, whose main purpose is to protect the represented party. *See* Rule 4.2, cmt. [1]. Thus, when communicating with a represented counterparty, a lawyer (a) must avoid overreaching and abusive, harassing,

or unfair conduct toward the represented person, (b) must not undermine the counterparty's relationship with his or her counsel, and (c) must not delve into privileged communications or protected information. *See* Rule 4.2, cmts. [11] and [12].

19. Finally, the lawyer should be mindful that, as a member of the Bar, whether or not performing legal services and whether represented by another lawyer, representing himself, or representing a client, a lawyer dealing with a counterparty must not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c).

CONCLUSION

20. 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. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without securing the prior consent of the represented party's counsel under Rule 4.2(a) or providing opposing counsel with reasonable advance notice under Rule 4.2(b).

(71-09)