

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re Thomas Melone )  
 ) PRB No. 25-120  
 )  
 ) December 15, 2025

**RESPONDENT’S MOTION FOR PERMISSION TO APPEAL**

Respondent THOMAS MELONE (“Respondent”) filed a motion to dismiss and a motion for a more definite statement (the “Motions”) in response to the Petition for Misconduct (the “Complaint” or “Petition”) filed by Michael Hanley against Respondent on September 26, 2025. Those Motions were denied on December 2, 2025 (“HP Order”).

Respondent hereby respectfully moves for permission to appeal the HP Order as it relates to the fundamental and controlling question of whether certain rules apply when Respondent is not representing a client.

The HP Order rejected Respondent’s position that he was not representing a client. The HP Order cites two cases, both of which are inapposite, and one of which did exactly the opposite of what the case is cited for. The HP Order cites *In re Morisseau*, 763 F. Supp. 2d 648, 652 (S.D.N.Y. 2010). HP Order at 9. *Morisseau* involved an attorney as a *pro se* litigant and the court held that *pro se* status would not exempt her from the Disciplinary Rules and Rule of Professional Conduct because “Local Civil Rule 1.5(b)(5) [of the Southern District of New York] applies to ‘any attorney,’ not only those appearing for a client.” 763 F. Supp. 2d at 652. But the Vermont Rules of Professional Conduct do not all apply to any attorney *by their own terms*. Thus, *Morisseau* is inapposite. The fundamental question is whether the rules should be applied to Respondent as written. Vermont Bar Counsel Michael Kennedy in 2022 raised the question of whether Vermont’s Rules of Professional Conduct should be amended to cover attorneys representing their own interests in response to ABA Formal Opinion 502. *See below*.

The HP Order then stated: “In accord, *Robinson v. Howard University, Inc.*, 335 F.Supp. 3d 13, 22 (D.D.C. 2018) (lawyers are not entitled to any special protection when they appear *pro se*.” *Robinson v. Howard University, Inc.* is not in accord at all. *Robinson* involved a tenured

law professor that was issued a letter of reprimand. “He was also required to participate in sensitivity training, to submit future quiz and exam questions to the Dean's Office for approval, and to have a few of his future lectures monitored. Impenitent, Mr. Robinson sued the University and various University officials. He allege[d] breach of contract, bad faith, violations Title IX of the Education Amendments Act of 1972 ("Title IX"), sex discrimination, intentional infliction of emotional distress, and other claims.” 335 F. Supp. 3d at \*18.

The HP Order cites *Robinson* for the proposition that “lawyers are not entitled to any special protection when they appear pro se.” HP Order at 9. But *Robinson* never held that. In fact, the court did the opposite. The context was whether on a motion to dismiss, the court should provide the normal leeway provided to *pro se* parties and their pleadings. The court observed that question was undecided in the D.C. Circuit, but that the court need not decide the issue because even though Professor Robinson was an attorney, the court would still afford Professor Robinson the leeway typically afforded pro se parties. In other words, the court in that case did the exact opposite of what the HP Order claims. In any event, that case had nothing to do with disciplinary rules.

The HP Order then cites V.R.C.P. 83(a)(3),<sup>1</sup> which provides “(3) The term ‘plaintiff’s attorney’ or ‘defendant’s attorney’ or any like term shall include any party appearing without counsel.” The HP Order then states: “[t]hus, a self-represented litigant is deemed to be an attorney for the purposes of the Rule of Civil Procedure and, by extension, disciplinary proceedings.” HP Order at 9. The HP Order’s conclusion does not follow from Rule 83. Respondent has found one reported case under Rule 83, which illustrates the point of the Rule (which is not to amend the Vermont Rules of Professional Conduct). In *Smith v. Brattleboro Reformer*, 147 Vt. 303, 304 (1986), Rule 83 was referenced in connection with service of a summons. *Id.* (“Defendants correctly point out that under V.R.C.P. 4(a) it is the responsibility of the plaintiff to deliver to the person who is to make the service the necessary complaint and summons with appropriate copies.

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<sup>1</sup> The Reporter’s Notes indicate that Rule 83 “has no equivalent in the Federal Rules but is based on Maine Rule 83.”

... Although the rule places this responsibility on the plaintiff's attorney, in the absence of any contrary indication, the term 'plaintiff's attorney' includes the party appearing without counsel. See V.R.C.P. 83(3); Reporter's Notes, V.R.C.P. 4(a)." (Internal citations and quotations omitted.) In other words, Rule 83(3) is a gap-filler for when there is no "plaintiff's attorney." There is no such gap-filler in the Vermont Rules of Professional Conduct and such Rules differentiate between a lawyer and a lawyer "representing a client."

Under Vt. R. App. P. 5 "[o]n any party's motion in a civil action, the superior court must permit an appeal from an interlocutory order or ruling if the court finds that: (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation."

Respondent's motion satisfies all three requirements. As far as meeting the "controlling" question requirement, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely. As far as meeting the substantial ground for difference of opinion, one need look no further than Bar Counsel Michael Kennedy's commentary on ABA Formal Opinion 502, which is discussed below. As far as meeting the requirement that the appeal may materially advance the termination of the litigation, elimination of the Counts tied to the *pro se* issue would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint asserts were false.

**I. THE HP ORDER INVOLVES A CONTROLLING QUESTION OF LAW ABOUT WHICH THERE EXISTS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.**

**A. The HP Order Involves a Controlling Question of Law.**

"[A]n order may [also] be 'controlling' if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Rivard v. State*, 2023 Vt. Super. LEXIS 135 \*9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982).

All of the Counts that Mr. Hanley presents in the Complaint are based upon Respondent acting *pro se*. In other words, none are based upon Respondent representing a third-party client. Respondent thus argued that as a general matter the Vermont Disciplinary Rules that Mr. Hanley alleges have been violated simply do not apply in the first place on their own terms, and certain rules expressly only apply when representing a client. *See, e.g.*, Rule 3.3, Comment [1]: “This rule governs the conduct of a lawyer *who is representing a client* in the proceedings of a tribunal.”; Rule 4.1: “*In the course of representing a client* a lawyer shall not knowingly make a false statement of material fact or law to a third person.”; Rule 4.2: “*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.” Rule 4.4: “(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.”

A reversal of the HP Order on the issue on Respondent not representing a client issue would certainly have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.

For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint claims were false. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

**B. The HP Order involves a controlling question of law about which there exists substantial ground for difference of opinion.**

As discussed below, ABA Formal Opinion 502 and the other authority discussed below provides ample illumination of the substantial ground for difference of opinion. Vermont Bar Counsel Michael Kennedy’s commentary, *see below*, reinforces that substantial ground or

difference of opinion, with Mr. Kennedy recommending a rule change to match Oregon's Rule

4.2. *See*, ABA Formal Opinion 502 (dissent):

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. *See In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction.<sup>2</sup>

It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it does in Connecticut, Kansas, and Texas? Or, does it mean what we wish it said, as several other states have declared?

***Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers.***

Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.

(emphasis added).

Even in cases like *Haley*, where the Washington Supreme Court concluded that the rule should be interpreted as applying to a pro se lawyer, the Washington Supreme Court (following the Nevada Supreme Court) held that it would be an unconstitutional violation of due process to do so in the case in which the question was presented. Rather, the Washington Supreme Court

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<sup>2</sup> *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

followed the principle of *In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191 (2001) that the Rule “was unconstitutionally vague on ‘the absence of clear guidance’ from the Nevada State Supreme Court and on ‘the existence of conflicting authority from other jurisdictions.’”

Also of note is the discussion in *Haley* regarding certain authority from other jurisdictions, particularly California:<sup>3</sup>

The comment to rule 2-100 of the California RPC, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

[T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. ***Such a member has independent rights as a party which should not be abrogated because of his or her professional status.*** To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Cal. RPC 2-100 []. Likewise, a comment to the restatement specifically provides that “[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals.” RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).

Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

(A) During the course of the lawyer's representation of a client, a lawyer shall not:  
(1) Communicate or cause another to communicate . . . with a person the lawyer knows to be represented by a lawyer. . . . *This prohibition includes a lawyer representing the lawyer's own interests.*

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that “[p]arties to a matter may communicate directly with each other.” ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does

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<sup>3</sup> [https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules/Rule-2-100#:~:text=\(A\)%20While%20representing%20a%20client,consent%20of%20the%20other%20lawyer.](https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules/Rule-2-100#:~:text=(A)%20While%20representing%20a%20client,consent%20of%20the%20other%20lawyer.)

not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in [Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075 \(1990\)](#), appears to call into question the policy concerns supporting the application of RPC 4.2(a) to lawyers acting pro se. In *Pinsky*, the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "(c)ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not "representing a client" as stated in the rule. *Id.* at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a)--the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching than would contacts from a represented lawyer-party, *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

(Emphasis added).

**C. Vermont Bar Counsel Michael Kennedy has recognized there exists substantial ground for difference of opinion.**

Vermont Bar Counsel Michael Kennedy has recognized that a rule amendment would be in order to address a situation involving a lawyer representing his own interests. *See* Kennedy, M., "ABA opinion concludes that the 'no-contact' rule applies to self-represented lawyers. Should we amend Vermont's rule?" September 29, 2022. *See*, <https://vtbarcounsel.wordpress.com/2022/09/29/aba-opinion-concludes-that-the-no-contact-rule-applies-to-self-represented-lawyers-should-vermont-amend-its-rule/>. Bar Counsel Kennedy's post is reproduced below proposed following Oregon's Rule 4.2, which says: "In representing a client or the lawyer's own interests," instead of simply "in representing a client." (Emphasis supplied by Mr. Kennedy.)

**ABA opinion concludes that the "no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?**

The issue of whether a self-represented lawyer is subject to Rule 4.2's "no-contact" provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don't remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in [this post](#) about the first decision ever issued after Vermont adopted a formal professional responsibility program.<sup>[1]</sup>

Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer*.<sup>4</sup> The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person's lawyer or unless the communication is otherwise authorized by law.

I appreciate the opinion for several reasons.

For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."

The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

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<sup>4</sup> <https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-formal-opinion-502/>.

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- “By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.” I tend to agree. And amending the rule wouldn't be difficult.<sup>[2]</sup> Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- “In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . .” In any event, that's why I post today. To raise the question of whether to amend Rule 4.2.

To me, it's an interesting question. Again, I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.<sup>[3]</sup> However, many of the rules include phrases like “when representing a client” or “in representing a client.” If, for the purposes of Rule 4.2, a self-represented lawyer is “representing a client,” it's interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

“By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.” I tend to agree.

## II. AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

The final requirement is that “an immediate appeal may materially advance the termination of the litigation.” This requirement is clearly satisfied. Here, “reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.” *Rivard v. State*, 2023 Vt. Super. LEXIS 135 \*9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982). For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint claims were false. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

Dated: December 15, 2025

Respectfully Submitted,

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## Restat 3d of the Law Governing Lawyers, § 99

*Restatement of the Law 3d, Law Governing Lawyers - Official Text > Chapter 6- Representing Clients--in General > Topic 3- Lawyer Dealings with a Nonclient > Title B- Contact with a Represented Nonclient*

### § 99 A Represented Nonclient--The General Anti-Contact Rule

(1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:

- (a) the communication is with a public officer or agency to the extent stated in § 101;
- (b) the lawyer is a party and represents no other client in the matter;
- (c) the communication is authorized by law;
- (d) the communication reasonably responds to an emergency; or
- (e) the other lawyer consents.

(2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

#### COMMENTS & ILLUSTRATIONS

##### Comment:

*a. Scope and cross-references.* This Section states the general rule prohibiting a lawyer from communicating about a matter involved in a representation with a nonclient involved in the same matter who is represented by another lawyer. Several exceptions are then stated. Narrower prohibitions may apply with respect to communication by a government investigating lawyer (Comment *h* hereto) and communication with represented governmental agencies or officials (Subsection (1)(a) & § 101). On remedial orders and remedies, see Comments *m* and *n*.

Nonclients and representatives of nonclients included within this Section are defined in § 100 (see also Comment *c* hereto). On limitations on communications with confidential agents of a nonclient, see § 102. On the rule limiting communications with an unrepresented nonclient, see § 103.

The rule stated in this Section derives from the lawyer codes and a violation is thus subject to professional discipline (see § 5). Unless the lawyer's conduct is otherwise tortious, for example because the communicating lawyer engages in actionable misrepresentation (see generally § 98), a nonclient has no civil-damage remedy against the offending lawyer (see § 51, Comment *c*). On other possible remedies, such as disqualification of the offending lawyer or suppression of information or an agreement gained through prohibited contact, see Comment *n* hereto. On court orders relaxing the rule or otherwise regulating contact with represented nonclients, see Comment *h*.

*b. Rationale.* The rules stated in §§ 99-103, protect against overreaching and deception of nonclients. The rule of this Section also protects the relationship between the represented nonclient and that person's lawyer and assures the confidentiality of the nonclient's communications with the lawyer (see also § 102).

The general exception to the rule stated in Subsection (1)(e) requires consent of the opposing lawyer; consent of the client alone does not suffice (see Comment *j*). The rule accordingly has been criticized for requiring three-stage communications (from client, through lawyer, through another lawyer, or vice versa) that are often

## Restat 3d of the Law Governing Lawyers, § 99

more expensive, delayed, and inconvenient than direct communication. In addition, the rule limits client autonomy by requiring that both communication and consent be given by the lawyer (see Comment *j* hereto). Notwithstanding such criticism, the rule is universally followed in American jurisdictions.

A lawyer whose appropriate efforts to communicate with a represented nonclient through that person's lawyer are thus frustrated may in some situations seek the aid of a tribunal to effectuate the communication (see Comment *m*) or complain to an appropriate disciplinary authority. On communications made by a lawyer's client, see Comment *k*.

The anti-contact rule constrains a lawyer who represents another person in the matter. The rule also applies to nonlawyer employees and other agents of a lawyer, such as an investigator. On agents of a client, see Comment *k* hereto.

*c. Persons protected by the anti-contact rule.* As stated in Subsection (1), the anti-contact prohibition extends to any nonclient that the contacting lawyer knows to be represented by counsel in the matter in which the lawyer is representing a client. It is not limited to situations of opposing parties in litigation or in which persons otherwise have adverse interests. Thus, the rule covers a represented co-party and a nonparty fact witness who is represented by counsel with respect to the matter, as well as a nonclient so represented prior to any suit being filed and regardless of whether such suit is contemplated or eventuates. A lawyer represented by other counsel is a represented person and hence covered by this Section. On inside legal counsel for a corporation or similar organization, see § 100, Comment *c*.

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. If such additional or substituted counsel is retained, an opposing lawyer may, of course, communicate and otherwise deal with new counsel for the nonclient. Thus, a lawyer representing a claimant in an injury case may approach a lawyer personally retained in the matter by an insured defendant even if other counsel have been designated by the defendant's insurer to represent the person in the matter.

*d. A communication on an unrelated matter.* This Section does not prohibit communications with a represented nonclient in the course of social, business, or other relationships or communications that do not relate to the matter involved in the representation. What matter or matters are involved in a representation depends on the circumstances. For example, a lawyer might know that a witness at a deposition was represented by a lawyer for an opposing party only for purposes of attending the deposition. The lawyer may contact that nonclient following the deposition when representation has ended.

**Illustrations:**

1. Lawyer A is counsel to Corporation and represents Corporation, among other matters, in connection with a shareholder action filed against it. Officer is separately represented in the matter by Lawyer B. In the course of the other matters on which Lawyer A represents Corporation, Lawyer A and Officer have frequent occasion to speak and correspond. Lawyer A may continue such discussions directly with Officer on matters not related to the matter in which Officer is represented. However, Lawyer A may not discuss with Officer facts or legal issues involved in the shareholder action, unless Lawyer B consents (see Comment *j*).
2. Plaintiff, represented by Lawyer B, has filed a personal-injury action against Defendant. Lawyer A, who is representing Defendant, directs Investigator to make an appointment at Plaintiff's place of business, a beauty parlor. While Plaintiff shampoos, cuts, and sets Investigator's hair, Plaintiff and Investigator engage in small talk unrelated to Plaintiff's lawsuit or physical condition. Investigator reports to Lawyer A, including several observations indicating that Plaintiff is not physically impaired as alleged. Lawyer A has not violated the rule of this Section because Investigator did not engage Plaintiff in conversation relevant to the matter on which Plaintiff is represented and only engaged Plaintiff in activities that Plaintiff engages in regularly in dealing with the public.

*e. A lawyer communicating in a nonrepresentational situation.* A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals (see Subsection (1)(b)). A lawyer representing both a client and the lawyer's own interests in the same matter is subject to the anti-contact rule of the Section.

**Illustration:**

3. Lawyer A, who rents law-office space from Landlord, receives a letter from Lawyer B, representing Landlord, directing Lawyer A to vacate by a certain date. Lawyer A telephones Landlord without the prior consent of Lawyer B and insists to Landlord that the lease prohibits the eviction. Lawyer A has not violated the rule of this Section.

*f. Prohibited forms of communication.* Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer's client (see § 20), such as a settlement offer. The rule prohibits all forms of communication, such as sending a represented nonclient a copy of a letter to the nonclient's lawyer or causing communication through someone acting as the agent of the lawyer (see § 5(2) & Comment *f* thereto) (prohibition against violation of duties through agents). The anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication.

**Illustration:**

4. Wife is represented by Lawyer A in a marriage-dissolution action. Husband is represented by Lawyer B. Meeting without Lawyer A or Lawyer B, Wife and Husband negotiate the outlines of an agreement providing for property division and child support. Wife then brings Husband to Lawyer A's office to have the agreement reduced to writing. Lawyer A welcomes both Wife and Husband and engages in a discussion of provisions of the agreement with both of them. Lawyer A has violated the rule of this Section.

*g. A communication authorized by law.* As stated in Subsection (1)(c), direct communication with a represented nonclient is permissible, without consent of the nonclient's lawyer (cf. Comment *j* hereto), when authorized by law. Where such communication is permissible, it may extend no further than reasonably necessary. No complete list of such authorizations is stated here. Several of the important interests are described below. See also § 101 (contact with officers or employees of represented governmental agency). Whether direct communication is authorized depends on the legal justification for the contact in the situation, having regard for the interest in protecting client-lawyer relationships and avoiding overreaching of represented nonclients (see Comment *b*).

An interest sometimes recognized by law is that of transmitting notice directly to a represented nonclient of certain legally significant matters. Among other things, such notice eliminates the possibility of disputes as to the authority of the nonclient's lawyer to receive such notice. For example, law commonly provides for service of process on a defendant, even in instances where the lawyer for the plaintiff knows that the defendant is represented by a lawyer in the matter. However, after initial notice has been transmitted directly to the represented nonclient, the authority of the defendant's lawyer to act on the defendant's behalf can readily be determined (see § 25). Thereafter, communication with the nonclient ordinarily must be conducted through the nonclient's lawyer.

Direct communication may occur pursuant to court order or under the supervision of a court. Thus, a lawyer is authorized by law to interrogate as a witness an opposing represented nonclient during the course of a duly noticed deposition or at a trial or other hearing. It may also be appropriate for a tribunal to order transmittal of documents, such as settlement offers, directly to a represented client.

A tribunal, in the exercise of its authority over advocates appearing before it (see § 1, Comment *c*) and over proceedings generally, may expand the right of a lawyer to make *ex parte* contact with a nonclient represented by opposing counsel. Such a court order is usually entered after notice and hearing. For example, although a lawyer for plaintiffs in a certified class action is considered to represent all members of the class (see Comment *h*), the court may permit defense counsel to approach class members directly if in the circumstances the court concludes that such persons will not be subjected to overreaching and that direct contact would otherwise be appropriate. So also, a court may appoint a psychiatrist designated by the prosecutor to conduct a pretrial evaluation of a represented defendant, in contemplation of consultation between the psychiatrist and the prosecutor following the examination.

Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated nonclient, even if represented in the matter, is authorized to comply with legal requirements of the contract.

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*h. A represented nonclient accused or suspected of a crime.* Controversy has surrounded the question whether prosecutors are fully subject to the rule of this Section with respect to contact, prior to indictment, with represented nonclients accused or suspected of crime. Certain considerations favor a relaxed anti-contact rule. Law-enforcement officials traditionally have resorted to undercover means of gathering important evidence. If retention of a lawyer alone precluded direct prosecutorial contact, a knowledgeable criminal suspect could obtain immunity from otherwise lawful forms of investigation by retaining a lawyer, while unsophisticated suspects would have no similar protection. Moreover, nonlawyer law-enforcement personnel such as the police are not subject to the rule of this Section. Rigidly extending the anti-contact rule to prosecutors would create unfortunate incentives to eliminate them from involvement in investigations.

On the other hand, certain considerations argue in favor of an anti-contact rule for prosecutors. They are in a position to overreach suspects or interfere in client-lawyer relationships in the same manner as lawyers in private practice and may be tempted to do so to solve a crime. Accordingly, at a minimum, a suspect or accused has constitutional protection of the following kind: against governmental intrusion, including prosecutorial intrusion, into essentials of the client-lawyer relationship, such as attempts to dissuade a nonclient from retaining counsel or from trusting or consulting counsel already retained or assigned; against taking statements from a suspect who is in custody and has not effectively waived the right to counsel; and against such measures as unlawful searches of a lawyer's office or similar threats to client-lawyer confidentiality. Elaboration of such limitations is beyond the scope of this Restatement.

It has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors or, to the contrary, whether the authorized-by-law exception (see Comment *g*) entirely removes such limitations. Both polar positions seem unacceptable. Organizations of prosecutors and lawyers are elaborating rules governing specific situations. The scope of such rules and the law in default of such rules are subjects beyond the scope of this Restatement. Prosecutor contact in compliance with law is within the authorized-by-law exception stated in Subsection (1)(c).

*i. A communication reasonably responding to an emergency.* Communication with a represented nonclient is authorized to protect life or personal safety and to deal with other emergency situations. As provided in Subsection (1)(d), communication in such situations is permissible to the extent reasonably necessary to deal with the emergency.

**Illustration:**

5. Lawyer A represents Husband in a divorce action. Wife has retained Lawyer B in connection with the action. Late at night, Wife calls Lawyer A, saying that Husband is threatening to harm her and that she cannot reach Lawyer B. Lawyer A advises Wife to leave the house and that Lawyer A will immediately attempt to calm down Husband. Lawyer A has not violated the rule of this Section.

*j. A communication with the consent of the lawyer for the represented nonclient.* As stated in Subsection (1)(e), a lawyer otherwise subject to the rule of this Section may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.

The nonclient's lawyer has a duty to the client to consent when doing so would be in the interest of the client or when the client so instructs the lawyer (see § 21(2)). When determining whether to consent, the lawyer must consider only the client's interest and not the lawyer's personal interest in controlling aspects of the representation.

*k. A communication by a client with a represented nonclient.* No general rule prevents a lawyer's client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer's investigator or other agent (see Comment *b* hereto) may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client's investigator or other agent.

As stated in Subsection (2), the anti-contact rule does not prohibit a lawyer from advising the lawyer's own client concerning the client's communication with a represented nonclient, including communications that may occur without the prior consent (compare Comment *j*) or knowledge of the lawyer for the nonclient.

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.

**Illustration:**

6. Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section.

*l. A communication with class members.* A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

*m. Clarifying, protective, and remedial orders of a tribunal.* In situations of doubt involving communication with a represented non-client, a clarifying ruling may be sought from a tribunal. A party seeking to protect against impermissible contact by an opposing lawyer may seek a protective or remedial ruling. A ruling may impose conditions on access and may expand or contract the general rule of this Section as appropriate in light of circumstances. For example, a ruling permitting access may require the lawyer to inform each contacted nonclient of the identity and interests of the lawyer's client, the right of the nonclient to refuse to be interviewed, and the right of the nonclient to request the presence of a lawyer during an interview. The court may grant access on condition that no statement taken will be admissible in evidence. Contact pursuant to the terms of such a ruling is authorized by law within the meaning of this Section (see Comment *h*).

*n. Disqualification, evidence suppression, and related remedies.* When contact has been made in violation of this Section, a court may disqualify the offending lawyer when necessary to protect against a significant risk of future misuse of confidential information obtained through the contact, when the contact has substantially interfered with the client's relationship with the client's lawyer, or when disqualification is appropriate to deter flagrant or reckless violations. A lawyer violating or threatening to violate the rule may be enjoined from doing so. A lawyer who violates the rule of this Section is also subject to professional discipline. Fines and fee-shifting sanctions may be warranted under applicable procedural law.

A court may also suppress or otherwise exclude from evidence statements, documents, or other material obtained in violation of the rule. When a release or other document affecting the interests of a represented nonclient is obtained in violation of the rule, the law against fraud or overreaching may permit the nonclient to obtain a ruling voiding the document. A tribunal may compel production of any statement taken in violation of the rule despite its status otherwise as protected work product (see § 87(3)).

**REPORTER'S NOTES**

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*Comment b. Rationale.* See generally ABA Model Rules of Professional Conduct, Rule 4.2 (1983) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so"); ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969) ("During the course of his representation of a client a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is

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authorized by law to do so"); 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 4.2:101-110 (2d ed.1990); C. Wolfram, *Modern Legal Ethics* § 11.6.2, at 611 (1986).

ABA Model Rule 4.2 was amended by the ABA House of Delegates in August, 1995, principally by changing the reference from a represented "party" to a represented "person"--clarifying that the rule extended beyond nonclients represented in litigation--and clarifying that a lawyer's knowledge of such a person's representation by counsel could be inferred from the circumstances. See *Lawyers' Man. Prof. Conduct* 149, 150 (1995); A.B.A. J. 106 (October, 1995). The amendment conformed the wording of the rule to the interpretation favored by most commentators and decisions. See Reporter's Note to Comment c.

Commentators have debated the wisdom of the anti-contact rule. Compare Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. Rev. 683 (1979) (professional rule should be changed so lawyer may contact represented nonclient by letter, with contemporaneous copy to opposing lawyer, or in person, after reasonable notice to opposing lawyer of intent to contact), with Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 Va. L. Rev. 1903 (1993) (defending the rule in civil cases as primarily a method of regulating deception of opposing parties in evidence-gathering); Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 Conn. B. J. 136 (1977).

On the inapplicability of the rule to a lawyer when a represented person seeks a second opinion or new counsel, see, e.g., Cal. R. Prof. Conduct, Rule 2-100(C)(2) (anti-contact rule inapplicable to "communication initiated by a party seeking advice or representation from an independent lawyer"); *Walsh v. O'Neill*, 215 N.E.2d 915, 26 A.L.R.3d 673 (Mass. 1966); *Martini v. Leland*, 455 N.Y.S.2d 354, 355 (N.Y.Civ.Ct.1982); C. Wolfram, *Modern Legal Ethics* § 11.6.2, at 612 (1986); cf. ABA Model Rule 4.2, Comment P [1] ("[A] lawyer having independent justification . . . for communicating with a represented person is permitted to do so. . .").

There is no equivalent rule governing unconsented contact between nonlawyer agents of a nonclient and a represented nonclient of opposing interest. E.g., *Korson v. Independence Mall I, Ltd.*, 595 So.2d 1174, 1181 (La.Ct.App.1992).

*Comment c. Persons protected by the anti-contact rule.* Both the ABA Model Code of Professional Responsibility (1969) and the pre-1995 version of the ABA Model Rules of Professional Conduct (1983) refer to a "party" represented by a lawyer, but commentators have uniformly read the prohibition as if the rules said "person." E.g., 1 G. Hazard & Hodes, *The Law of Lawyering* § 4.2:105, at 733-34 (2d ed.1990); C. Wolfram, *Modern Legal Ethics* 611 n.33 (1986); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 515-16 (Ky.1994) (applies both before and after formal proceedings are initiated); see also Reporter's Note to Comment b. The Comment to the ABA Model Rules of Professional Conduct (1983) made the point clear. *Id.* Rule 4.2, Comment P [3] ("This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.").

A different reading of the rules would illogically limit the rule to representations involving only litigation. Among other things, that would create disparity based on party status; a plaintiff (but not an unwitting defendant) could evade the rule by withholding the filing of suit until completing ex parte interviews with adverse nonclients, even if they were known to be represented by counsel. But see, e.g., *Grievance Committee v. Simels*, 48 F.3d 640 (2d Cir.1995) (anti-contact rule narrowly construed to apply only to defense-counsel contact with actual co-defendants to same indictment, thus authorizing contact with unindicted potential adverse witness represented by counsel); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990) (application of DR 7-104(A)(1) to "party" means that it does not apply in absence of formal adversarial setting); *Tucker v. Norfolk & W. Ry.*, 849 F.Supp. 1096, 1098 (E.D.Va.1994) (dicta) (concurring with view of parties that rule does not govern lawyer's communications prior to filing of action). Even under the amended ABA rule, filing suit may as a practical matter bring the anti-contact rule into play more surely than during pre-filing investigations. A claimant's lawyer will generally not know (as the rule requires) that a prospective defending party is represented by counsel in the matter prior to asserting a claim against the person. See, e.g., *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So.2d 363 (Ala.1996) (in pre-filing interview of prospective defending party's employees, lawyer lacked necessary knowledge of representation).

The ABA House of Delegates amended ABA Model Rule 4.2 in August, 1995, to conform it clearly to the majority rule--the rule reflected in the Section and Comment. See Reporter's Note to Comment b. That position accorded with the position of the ABA's ethics committee. See ABA Formal Opin. 95-396 (1995).

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The 1983 ABA Model Rules in Rule 4.2, Comment P [5] indicate that the anti-contact prohibition applies when a lawyer has "actual knowledge" of the nonclient's representation:

The prohibition on communications with a represented person only applies . . . in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

See also, e.g., ABA Formal Opin. 95-396 (1995). But cf., e.g., *Faison v. Thornton*, 863 F.Supp. 1204, 1214-15 (D.Nev.1993) (violation of anti-contact rule found despite lawyer's assurance to nonclient that he could have counsel present during interview and nonclient's statements that he didn't believe he was represented by a lawyer and consented to interview).

The decisions agree that a client who is represented generally by a lawyer--as a corporation might be represented by inside legal counsel or a business by a general counsel in private practice--is not represented in a matter unless the lawyer has undertaken legal tasks with respect to the matter in question. E.g., *Terra Int'l v. Mississippi Chem. Corp.*, 913 F.Supp. 1306 (N.D.Iowa 1996); *Humco Inc. v. Noble*, 1999 WL 1207051 (Ky.Ct.App.1999); ABA Formal Opin. 95-396, at 13-15 (1995).

On the application of the rule to coparties, see, e.g., *In re Thompson*, 492 A.2d 866 (D.C.1985) (co-defendant in criminal case); *In re Alcantara*, 676 A.2d 1030 (N.J.1995) (same).

On the prohibition against communication through another, the prohibition in the ABA Model Rules is narrower than one arguable interpretation of the wording employed in the ABA Model Code. Compare DR 7-104(A)(1) (1969) ("communicate or cause another to communicate") (emphasis supplied), with ABA Model Rule 4.2 (omitting phrase "or cause another to communicate" while otherwise copying ABA Model Code of Professional Responsibility (1969)). However, the ABA Model Rules do generally prohibit a lawyer from employing an agent of the lawyer to contact a represented nonclient. See ABA Model Rule 5.3(c)(1) (prohibition against ordering or ratifying conduct by nonlawyer assistant that would be violation if engaged in by lawyer); *id.* Rule 8.4(a) (prohibiting lawyer from violating rule "through the acts of another"). See, e.g., *Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192 (D.Kan.1998) (affidavits obtained by client in age-discrimination suit against employer from co-workers after lawyer encouraged such; evidence held inadmissible); *In re Marietta*, 569 P.2d 921 (Kan.1977) (under ABA Model Code, discipline of lawyer for having "caused" client to contact opposing party). The prohibition does not apply, however, if the lawyer was unaware of the contact (and not otherwise accountable for it, such as by failing to supervise an employee). E.g., *Barham v. Turner Constr. Co.*, 803 S.W.2d 731, 739-40 (Tex.Ct.App.1990). On the extent to which a lawyer may assist a client in client-client communications, see Reporter's Note to Comment *k*, *infra*.

*Comment d. A communication on an unrelated matter.* See 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 4.2:104 (2d ed.1990) (noting that the reference in ABA Model Rule 4.2 and DR 7-104(A)(1) to communication on "the subject of the representation" means that communication for other purposes is impliedly permissible); *State v. Clawson*, 270 S.E.2d 659 (W.Va.1980) (defendant represented in New Jersey prosecution could be questioned about unrelated West Virginia murders). Perhaps an extreme case is *United States v. Masullo*, 489 F.2d 217 (2d Cir.1973) (no anti-contact violation for federal agents, knowing nonclient was leaving lawyer's office after consultation on pending state narcotics charges, to stop and interrogate concerning federal narcotics charges); *contra*, e.g., *Abeles v. State Bar*, 510 P.2d 719 (Cal.1973); *State v. Yatman*, 320 So.2d 401 (Fla.Dist.Ct.App.1975).

Illustration 2 is based on *Mondelli v. Checker Taxi Co.*, 554 N.E.2d 266 (Ill.App.Ct.1990). On the several potential problems of deception involved, see generally Isbell & Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 *Geo. J. Legal Ethics* 791 (1995). See also, e.g., *Gidatex S.r.L v. Campaniello Imports Ltd.*, 82 F.Supp.2d 119 (S.D.N.Y.1999) (lawyer for furniture manufacturer could send undercover investigators posing as customers to engage in ordinary business transaction with former distributors' sales clerks to determine whether they were infringing trademark).

*Comment e. A lawyer communicating in a nonrepresentational situation.* See ABA Model Rules of Professional Conduct, Rule 4.2, Comment P [1] (1983) ("This Rule does not prohibit communication with a party . . . concerning matters outside the representation. . . . Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so"). E.g., *In re Mettler*, 748 P.2d 1010, 1012 (Or.1988) (lawyer working for state securities examiner not subject to anti-contact rule where position did not require incumbent to be lawyer); N.Y. Cty. Ethics Opin. 705 (1995) (lawyer employed as corporation's personnel director).

Illustration 3 is based on the facts and holding in *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075 (Conn.1990). The position of the ABA ethics committee is probably contrary to that in the Section and Comment, although other bar-association committees support it. Compare, e.g., ABA Informal Opin. 982 (1967) (lawyer appearing pro se subject to anti-contact rule), with, e.g., Ass'n B. City of N.Y., Opin. No. 81-8 (1981) (pro se lawyer not subject to rule). There is significant authority contrary to the Section and Comment. E.g., *Toliver v. Sullivan Diagnostic Treatment Center*, 818 F.Supp. 71, 73 (S.D.N.Y.1993) (dicta) (lawyer representing self subject to anti-contact rule); *In re Segall*, 509 N.E.2d 988, 990 (Ill.1987) (lawyer appearing pro se in litigation represents himself when he contacts opposing party); *In re Smith*, 861 P.2d 1013 (Or.1993), cert. denied, 513 U.S. 866, 115 S.Ct. 183, 130 L.Ed.2d 117 (1994) (under version of Oregon rule specifically so providing, pro se lawyer subject to discipline for sending letter directly to president of corporation with which lawyer was in litigation with copy to counsel); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex.Ct.App.1999) (refusing to follow *Pinsky*); *Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894, 898 (W.Va.1990) (assuming application of anti-contact rule); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo.1994). In *Ryland v. Taylor, Porter, Brooks & Phillips*, 496 So.2d 536, 541-42 (La.Ct.App.), writ denied, 497 So.2d 1388 (La.1986), the court suggested a middle ground, permitting direct contact where the lawyer was performing an act that any principal might perform (there, paying a utility bill) but indicating that contact would be prohibited with respect to an act that was representational in character (such as filing an action against the utility company).

*Comment f. Prohibited forms of communication.* On application of the rule to a lawyer who corresponds by letter with simultaneous copy to the nonclient's lawyer, see, e.g., *Committee on Professional Ethics and Conduct v. Hoffman*, 402 N.W.2d 449 (Iowa 1987); *In re Schenck*, 879 P.2d 863, 866-67 (Or.1994) (discipline case); ABA Formal Opin. 92-362, at 2-4 (1992).

As an aspect of the rule that the represented nonclient's consent is irrelevant, the rule extends to communications initiated by either the lawyer or the represented nonclient. See, e.g., *In re Herkenhoff*, 866 P.2d 350, 352 (N.M.1993); *In re Illuzzi*, 632 A.2d 346, 354 (Vt.1993); ABA Formal Opin. 95-396 (1995).

Illustration 4 is taken from *In re Waldron*, 790 S.W.2d 456 (Mo.1990).

*Comment g. A communication authorized by law.* See ABA Model Rules of Professional Conduct, Rule 4.2 (1983) and ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969), both quoted in the Reporter's Note to Comment *b*. See generally Lidge, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 Ind. L.J. 549 (1992); ABA Formal Opin. 95-396 (1995). On statutes interpreted to exempt lawyers in particular settings from the anti-contact rule, compare, e.g., *United Transp. Union v. Metro-North Commuter R.R.*, 1995 WL 634906 (S.D.N.Y.1995) (provision of Federal Employers Liability Act (FELA) barring rules inhibiting railroad workers from furnishing information voluntarily), and authorities cited; *State ex rel. Atchison, Topeka & Santa Fe R.R. v. O'Malley*, 888 S.W.2d 760 (Mo.Ct.App.1994) (same), with, e.g., *Queensberry v. Norfolk & W. Ry.*, 157 F.R.D. 21 (E.D.Va.1993) (refusing to construe FELA to authorize contact in contravention of state ethical rules).

On the applicability of the anti-contact rule to prosecutors, see Comment *h* hereto and Reporter's Note thereto. There is no general exemption applicable to government lawyers, e.g., *Tannahill v. United States*, 27 Fed. Cl. 724 (Cl.Ct.1992) (Justice Department lawyers investigating civil tax matters); *Bearden v. Bearden*, 426 S.E.2d 568 (Ga.1993) (lawyers representing child-support recovery unit subject to rule); *In re Quinlan*, 801 P.2d 1337 (Mont.1990) (discipline of prosecutor for interviewing represented defendant in criminal case); *In re Mettler*, 748 P.2d 1010, 1012 (Or.1988), and courts generally have shown no disposition to favor a reading of statutes to create exemptions, e.g., *In re Williams*, 840 P.2d 1280, 1285-86 (Or.1992).

A lawyer's unreasonable refusal to permit opposing counsel to have direct contact contemplated by law may persuade a court that service on the objecting lawyer should be treated as notice to the client. See *Bagwell v.*

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Sportsman Camping Centers, Inc., 241 S.E.2d 602 (Ga.Ct.App.1978) (statutorily required notice sufficiently achieved if given to nonclient's lawyer, who refused permission for direct communication with client to opposing lawyer who was attempting to provide notice under statute).

On communication pursuant to court order, see *United States v. Lopez*, 4 F.3d 1455, 1461-62 (9th Cir. 1993) (on rehearing) (court order can exempt lawyer from anti-contact rule under "authorized by law" exception, unless court misled in issuing order). On inapplicability of the anti-contact rule to interrogation during depositions and similar examination, see, e.g., *United States v. Schwimmer*, 882 F.2d 22, 28 (2d Cir.1989) (interrogation of represented suspect by prosecutor during grand-jury testimony), cert. denied, 493 U.S. 1071, 110 S.Ct. 1114, 107 L.Ed.2d 1021 (1990).

*Comment h. A represented nonclient accused or suspected of a crime.* See generally 2 G. Hazard & W. Hodes, *The Law of Lawyering* § 4.2:109 (1991 supp.); C. Wolfram, *Modern Legal Ethics* 615 (1986); Stuntz, *Lawyers, Deception and Evidence Gathering*, 79 Va. L. Rev. 1903 (1993); Cramton & Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291 (1992); Dash, *Contact with Represented Persons: An Alarming Assertion of Power*, 78 *Judicature* 137 (1994).

On applicability of the general anti-contact rule to defense counsel, see, e.g., *United States v. Santiago-Lugo*, 162 F.R.D. 11 (D.P.R.1995); *Attorney Grievance Comm'n v. Kent*, 653 A.2d 909 (Md.1995); but cf. *Grievance Committee v. Simels*, 48 F.3d 640 (2d Cir.1995) (anti-contact rule narrowly construed to apply only to defense-counsel contact with actual co-defendants to same indictment, thus authorizing contact with unindicted potential adverse witness represented by counsel).

On contact after the constitutional right to counsel attaches, see generally *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (once accused requested and obtained appointed counsel, prosecutor-initiated interrogation that accused was required to attend without counsel was impermissible under Fifth Amendment and resulting statements were inadmissible in evidence); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (under Fifth Amendment, once in-custody accused requests and is entitled to counsel, officials may not reinitiate questioning), as limited by *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (postwaiver request for counsel must be unambiguous and unequivocal); *United States v. Henry*, 447 U.S. 264, 275 n.14, 100 S.Ct. 2183, 2189, 65 L.Ed.2d 115 (1980) (dicta) (approvingly noting anti-contact rule of DR 7-104(A)(1) in case finding Sixth Amendment violation where prosecutor placed informer in jail cell with represented suspect); *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (postarraignment, in-custody interrogation of represented defendant violates Sixth Amendment); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (surreptitious questioning of represented defendant following arraignment and release on bail).

With respect to contact with a represented suspect prior to the time the right to counsel attaches, compare, e.g., *United States v. Powe*, 9 F.3d 68 (9th Cir.1993) (under California lawyer code, pre-indictment, noncustodial conversation through secretly cooperating co-conspirator authorized by law); *United States v. Heinz*, 983 F.2d 609 (5th Cir.1993) (anti-contact rule does not apply during preindictment, noncustodial information-gathering); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990), and authorities cited (anti-contact rule of DR 7-104(A)(1) does not apply in absence of relatively formal adversarial setting and thus is inapplicable to preindictment, noncustodial investigations); *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir.1988), cert. denied, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990) ("*Hammad II*") ("the use of informants by government prosecutors in a preindictment, noncustodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception of DR 7-104(A)(1) and therefore will not be subject to sanction"); *Triple A Mach. Shop, Inc. v. State*, 261 Cal.Rptr. 493, 497-98 (Cal.Ct.App.1989); *In re Criminal Investigation No. 13*, 573 A.2d 51 (Md.Ct.Spec.App.1990); *State v. Miller*, 600 N.W.2d 457 (Minn.1999) (noncustodial, voluntary interview with managerial-level employee conducted during criminal investigation despite protest of counsel and did not come within "authorized by law" exception).

*Hammad II*, supra, 858 F.2d at 839, noted that career criminals with permanent "house counsel" were not immune from otherwise appropriate informer infiltration. Nonetheless the court in *Hammad II* held that the prosecutor had violated the anti-contact rule because the prosecutor had engaged in "egregious misconduct"--using the "improper and illegitimate stratagem" of a counterfeit grand-jury subpoena to gain access to the

represented suspect. Accordingly, the court recognized the discretionary power of the trial court to invoke an exclusionary rule and suppress evidence obtained through a violation of DR 7-104(A)(1). See 858 F.2d at 840.

A continuing area of controversy is the policy of the Justice Department concerning contact with represented suspects. One position taken by the Department is contained in a series of rules regulating (but broadly permitting) noncustodial, preindictment contact. See 59 Fed. Reg. 39910 (1994). The ABA has attacked the rules on a number of grounds. See 11 Lawyers' Man. Prof. Conduct 245 (1994); ABA Formal Opin. 95-396 (1995). In a memorandum of June 8, 1989, the then Attorney General purported to exempt Justice Department litigators categorically from the ABA Model Rules of Professional Conduct with respect to precustodial contact. See, e.g., *United States v. Western Elec. Co.*, 1990-2 CCH Trade Cas. P69,148, 6 ABA/BNA Law. Manual Prof. Conduct (Current Reports) 297, 298 (D.D.C.1990) (quoting policy statement); see also, e.g., *In re Doe*, 801 F.Supp. 478 (D.N.M.1992) (U.S. Attorney General's memorandum did not constitute controlling law and thus was not within "authorized by law" exception to anti-contact rule). See generally, e.g., Cramton & Udell, *supra*, 53 U. Pitt. L. Rev. at 333-57. The 1994 rules were a revision and formalization of those policies. The formal opinion of the ABA opposing the Justice Department position, ABA Formal Opin. 95-396 (1995), did concede that prevailing judicial decisions permitting preindictment contact constituted the necessary legal authorization under the "authorized by law" exception (see Subsection (1)(c)).

The Supreme Court has held, under the Fifth and Sixth Amendments, that a defendant charged with crime and represented by counsel may voluntarily decide to speak to the police or prosecutor in the absence of the lawyer. A statement obtained under such circumstances is admissible against the defendant. See *Michigan v. Harvey*, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (Fifth Amendment); *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth as well as Fifth Amendment-based right to counsel subject to knowing and intelligent waiver); see also *Minnick v. Mississippi*, *supra*, 498 U.S. at 156, 111 S.Ct. at 492 (dicta) (precedent "does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities"). A federal court of appeals has nonetheless held that a local rule adopting a state's anti-contact rule may in some circumstances be binding on a prosecutor with respect to postcharge contact even if initiated by the defendant. See *United States v. Lopez*, 4 F.3d 1455 (9th Cir.1993) (prosecutor had duty to avoid direct communication with indicted nonclient represented by counsel).

*Comment i. A communication reasonably responding to an emergency.* No authority, either supporting or opposing the exception, has been found. This exception is justified by superior legal interest and creates no significant risk of harm to the represented nonclient.

*Comment j. A communication with the consent of the lawyer for the represented nonclient.* See ABA Model Rules of Professional Conduct, Rule 4.2 (1983) & ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969), both quoted in the Reporter's Note to Comment *b* hereto. The focus of the rule on consent by the nonclient's lawyer to the exclusion of the represented nonclient has been criticized by commentators. E.g., Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. Rev. 683 (1979); but see Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 Conn. B. J. 136 (1977). On the requirement of consent of opposing counsel regardless of the sophistication of the opposing client, see, e.g., *Estate of Vafiades v. Sheppard Bus Service, Inc.*, 469 A.2d 971, 978 (N.J.Sup.Ct.Law Div.1983) (personal-injury claimant's lawyer violated anti-contact rule through direct settlement discussions with liability-insurance company); *In re Illuzzi*, 616 A.2d 233 (Vt.1992) (same, in discipline case).

As indicated in the Comment, the represented nonclient is empowered to instruct the lawyer to consent (see § 21(2)), so that the practical effect of the allocation of power to consent is to disable clients unaware of their power to instruct their lawyer on the matter. Among the rare cases involving a lawyer refusing to accede to a client's demand that the lawyer consent to direct contact, see *Dagny Management Corp. v. Oppenheim & Meltzer*, 606 N.Y.S.2d 337 (N.Y.App. Div.1993) (lawyer subject to discharge and forfeiture of entire fee when lawyer, seeking to protect fee, appeared at closing and insisted, despite client's contrary instruction, that opposing party to transaction conduct all dealings through lawyer, including deposit of funds into lawyer's trust account).

Illustration 6 reflects what is believed to be the prevailing lawyer practice in such situations. No authority directly in point has been found. In such instances, application of the anti-contact rule to prevent the lawyer from

## Restat 3d of the Law Governing Lawyers, § 99

effectively assisting the client who seeks legal guidance on a lawful activity would be inconsistent with both client autonomy and the right to effective legal assistance.

*Comment k. A communication by a client with a represented nonclient.* E.g., ABA Model Rules of Professional Conduct, Rule 4.2, Comment P [1] (1983) ("parties to a matter may communicate directly with each other"); ABA Formal Opin. 92-362, at 5 (1992) (lawyer for party who wishes to communicate settlement offer directly to opposing party has "duty to that party to discuss . . . the freedom of the offeror-party to communicate with the opposing offeree-party"; but broad and complex questions of precisely what lawyer may advise client not decided); Cal. Formal Opin.1993-131 (1993) (lawyer need not attempt to dissuade client, may in fact encourage such client-client communications to efficiently settle or resolve dispute; lawyer prohibited only from initiating idea of contact or scripting it, but may otherwise advise and assist client concerning it); cf. Ass'n B. City N.Y. Ethics Opin.1991-2 (1991) (lawyer not required to dissuade client-client communication, but may not advise or encourage client to do so or advise client with respect to any negotiations that might ensue); Miano v. AC & R Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y.1993) (following City Bar opinion, but finding no violation on facts shown). Older ABA ethics opinions had asserted that a lawyer was required to attempt to discourage client-client communications, see ABA Formal Opin. 75 (1932) and 524 (1964), but those opinions have been withdrawn as inconsistent with both the ABA Model Code of Professional Responsibility (1969) and the ABA Model Rules, see ABA Formal Opin. 84-350 (1984). An attempt to broaden the anti-contact rule so as to prohibit a lawyer from advising a client with respect to client-client contacts was rejected during the process of developing the ABA Model Rules. See Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 148-49 (1987); see also, e.g., Crane v. State Bar, 635 P.2d 163 (Cal.1981).

*Comment l. A communication with class members.* On postcertification contact, see, e.g., Fulco v. Continental Cablevision, Inc., 789 F.Supp. 45, 47 (D.Mass.1992) (once court enters order certifying class, all class members become "represented party" for purposes of anti-contact rule); Haffer v. Temple University, 115 F.R.D. 506 (E.D.Pa.1987); Tedesco v. Mishkin, 629 F.Supp. 1474 (S.D.N.Y.1986); In re Federal Skywalk Cases, 97 F.R.D. 370 (W.D.Mo.1983). On precertification contact, compare, e.g., Babbitt v. Albertson's, Inc., 1993 WL 150300 (N.D.Cal.1993) (precertification communication by defense lawyer with putative class members not in violation of anti-contact rule); Gibbons v. CIT Group/Sales Fin., Inc., 400 S.E.2d 104 (N.C.Ct.App.1991) (affirming trial court order requiring counsel for both sides to notify other in writing within 24 hours of name and address of putative class member contacted, but otherwise permitting contact), with, e.g., Impervious Paint Ind., Inc., v. Ashland Oil, 508 F.Supp. 720 (W.D.Ky.) (pre-certification contact--during opt-out period--violates anti-contact rule), appeal dism'd, 659 F.2d 1081 (6th Cir.1981). On the constitutionality of carefully and narrowly drawn prohibitions against communications with represented class members in violation of the anti-contact rule, see, e.g., Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1205 (11th Cir.1985); In re San Juan Star Co., 662 F.2d 108, 116 (1st Cir.1981). Courts have thus uniformly held that the anti-contact rule is consistent with the holding of the Supreme Court in Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), that contact between a lawyer for the class and members of the class could be restricted by court order only if narrowly drawn and based on a demonstrated need for the restriction in the particular case. E.g., Bower v. Bunker Hill Co., 689 F.Supp. 1032, 1033 (E.D.Wash.1985).

*Comment m. Clarifying, protective, and remedial orders of a tribunal.* On expanding allowable contact, subject to protective measures, see, e.g., PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118 (W.D.Pa.1990) (lawyers could contact designated employees, but were first required to hand employees copy of court's opinion and instruct them to read it; at beginning of interview, lawyers must advise interviewees not to disclose privileged information); B.H. by Monahan v. Johnson, 128 F.R.D. 659, 661 (N.D.Ill.1989) (conditioning judicially permitted access on exclusion of any resulting statement from evidence as admission). Courts will not generally require a lawyer to notify the opposing lawyer to permit that lawyer also to attend the interview, fearing that such presence would seriously disrupt the value of the interview. E.g., In re Criminal Investigation No. 13, 573 A.2d 51, 55 (Md.Ct.Spec.App.1990); but cf. In re Opinion 668, 633 A.2d 959, 963 (N.J.1993) (interim rules, pending final resolution of breadth of anti-contact rules, require notification to opposing counsel before interviewing employees of represented organization whose conduct establishes organization's liability). On disallowing or limiting normally permissible contact in view of particular circumstances, see, e.g., United States v. Florida Cities Water Co., 1995 WL 340980 (M.D.Fla.1995) (in view of possible threat to revelation of privileged communications, government must provide notice to corporation and opportunity to attend ex parte interview of

former corporate managerial-level employees); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D.La.1992) (protective order entered precluding lawyer for class from further ex parte contact with any of defendant oil company's employees after lawyer obtained confidential documents from unknown employee).

*Comment n. Disqualification, evidence suppression, and related remedies.* On disqualifying a lawyer who has gained access to confidential information through violation of the anti-contact rules, see, e.g., *Faison v. Thornton*, 863 F.Supp. 1204 (D.Nev. 1993) (disqualification, fee sanction, and order excluding evidence); *MMR/Wallace Power & Indus. v. Thames Associates*, 764 F.Supp. 712 (D.Conn.1991) (lawyer disqualified following ex parte contact with former employee of adversary who had been member of adversary's litigation team); *Papanicolaou v. Chase Manhattan Bank*, 720 F.Supp. 1080, 1085-87 (S.D.N.Y.1989) (both lawyer and lawyer's firm, by imputation, disqualified in absence of proof that no lawyer in firm shared ill-gained confidential information); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 516 (Ky.1994). On injunctive relief, see, e.g., *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991). On professional discipline, see, e.g., *In re Wehringer's Case*, 547 A.2d 252 (N.H. 1988), cert. denied, 489 U.S. 1001, 109 S.Ct. 1103, 103 L.Ed.2d 169 (1989) (in divorce and child-custody dispute, negotiating settlement directly with represented wife after husband had kidnapped child and communicating husband's threat to take child out of country); *In re Waldron*, 790 S.W.2d 456 (Mo.1990).

On fines and fee-shifting under procedural-sanction rules, see, e.g., *Haffer v. Temple University*, supra (counsel for university violated anti-contact rule by communicating with members of class of women student-athletes in connection with pending sex-discrimination suit; sanctions include court-ordered corrective notice, substantial fine, and award of costs and attorney fees). On an offending party's liability in damages to the opposing lawyer, the general rule is that an adversary may not recover damages in the absence of privity or fraud, e.g., *Hacker v. Holland*, 570 N.E.2d 951, 958 (Ind.Ct.App.1991); *Sievers v. Liberty Mut. Ins. Co.*, 851 S.W.2d 529 (Mo.Ct.App.1992) (state does not recognize cause of action for intentional interference with physician-patient privilege); but see *Cross v. American Country Ins. Co.*, 875 F.2d 625 (7th Cir.1989) (insurer, who had settled with represented claimant in direct dealings unknown to claimant's lawyer, liable to claimant's lawyer for lost contingent fee and substantial punitive damages based on tortious interference with contract); *State Farm Mut. Ins. Co. v. St. Joseph's Hospital*, 489 P.2d 837 (Ariz. 1971) (same). Contacting a debtor individually who is known to be represented by counsel may constitute a violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(a)(2).

On excluding from evidence a statement taken in violation of an anti-contact rule in a civil matter, see, e.g., *Faison v. Thornton*, 863 F.Supp. 1204 (D.Nev.1993); *Insituform of North America, Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622 (S.D. Ohio 1991); *University Patents, Inc. v. Kligman*, 737 F.Supp. 325, 329 (E.D.Pa.1990); *Papanicolaou v. Chase Manhattan Bank*, supra, 720 F. Supp. at 1085-87; *Cagguila v. Wyeth Labs., Inc.*, 127 F.R.D. 653 (E.D.Pa.1989) (statement excluded, but witnesses could be called as witness by either side); *In re FMC Corp.*, 430 F.Supp. 1108 (S.D.W.Va.1977); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 516 (Ky. 1994); contra, *Nordhauser v. New York City Health & Hospitals Corp.*, 575 N.Y.S.2d 117, 120 (N.Y.App.Div. 1991). While an order requiring turnover of documentary and other material obtained in violation of the anti-contact rule would normally involve work product, work-product protection may not extend to material obtained through an anti-contact violation. E.g., *University Patents, Inc. v. Kligman*, supra, 737 F. Supp. at 329-30; *Haffer v. Temple University*, supra, 115 F.R.D. at 513 n.3; *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 379 (N.D.Ill.1982). See also, e.g., *Mintwood Corp. v. Fonseca*, 47 U.S.L.W. 2019 (D.C.Super.Ct.1978) (agreements with represented tenants, negotiated by lawyer for landlord in blatant disregard of anti-contact rule, voided as obtained through undue influence); *Coffman v. Poole Truck Line, Inc.*, 811 S.W.2d 908 (Tenn.Ct.App.1991) (new trial ordered where impermissible ex parte interview with opposing party's employee "neutralized" employee for purposes of trial testimony).

In determining whether to award particular remedies for a violation, a tribunal may be influenced by whether the inquiring lawyer gave prior notice (regardless of consent) to the opposing lawyer, see, e.g., *Cagguila v. Wyeth Labs., Inc.*, 127 F.R.D. 653, 654 (E.D.Pa.1989).

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# Ethical Grounds

## The Unofficial Blog of Vermont's Bar Counsel

### ABA opinion concludes that the "no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?

© SEPTEMBER 29, 2022 APRIL 16, 2024    👤 MICHAEL    💬 5 COMMENTS

The issue of whether a self-represented lawyer is subject to Rule 4.2's "no-contact" provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don't remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in [this post](https://vtbarcounsel.wordpress.com/2016/12/22/tbt-1990-is-a-self-represented-lawyer-subject-to-rule-4-2/) (<https://vtbarcounsel.wordpress.com/2016/12/22/tbt-1990-is-a-self-represented-lawyer-subject-to-rule-4-2/>) about the first decision ever issued after Vermont adopted a formal professional responsibility program.[1]

Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer* ([https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-502.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-502.pdf)). The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person's lawyer or unless the communication is otherwise authorized by law.

I appreciate the opinion for several reasons.



(<https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/01/legal-ethics.jpg>)

For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."

The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree. And amending the rule wouldn't be difficult.<sup>[2]</sup> Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- “In representing a client **or the lawyer’s own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . .”

In any event, that’s why I post today. To raise the question of whether to amend Rule 4.2.

To me, it’s an interesting question. Again, I don’t disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.[3] However, many of the rules include phrases like “when representing a client” or “in representing a client.” If, for the purposes of Rule 4.2, a self-represented lawyer is “representing a client,” it’s interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

I’m at risk of going on and on. So, I’ll stop. Please feel free to share thoughts, either in the comment section or by email to [Michael.Kennedy@vermont.gov](mailto:Michael.Kennedy@vermont.gov) (<mailto:Michael.Kennedy@vermont.gov>).

As always, let’s be careful out there.

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[1] PCB Decision 1 issued in August 1990, the same month that I began my first year in law school. While ostensibly about the application of no-contact rule to a self-represented attorney, the post was an excuse for me to include a picture taken around the same time. In that legions of Vermont lawyers may not now about my former flow, I’m sharing it again.



(<https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/09/image-4.png>)

[2] Nor would it be the first time the rule was amended in response to a debate over its meaning. For many years, the rule prohibited communication with a “represented party.” Indeed, in 1994, the VBA issued this [advisory opinion](https://www.vtbar.org/wp-content/uploads/2021/03/94-03.pdf) (<https://www.vtbar.org/wp-content/uploads/2021/03/94-03.pdf>) in which it stated that “[t]he use of the term ‘party’ . . . read in light of the purpose of the rule is reasonably interpreted as extending to any person represented by counsel in matters closely related to the subject matter of the client’s representation.” The next year, and in response to the debate, the ABA changed the Model Rule to “represented person.” Vermont followed suit when it adopted the Model Rules in 1999.

[3] There are situations that make me wonder if the rule, either as currently written or amended, should include safe harbors that allow a self-represented lawyer to communicate with a represented person in specified situations. For instance, if a lawyer is self-represented in a contested divorce, can the lawyer communicate with their spouse about issues that, arguably, fall under the umbrella of “parental rights & responsibilities” that are at issue in the litigation? The safe harbors are a topic for another day.

#### 📌 COMMUNICATING WITH A REPRESENTED PERSON

## 5 thoughts on “ABA opinion concludes that the ” no-contact” rule applies to self-represented lawyers. Should we amend Vermont’s rule?”

1.

**Monday Morning Honors #262 – Ethical Grounds** says:

October 3, 2022 at 9:32 am

[...] with a represented person without the consent of the represented person’s lawyer. See, this blog post. The post generated significant feedback. Then, we had an interesting discussion of [...]

2.

**The no-contact rule, represented organizations, and . . . basketball? – Ethical Grounds** says:

October 20, 2022 at 11:58 am

[...] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend... [...]

3.

**Update on the no-contact rule and represented organizations. – Ethical Grounds** says:

November 16, 2022 at 12:03 pm

[...] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend... [...]

4.

**With an assist from facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds**

says:

January 3, 2023 at 2:33 pm

[...] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend... [...]

5.

**Identified by facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds**

says:

January 3, 2023 at 2:36 pm

[...] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend... [...]

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# No Title in Original

September 28, 2022

## **Formal Opinion 502**

### **Communication with a Represented Person by a Pro Se Lawyer > Formal Opinion 502 Communication with a Represented Person by a Pro Se Lawyer**

Formal Opinion 502  
Communication with a Represented Person by a Pro Se Lawyer

## **Core Terms**

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pro se, ethic, communicate directly, court order, overreach, represented by counsel, revise, authorized by law, direct communication, majority opinion, disclosure

## **Text**

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*Under Model Rule 4.2,<sup>1</sup> if a person is represented in a matter, lawyers for others in the matter may not communicate with that represented person about the subject of the representation but instead must communicate about the matter through the person's lawyer, unless the communication is authorized by law or court order or consented to by the person's lawyer.*

*When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, both the language of the Rule and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle.*

*Accordingly, unless the pro se lawyer has the consent of the represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications.*

### **I. Introduction**

Model Rule 4.2, Communication with Person Represented by Counsel, is commonly known as the "no-contact" or "anticontract" rule.<sup>2</sup> It has been part of the ABA Model Rules of Professional Conduct since their 1983 inception in largely its present form.<sup>3</sup> The rule is "universally followed" in American jurisdictions.<sup>4</sup> It provides as follows:

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> ELLEN J. BENNETT & HELEN W. GUNNARSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (9th ed. 2019).

<sup>3</sup> In 1995, an amendment proposed by the ABA Standing Committee on Ethics and Professional Responsibility changed the term "party" to "person" in the text of the rule and revised the Comment. In 2002, amendments proposed by the ABA Ethics 2000 Commission added a reference to "court order" in the text of the rule and revised the Comment. See ART GARWIN, A

## No Title in Original

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 court order.

Viewed broadly, the rule requires that a lawyer's communications about a legal matter be routed through a represented person's lawyer; direct communication with the represented person about the subject of the representation is prohibited unless the lawyer has the consent of the represented person's lawyer or is authorized to engage in the communication by law or a court order. The rule "contributes to the proper functioning of the legal system" by preventing lawyers from overreaching, from interfering in other lawyers' relationships with their clients, and from eliciting protected information via "uncounselled disclosure."<sup>5</sup>

When a lawyer engages in self-representation in a legal matter in which that lawyer is personally involved, in other words, when a lawyer is acting pro se,<sup>6</sup> application of Model Rule 4.2 is less straightforward. Such a lawyer might not appear to be "representing a client" in the matter because the lawyer is acting solely on the lawyer's own behalf, i.e., "without a lawyer."<sup>7</sup> Moreover, the commentary to Rule 4.2 specifically states that "Parties to a matter may communicate directly with each other . . . ."<sup>8</sup> However, a pro se lawyer is representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle.<sup>9</sup>

This opinion analyzes applicability of Model Rule 4.2 and the rationale for the anticontact rule in the context of a lawyer engaged in self-representation. The opinion also provides guidance on the advisability in these situations of

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LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 558-66 (2013). Model Rule 4.2 can be traced back to Canon 9 of the 1908 ABA Canons of Professional Ethics, which stated that "[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 deal only with his counsel." The concept carried forward into the 1969 ABA Model Code of Professional Responsibility, DR 7-104(A)(1), which provided that a lawyer should not "communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 3-4 (1995) (recounting long history of anti-contact rule); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 799 (2009).

<sup>4</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000) [hereinafter RESTATEMENT THIRD].

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) ("the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"). See also RESTATEMENT THIRD, *supra* note 4 (purpose is to "protect against overreaching and deception of nonclients," protect "the relationship between the represented nonclient and that person's lawyer" and "assure [] the confidentiality of the nonclient's communications with the lawyer").

<sup>6</sup> Pro se is defined as "For oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (11th ed. 2019); see also definition of *propria persona* as "In his own person." *Id.*

<sup>7</sup> Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 325 (2003) ("On its face, the reference in the Rule to a lawyer 'representing a client' can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se, or is represented by another lawyer, in a matter in which she is interested.").

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4].

<sup>9</sup> See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS - THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("when a lawyer represents himself pro se, Rule 4.2 can be interpreted to prohibit the lawyer-party from communicating directly with an opposing represented party"); *In re Haley*, 156 Wash. 2d 324, 338, 126 P.3d 1262, 1269 (2006) ("we hold that a lawyer acting pro se is 'representing a client' for purposes of RPC 4.2(a)").

reaching advance agreement on the permissibility and scope of any direct pro se lawyer-to-represented person communications.<sup>10</sup>

## II. ANALYSIS

Although the general prohibition of Model Rule 4.2 is ubiquitous in U.S. jurisdictions, as applied to pro se lawyers the scope of the rule is less clear.<sup>11</sup> Interpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes.

The language in the Rule that is primarily at issue in this analysis is its first clause: " *In representing a client, a lawyer shall not . . .*"<sup>12</sup> The key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounselled disclosures, including inappropriate acquisition of confidential lawyer-client communications.<sup>13</sup> In the context of pro se lawyers, balanced against these policy goals is the principle that, as a general proposition, parties to a matter may communicate directly with each other.<sup>14</sup>

Yet, both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers. Pro se lawyers represent themselves as "a client," and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication. That said, it is important to remember that Model Rule 4.2 applies only when a communication is "about the subject of the representation," i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject of the representation. See Model Rules R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").<sup>15</sup>

### A. Model Rule 4.2 and Pro Se Lawyers

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<sup>10</sup> This opinion does not address the related question of applicability of Rule 4.2 when a lawyer is represented by another lawyer and the represented lawyer wishes to communicate with another represented person about the matter.

<sup>11</sup> Samuel J. Levine, *The Law and the "Spirit of the Law,"* 2015 Prof. Law. 1, 17 (2015) (noting the Model Rules do not expressly address a case in which a lawyer is proceeding as a pro se party to a matter) [hereinafter *Spirit of the Law*]; Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 37 (2011) (issue of whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel was not explicitly addressed in Model Rule 4.2).

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

<sup>13</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; RESTATEMENT THIRD, *supra* note 4.

<sup>14</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]. See also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client and observing that in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

<sup>15</sup> Note, however, that perspectives can differ in this context about whether a lawyer's effort to communicate with a represented person is beyond the scope of the rule. See *In re Steele*, 181 N.E.3d 976 (Ind. 2022) (rejecting respondent's contention that an email was not "about the subject of the representation" but rather "spoke only of matters involving friendship," a contention that was belied both by the language of the email itself, which thrice explicitly requested that the adverse party bypass their lawyer, and by the context in which it was sent, after two weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit).

## No Title in Original

Application of the Rule 4.2 anticontact principle to pro se lawyers is a well-documented ethical dilemma. There are decades worth of disciplinary cases,<sup>16</sup> civil cases,<sup>17</sup> and ethics opinions<sup>18</sup> concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person's lawyer, unless the communication is authorized by law or court order.<sup>19</sup> These authorities reason that a pro se lawyer is "representing a client" for purposes of Model Rule 4.2, and that the policy underlying the prohibition makes it clear that such communications are "ripe with potential for overreaching and exploitation,"<sup>20</sup> and that "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."<sup>21</sup>

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<sup>16</sup> *In re Steele*, 181 N.E.3d 976 (Ind. 2022); *The Florida Bar v. Faro*, Report of Referee, Florida Bar File 2014-70, 913 (11J) (July 24, 2017), available at [https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ILE/\\_461.PDF](https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ILE/_461.PDF).

ILE/\_461.PDF, ILE/\_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018); *In re Hodge*, 407 P.3d 613 (Kan. 2017); *Medina County Bar Association v. Cameron*, 958 N.E.2d 138 (Ohio 2011); *In re Lucas*, 789 N.W.2d 73 (N.D. 2010); *In re Haley*, 126 P.3d 1262 (Wash. 2006); *In re Schaefer*, 25 P.3d 191 (Nev. 2001); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex. Ct. App. 1999); *Office of Disciplinary Counsel v. Donnell*, 684 N.E.2d 36 (Ohio 1997); *Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996); *In re Smith*, 861 P.2d 1013 (Or. 1993) (application to corporate representation); *In re Segall*, 509 N.E.2d 988 (Ill. 1987) (application to corporate representation).

<sup>17</sup> *Fichelson v. Skorupa*, 13 Mass. L. Rptr. 458 (Mass. Super. Ct. July 31, 2001) (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed.)); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1993).

<sup>18</sup> Ala. State Bar Op. RO-85-52 (1985); Alaska Bar Ass'n Op. 95-7 (1995); D.C. Bar Op. 258 (1995); Haw. Disciplinary Bd. Op. 44 (2003); Mass. Bar Ass'n Op. 97-1 (1997); State Bar of Mich. Op. CI-1206 (1988); State Bar of Nev. Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 8 (1987); N.Y. City Bar, Formal Op. 2011-01 (2011); Va. State Bar Op. 1527 (1993) (application to corporate representation); Va. State Bar Op. 1890 (2020).

<sup>19</sup> Oregon has adopted a modified version of Model Rule 4.2 to address this issue. Or. Rules of Prof'l Conduct R. 4.2 ("In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject . . .").

<sup>20</sup> *The Florida Bar v. Faro*, Report of Referee, Florida Bar File 2014-70, 913 (11J), at 10 (July 24, 2017), [https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ILE/\\_461.PDF](https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ILE/_461.PDF).

Viewed in this light, it is not possible for a pro se lawyer to "take off the lawyer hat" and navigate around Rule 4.2 by communicating solely as a client. Consequently, the proposition, set forth in Comment [4] to Model Rule 4.2, that "[p]arties to a matter may communicate directly with each other" n22 does not apply to pro se lawyers. This proposition recognizes that, in general, the rules of professional conduct establish limits on lawyer behavior, not that of their clients. n23 22 23 The first clause of Model Rule 4.2-- " *In representing a client*, a lawyer shall not . . . ." n24--may be seen as creating an ambiguity as applied to lawyers representing themselves. The conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2. n25 A pro se lawyer is self-representing, i.e., "representing a client" for purposes of Model Rule 4.2. The risk in this situation of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures, is acute, outweighing the potential benefit of direct client-to-client communication. n26 Accordingly, unless a pro se lawyer has the consent of the other represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. n27 24 25 26 27

**B. Obtaining Consent for Client-to-Client Communication**

In certain situations, otherwise prohibited client-to-client communications involving a pro se lawyer may be beneficial. n28 If a pro se lawyer wishes in good faith to communicate with another represented person about the subject of the representation, that lawyer should contact the represented person's counsel and seek to obtain consent, providing an opportunity for that lawyer to object, consent, or consent by agreement to conditions under which such communications are to take place. If a lawyer receives such a request from a pro se lawyer, it is prudent to discuss with the client in advance the advisability of such communication, along with the risks and benefits of such communication. n29 In some circumstances it may be appropriate to advise the client not to communicate with the pro se lawyer. 28 29

Although a lawyer's decision to consent to a pro se lawyer's communication with the lawyer's client is within the lawyer's discretion and will depend on the circumstances, there are certain situations in which direct communication between a pro se lawyer and the represented person are likely necessary or appropriate such that consenting to the communication makes sense.

Conversely, consenting to a communication where the pro se lawyer appears to be overreaching for a strategic advantage--such as seeking the communication for a concession to an extension of time to produce documents, renegotiating terms of an agreed-upon contract, or calling to elicit disclosures--is not advisable.

Advance agreements between counsel for the represented person and the pro se lawyer are important to avoid disputes about compliance and ensure no disruption of Model Rule 4.2's protections. Thus, the agreement should be clear about the scope of any direct pro se lawyer-to-represented person communications. It would be prudent to memorialize the agreement in writing.

### III. CONCLUSION

Under Model Rule 4.2, in representing a client, a lawyer may not communicate with a person the lawyer knows is represented by counsel about the subject of the representation, unless that person's counsel has consented to the communication, or the communication is authorized by law or court order. When a lawyer is participating in a matter pro se, that lawyer is engaged in self-representation and is therefore subject to Model Rule 4.2's prohibition.

### DISSENT

I must respectfully dissent from the conclusion of the well-written majority opinion because I cannot agree that "both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers." While the *purpose* of the rule would clearly be served by extending it to self-represented lawyers, its language clearly prohibits such application. Again, Model Rule 4.2 states:

*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 court order. [Emphasis added.]

Our majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule. It is not uncommon for ethics committees to weigh in when there is such a split. But it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments.

The interpretation of our majority opinion and the ethics and discipline opinions cited therein depend upon the conclusion that, "A pro se lawyer is self-representing, i.e., 'representing a client' for purposes of Model Rule 4.2." Majority Opinion, at p. 5. This logic provides the rationale for cases holding that the rule applies to pro se lawyers. n1 The number of opinions following this approach is not convincing if the analysis is not persuasive; error compounded is still error. <sup>1</sup>

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction. n2 <sup>2</sup>

It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it does in Connecticut, Kansas, and Texas? n3 Or, does it mean what we wish it said, as several other states have declared? <sup>3</sup>

Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, n4 cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, n5 and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers. n6 <sup>4 5 6</sup>

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Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. n7 By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion. <sup>7</sup> Mark Armitage Robinjit Eagleson

ILE/\_461.PDF, ILE/\_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018).

<sup>22</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) ("Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.").

<sup>23</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Model Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS - THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("The rule governs lawyer, not their clients . . ."). It is well established, however, that a lawyer cannot direct client-to-client communication as a way of evading Model Rule 4.2's prohibition. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) (when advising a client about direct client-to-client communication, the line between permissible advice and impermissible assistance "must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2"). In the pro se lawyer situation, it is not feasible to parse the distinction between a lawyer acting as a lawyer and a lawyer acting as a client.

<sup>24</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

<sup>25</sup> See, e.g., Md. Bar Ass'n Ethics Comm., *Can Pro Se Lawyer Speak with A Represented Party over the Objection of the Party's Lawyer?*, MD. B.J., Sept./Oct. 2006, at 57, 59 ("We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive."). We recognize that a handful of authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion. See RESTATEMENT THIRD, *supra* note 4, cmt. e, at 73 ("[a] lawyer representing his or her own interests pro se may communicate with an opposing represented non-client on the same basis as any other principals."). The Reporter's Note, however, recognizes that "The position of the ABA ethics committee is probably contrary to that in the Section and Comment . . ." *Id.* Reporter's Note on Illustration 3 (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967)). See also *In re Benson*, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003); Texas Ethics Comm'n Advisory Op. 653 (Jan. 2016); Cal. Rules of Prof'l Conduct R. 4.2, cmt. 3 ("The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person\* in that matter."). Cf. N.Y. Rules of Prof'l Conduct R. 4.2(c) ("A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.").

<sup>26</sup> See generally *Spirit of the Law*, *supra* note 11 ("The methodologies courts have employed to expand the scope of the no-contact rule to include pro se lawyers exemplify the potential relevance of a spirit of the law approach for the interpretation of ethics codes."). Recognizing the significance of Rule 4.2's underlying public policy, an Illinois appellate court upheld application of Rule 4.2 to a non-lawyer pro se plaintiff in a civil case. See *Zemater v. Village of Waterman*, 157 N.E.3d 1069, 1074 (Ill. App. 2020) ("Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship.").

<sup>27</sup> This conclusion is consistent with this Committee's 1967 analysis of Canon 9 of the former Canons of Professional Ethics. See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967) (attorney who is a defendant in a case may not settle the case directly with the plaintiff who is represented by counsel without the knowledge of the plaintiff's counsel).

## No Title in Original

Formal Opinion 502  
 Communication with a Represented Person by a Pro Se Lawyer

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<sup>28</sup> See *Att'y Grievance Comm'n of Maryland v. Trye*, 444 Md. 201, 221, 118 A.3d 980, 991 (2015) (noting that "direct communication between the principals--leaving the lawyers out of the room--is sometimes the path to settlement of a dispute").

<sup>29</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

<sup>1</sup> See, e.g., *In re Haley*, 126 P.3d 1262 (Wash. 2006) (forthrightly summarizing authorities and all of the reasons one might think the rule means what it says, but noting that jurisdictions considering the question "have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se"). See also *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 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.").

<sup>2</sup> See "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

<sup>3</sup> See *Pinsky v. Statewide Grievance Comm.*, 216 Conn. 228, 236, 578 A.2d 1075, 1079 (1990) ("plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client"); *In re Benson*, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003) ("violation of KRPC 4.2 was not shown to have occurred, as the rule applies only to acts done '[i]n representing a client.'"); and *Texas Comm. on Prof'l Ethics Op. 653* (2016) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer.").

<sup>4</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(b), and cmt. (e) thereto ("A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals").

<sup>5</sup> See, e.g., *In re Discipline of Shaeffer*, 25 P.3d 191, 199-202 (Nev. 2001), and *In re Disciplinary Proceeding Against Haley*, 156 Wash. 2d 324, 1267-69; 126 P.3d 1262 (2006).

<sup>6</sup> See, e.g., Or. Rules of Prof'l Conduct R. 4.2: "In representing a client or the lawyer's own interests, a lawyer shall not communicate . . ." (emphasis added).

<sup>7</sup> See, e.g., Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 324-329 (2003) (tracing the Ethics 2000 Commission's failure to address the problem pointed out by the author and others and recommending that states adopt a rule with language clearly prohibiting contact by pro se lawyers); Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 38 (2011) (recognizing the split, asserting that the rule does not answer the question and consulting the purpose should be done, but stating: "It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers."); and Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 831 (2009) (also recognizing this mess and concluding: "We therefore propose changing the text of the Rule from 'In representing a client, a lawyer shall not . . . ' to 'A lawyer participating in a matter shall not . . . '").

<sup>21</sup> *In re Schaefer*, 25 P.3d 191, 199 (Nev. 2001).

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# In re Discipline of Haley

Supreme Court of Washington

May 10, 2005. ; January 26, 2006, File

No. 200,153-0

## Reporter

156 Wn.2d 324 \*; 126 P.3d 1262 \*\*; 2006 Wash. LEXIS 115 \*\*\*

*In the Matter of the Disciplinary Proceeding Against JEFFREY T. HALEY, an Attorney at Law.*

## Subsequent History: [\*\*\*1]

Related proceeding at In re Discipline of Haley, 157 Wn.2d 398, 138 P.3d 1044, 2006 Wash. LEXIS 601 (Wash., July 27, 2006)

**Counsel:** *Jeffrey T. Haley*, pro se.

*Randy V. Beitel*, for the bar association.

**Judges:** Authored by Susan Owens. Concurring: James Johnson, Barbara A. Madsen, Bobbe J. Bridge, Charles W. Johnson, Richard B. Sanders, Tom Chambers. Dissenting: Gerry L Alexander, Mary Fairhurst.

**Opinion by:** Susan Owens

## Opinion

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En Banc.

[\*\*1263] [\*327] P1 OWENS, J. -- Attorney Jeffrey T. Haley appeals the recommendation of the Disciplinary Board of the Washington State Bar Association (Board) that he serve two six-month suspensions pursuant to counts 2 and 3 of his disciplinary proceedings. Regarding count 2, the Board determined that Haley was subject to a six-month suspension for knowingly violating RPC 4.2(a), which provides that, "[i]n representing a client, a lawyer shall not communicate . . . with a party . . . represented by another lawyer." The Board concluded as to count 3 that Haley was subject to a six-month suspension for knowingly violating RPC 1.7, which prohibits a lawyer from representing a client if the representation is "directly adverse to another client" or "may be materially limited by . . . the; lawyer's own interests." RPC 1.7(a), (b). The Board recommended allowing Haley to serve the two six-month suspensions concurrently. [\*\*\*2] The Washington State Bar Association (WSBA) agrees that two six-month suspensions are appropriate but maintains that the suspensions should run consecutively.

P2 Although we hold that, under RPC 4.2(a), a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter, we apply our interpretation [\*328] of RPC 4.2(a) prospectively only and dismiss the violation alleged in count 2. We agree that the presumptive sanction for Haley's knowing violation of RPC 1.7 is a suspension, but we conclude that a departure from the Board's recommendation is warranted, particularly in light of the considerable delay in reporting and prosecuting the misconduct. For Haley's violation of RPC 1.7, we therefore impose a reprimand.

FACTS

[1] P3 Counts 2 and 3 of the WSBA's complaint against Haley arose out of separate sets of events that occurred in 1996-1997 and 1988-1991, respectively. Haley does not challenge any finding of fact as made by the hearing examiner or adopted by the Board. Accordingly, such facts are considered verities on appeal to this court. *In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 582, 70 P.3d 940 (2003).<sup>1</sup>

**\*\*\*3]** P4 *Count 2*. In 1994, Haley filed a lawsuit against Carl Highland, the former chief executive officer of a defunct closely held corporation, Coresoft, of which Haley was formerly a shareholder and board member. **\*\*1264]** Initially, Haley acted pro se in the matter but hired counsel when the case went to trial in November 1995. After the trial ended, Haley's counsel filed notice of withdrawal and Haley reverted to pro se status as to appeal and collection issues. Highland was represented by various attorneys at all times during this matter, and Haley knew that Highland was consistently represented by counsel.

P5 The hearing officer and Board concluded that Haley's improper contact with a represented party arose out of two incidents. First, while Haley was acting pro se after the trial, he sent a letter to Highland and his wife proposing **[\*329]** settlement. The letter was dated September 9, 1996, and stated in full as follows:

"I am about to spend approximately \$ 25,000 on costs and attorneys fees for the appeal. If the appeal is successful, the personal earnings of both Ronda Hull and Carl Highland will be subject to garnishment to satisfy my judgment and the judgment now held by Carl Highland will **\*\*\*4]** be overruled. Also, the amount I am about the [sic] spend on costs and attorneys fees will be added to the judgment.

"This is the last opportunity to settle the case before I spend the money on the appeal. This settlement offer will not be open after this week and may be withdrawn at any time if it is not promptly accepted. I am offering that all claims and judgments between the parties be releases [sic] with no payments. Please respond directly to me."

Decision Papers (DP) at 38. Highland forwarded the letter to his attorney who, in turn, suggested to Haley that the letter constituted a violation of RPC 4.2(a) and warned him not to have any further contact with Highland. Second, on January 31, 1997, Haley again contacted Highland, this time by telephone. Haley left the following voice message on Highland's phone:

"Carl, this is Jeff Haley . . . .

"I hope your attorneys have told you . . . Jim Bates decided that your judgment against me is collectable only from my separate assets and I have none; they're all community assets. And, therefore, your judgment is uncollectable (sic). And the chance for appeal of that determination by Jim Bates has run so you **\*\*\*5]** can't appeal it . . . so that if the appeal proceeds my position can only improve and yours can only get worse and if you have nothing collectable . . . there's no chance of ever getting anything collectable. It seems to me that we ought to settle this case and if we do so Monday . . . there'll be an opportunity on Monday to do so if you're interested. Give me a call."

DP at 41.

P6 In his "Amended Findings of Fact and Conclusions of Law," the hearing officer stated that Haley's letter and phone message were "clearly prohibit[ed]" by RPC 4.2(a), **[\*330]** DP at 46, but he acknowledged that there was some authority supporting Haley's position that attorneys acting pro se are not subject to the prohibition. DP at 46-47. Ultimately, in his "Additional Findings of Fact, Application of Standards, and Recommendation," the hearing officer determined that, "because of the specific language of RPC 4.2 (i.e., 'In representing a client . . . .') and because of the apparent absence of authority within the state of Washington on this specific issue, Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited." DP at 63. Consequently, the hearing officer **\*\*\*6]** concluded that the violation was "negligent" and that the presumptive

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<sup>1</sup> The WSBA's motion to strike the appendix attached to Haley's brief is granted pursuant to RAP 10.3(a)(7), but the motion for terms of \$ 500 is denied. Haley's motion to file additional briefing and submit a declaration of authenticity by Nicholas Corff is denied. Notably, the substance of the materials disputed in these motions is not germane to our resolution of the issues in this case.

sanction was thus a reprimand. *Id.* (citing ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS std. 6.33 (1991 & Supp. 1992) (ABA STANDARDS)).

P7 Deleting the hearing officer's conclusion that Haley's violation was negligent, the Board substituted its contrary determination that "Haley's mental state was knowledge" and that the presumptive sanction was therefore a suspension. DP at 7 (citing ABA STANDARDS std. 6.32). In doing so, the Board took note that Haley knew Highland was **[\*\*1265]** represented by counsel at all times and stated that a "reasonable reading of RPC 4.2 prohibits a lawyer, while representing him [self] or herself, from contacting a represented party." DP at 7-8. The Board also faulted Haley for not "taking time to determine whether his conduct was an ethical violation." DP at 8.

P8 *Count 3.* In 1988, Haley and four other individuals formed Coresoft, a Washington corporation in the software development business. The four other shareholder/directors were Nicholas Corff, Donald Padleford, Randolph Cerf, and Bruce Haley. In addition to being a shareholder, board member, and secretary of Coresoft, Haley also **[\*\*\*7]** served as the principal lawyer for the company.

P9 In raising capital for Coresoft, the corporation obtained a \$ 75,000 line of credit directly from Key Bank, which was personally guaranteed by the Coresoft shareholder/directors. This credit was properly secured with a **[\*331]** security agreement and UCC-1 financing statement, see chapter 62A.9A RCW, and, as a result, Key Bank maintained a first priority security interest in Coresoft's assets. Additional capital was obtained in the form of \$ 40,000 loaned to Coresoft by Haley in 1988, the funds for which Haley obtained via personal loan. Haley obtained a promissory note from Coresoft and a signed UCC-1 financing statement as part of the loan transaction. However, there was no separate security agreement securing the note, and the UCC-1 financing statement was not filed until October 1990.<sup>2</sup> Haley's purported security interest had second priority behind Key Bank's interest.

**[\*\*\*8]** P10 In late 1990, the Coresoft board of directors came to realize that the company's financial viability was hopeless. The board concluded that the best option was to form another corporation that would purchase Coresoft's assets for an amount at least covering the \$ 75,000 from Key Bank and, thereby, discharge all personal liability they had individually incurred by guaranteeing the line of credit. With the agreement or acquiescence of the board, Haley undertook the following course of action: (1) Haley formed a new corporation, known as Star Software, for the purpose of purchasing Coresoft's assets while leaving as many liabilities as possible behind;<sup>3</sup> (2) Haley conducted a foreclosure sale on Coresoft's assets, which he appeared to be in a position to do as a second priority security interest holder; and (3) acting as Star Software's attorney, the only bidder **[\*332]** at the sale, Haley purchased Coresoft's assets for an amount that covered both Key Bank's \$ 75,000 and the \$ 26,000 remaining due on Haley's \$ 40,000 loan to Coresoft. Coresoft became defunct on February 1, 1991.

**[\*\*\*9]** P11 Haley concedes that conflicts of interest arose out of this series of events. Specifically, Haley's duty to Coresoft and its shareholders conflicted with his interests in recovering on his personal loan and in moving Coresoft's assets to his new client, Star Software, at the lowest possible price. The hearing officer found that Haley made certain that Star Software took on only those assets and liabilities beneficial to the new company, including foreclosing on assets not covered by his UCC-1 financing statement. The hearing officer also found Haley's actions harmful or potentially harmful to Coresoft **[\*\*1266]** and its shareholders. While the Coresoft board members agreed to the formation of Star Software and the foreclosure sale, Haley did not obtain an informed written consent from

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<sup>2</sup>Under the Uniform Commercial Code, as adopted in Washington, a security interest in collateral becomes enforceable when "[t]he debtor has authenticated a security agreement that provides a description of the collateral." RCW 62A.9A-203(b)(3)(A). Perfection of a security interest (i.e., acquiring priority over unperfected security interests and lienholders under RCW 62A.9A-317) generally requires filing a UCC-1 financing statement. RCW 62A.9A-310(a). Given these rules, the absence of a separate security agreement and Haley's failure to file the UCC-1 financing statement until Coresoft was failing may have allowed Coresoft to void his security interest; thus, Coresoft and its shareholders might have been in an economic position that was potentially more favorable than they were aware of.

<sup>3</sup>Of the original Coresoft shareholders, only Haley and his brother Bruce became shareholders in Star Software. The other Coresoft shareholders declined Haley's invitation to invest in the new company.

Coresoft before the sale to Star Software.<sup>4</sup> The hearing officer concluded that Haley acted "with knowledge" and that the presumptive sanction for the violation was a suspension. DP at 64-66 (citing ABA STANDARDS std. 4.32).

**\*\*\*10** P12 The Board adopted the hearing officer's analysis of the presumptive sanction, but two members of the Board dissented, contending that Haley's failure to obtain written consent was merely negligent and that a reprimand would be the appropriate presumptive sanction.

P13 *Recommended Sanctions for Counts 2 and 3.* The hearing officer found three aggravating factors (prior disciplinary offense, multiple offenses, and substantial experience) and two mitigating factors (cooperative attitude and delay in the disciplinary proceedings). See ABA STANDARDS stds. 9.22(a), (d), (i); 9.32(e), (j). The hearing officer recommended that Haley be reprimanded for the count 2 violation and suspended for 60 days for the count 3 violation. Having **\*\*\*333** adopted the hearing officer's aggravating and mitigating factors, the Board recommended a six-month suspension for each count, with the two suspensions to be served concurrently.

## ISSUES

P14 1. Does RPC 4.2(a) prohibit a lawyer who is acting pro se from contacting a party who is represented by counsel? If so, should the rule be applied in the present case?

P15 2. What is the appropriate sanction for Haley's violation of RPC 1.7

## ANALYSIS

[2] [3] [4] [5] P16 *Standard of Review.* **\*\*\*11** When a lawyer discipline decision by the Board is appealed, this court has "plenary authority" on review. *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 716, 72 P.3d 173 (2003). While we "do[] not lightly depart from the Board's recommendation," we are "not bound by it." *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000). The court reviews conclusions of law de novo. *Whitt*, 149 Wn.2d at 716-17. We have "the inherent power to promulgate rules of discipline, to interpret them, and to enforce them." *In re Disciplinary Proceeding Against Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161 (1982) (emphasis added); see also ELC 2.1 (recognizing this court's "inherent power to maintain appropriate standards of professional conduct").

[6] P17 *Applicability of RPC 4.2(a) to Lawyer Acting Pro Se.* RPC 4.2(a) reads in full as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 **\*\*\*12** by law to do so.

**\*\*\*334** The rule is virtually identical to model rule 4.2. See ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003)(ABA ANNOTATED MODEL RULES) rule 4.2. While we have not formally adopted the commentary to the ABA *Annotated Model Rules*, we have noted that it "may be 'instructive in exploring the underlying policy of the rules.'" *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002) (quoting *State v. Hunsaker*, 74 Wn. App. 38, 46, 873 P.2d 540 (1994)). As the comment to model rule 4.2 explains, the rule aims to protect those represented by counsel "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."<sup>5</sup> **\*\*\*1267** In *Carmick*, we acknowledged that "[t]he rule's purpose is to prevent situations in which a represented party is taken advantage of

<sup>4</sup>None of Coresoft's shareholder/directors are complaining parties in this disciplinary matter. The grievance was filed by Highland after Haley initiated the litigation described in count 2.

<sup>5</sup>ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. The annotation to model rule 4.2 summarizes that "Rule 4.2 preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that clients will disclose confidential or damaging information." *Id.* at 418 (citing ABA Formal Ethics Op. 95-396 (1995)).

by adverse counsel." 146 Wn.2d at 597 (citing *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 197, 691 P.2d 564 (1984)).

**\*\*\*13** P18 At issue in the present case is whether RPC 4.2(a) applies to lawyers acting pro se -- or, more precisely, whether a lawyer who is representing himself or herself is, in the words of RPC 4.2(a), "representing a client." This court has not previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question. Other jurisdictions that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se. See *In re Segall*, 117 Ill. 2d 1, 5-6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons*, 184 W. Va. 183, 185, 399 S.E.2d 894 (1990); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *Runsvold v. Idaho State Bar*, 129 Idaho 419, 420-21, 925 P.2d 1118 **\*\*\*335** (1996); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex. Ct. App. 1999); *In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191 (2001).

P19 Haley asks this court to take the contrary view and hold that the plain meaning **\*\*\*14** of the word "client" in RPC 4.2(a) precludes application of the rule to a lawyer acting pro se. The word "client" is variously defined as "(a) person or entity that employs a professional for advice or help in that professional's line of work," BLACK'S LAW DICTIONARY 271 (8th ed. 2004), and "a person who engages the professional advice or services of another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 422 (2002). Thus, for the rule to apply to lawyers acting pro se, such lawyers would, in effect, be employing or engaging themselves for advice, help, or services. This, as Haley contends, suggests that lawyers who are acting pro se are excluded from the scope of the rule because such lawyers have no client.

P20 In the alternative, Haley maintains that, even if RPC 4.2(a) were construed to restrict pro se lawyers from contacting represented parties, we should conclude that the rule as applied to him, a lawyer proceeding pro se, was unconstitutionally vague, violating his constitutional due process rights. Such a resolution finds support in *Schaefer*, 117 Nev. 496. There, the Nevada State Supreme Court relied on the principle that "a statute or **\*\*\*15** rule is impermissibly vague if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 511 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).<sup>6</sup> The **\*\*\*336** *Schaefer* court based its determination that Nevada's Supreme Court Rule 182, a rule identical to RPC 4.2(a), was unconstitutionally vague on "the absence of clear guidance" from the Nevada State Supreme Court and on "the existence of conflicting authority from other jurisdictions." 117 Nev. at 512; see *State Bar of Tex. v. Tinning*, 875 S.W.2d 403, 408 (Tex. App. 1994) **\*\*\*1268** (applying standard that "statute, rule, regulation, or order is fatally vague only when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the proscribed conduct"); see also *In re Ruffalo*, 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (holding that, in state disbarment proceeding, "absence of fair notice as to the reach of the grievance procedure" violated attorney's **\*\*\*16** due process rights).

P21 Both factors relied on in *Schaefer* are present here. First, as noted above, no prior opinion of this court has addressed the application of RPC 4.2(a) to lawyers proceeding **\*\*\*17** pro se. Second, in late 1996 and early 1997 when Haley contacted Highland, authority permitting such contacts counterbalanced the prohibitions then existing from four jurisdictions. See *Segall*, 117 Ill. 2d at 5-6 (1987); *Simmons*, 184 W. Va. at 185; *Sandstrom*, 880 P.2d at

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<sup>6</sup>The dissent recalls that in *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991), we cited *Connally* but nevertheless "affirmed sanctions against a physician for violating a statute prohibiting "moral turpitude" although we recognized 'uncertainties associated with' the statutory language in question." Dissent at 353 (quoting *Haley*, 117 Wn.2d at 740). The dissent fails to acknowledge, however, that more recently in *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 998 P.2d 833 (2000), this court distinguished *Haley* and declined to find a violation of RLD 1.1 ("Commission of Act of Moral Turpitude") because "a bright-line rule prohibiting attorney-client sexual relations [did] not exist." *Id.* at 491-92.

108-09; *Runsvold*, 129 Idaho at 420-21.<sup>7</sup> The comment to rule 2-100 of the California RPC, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

[T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

**[\*337]** Cal. RPC 2-100 discussion P2. Likewise, a comment **[\*\*\*18]** to the restatement specifically provides that "[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).

P22 Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

(A) During the course of the lawyer's representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate . . . with a person the **[\*\*\*19]** lawyer knows to be represented by a lawyer. . . . *This prohibition includes a lawyer representing the lawyer's own interests.*

<sup>8</sup> **[\*\*\*21]**

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "[p]arties to a matter may communicate directly with each other." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990), appears to call into question the policy concerns supporting the **[\*\*1269]** application **[\*338]** of RPC 4.2(a) to lawyers acting pro se. In *Pinsky*, the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, **[\*\*\*20]** who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "(c)ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that *Pinsky* was not "representing a client" as stated in the rule. *Id.* at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a)-- the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro

<sup>7</sup> Looking no further than these four cases, the dissent ignores the counterbalancing authority found in rules, commentaries, and case law from other jurisdictions. Dissent at 352.

<sup>8</sup> *In re Conduct of Smith*, 318 Or. 47, 49 n.1, 861 P.2d 1013 (1993) (quoting DR 7-104(A)(1). Oregon's RPC 4.2 (adopted effective Jan. 1, 2005) likewise makes explicit that the prohibition applies to lawyers acting pro se: "In representing a client or the lawyer's own interests, a lawyer shall not communicate . . . with a person the lawyer knows to be represented by a lawyer. . . ." (Emphasis added.)

se would pose a greater threat of overreaching than would contacts from a represented lawyer-party,<sup>9</sup> *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

[7] P23 In sum, consistent with the resolution of the same issue in *Schaefer* we hold that a lawyer acting pro se is "representing a client" for purposes of RPC 4.2(a), but given the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries, we find the rule impermissibly vague as to its applicability to pro se attorneys and thus apply our interpretation of the rule prospectively only.<sup>10</sup> We therefore dismiss the violation alleged in [\*339] count 2. We need not reach Haley's alternative contention that the application of RPC 4.2(a) to his communications with Highland violated his free speech rights.

\*\*\*22] [8] [9] [10] P24 *Sanction Analysis for Violation of RPC 1.7* Our court has determined that the ABA Standards should guide our determination of appropriate sanctions in bar disciplinary cases. *In re Disciplinary Proceeding Against Johnson*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990); *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Under the ABA Standards, after misconduct is found, the court performs a two-part analysis. *Halverson*, 140 Wn.2d at 492-93. First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. *Id.* Second, the court considers aggravating and mitigating factors, which may alter the presumptive sanction or decrease or lengthen a suspension. *Id.* at 496; see ABA STANDARDS stds. 9.22, 9.32. The court will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision. See *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 259, 66 P.3d 1057 (2003) [\*\*\*23] (holding that the court would "retain the Noble factors of proportionality and degree of unanimity, but discard the remaining three as redundant due to the existence of similar provisions in the Standards and the ELC"); *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95-96, 667 P.2d 608 (1983) (identifying five factors to be considered in determining appropriate sanction).

\*\*1270] [11] [12] P25 The determination of the presumptive sanction is straightforward. Haley concedes that his dual representation of Coresoft and Star Software was prohibited by RPC 1.7(a) and his representation of Coresoft was materially limited under RPC 1.7(b) by his own interest in [\*340] foreclosing on his security interest and transferring Coresoft's assets to Star Software. Therefore, we look to the presumptive sanctions for conflict of interest violations under RPC 1.7:

Suspension is generally appropriate when a lawyer *knows of a conflict of interest* and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Reprimand is generally appropriate when a lawyer is *negligent in determining whether the representation* [\*\*\*24] *of a client may be materially affected* by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABA STANDARDS stds. 4.32, 4.33 (emphasis added). As to Haley's mental state, the hearing officer concluded that Haley "could not have reasonably believed that the representation of his own interests as a secured party (if, indeed, he was a secured party) or that his role as lawyer for, officer of, and shareholder of Star Software were not directly adverse to, or materially limited by his responsibilities to Coresoft." DP at 47. Haley offers no argument that

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<sup>9</sup> That a lawyer-party seeks representation may at least suggest that he or she does not have "the superior knowledge and skill of the opposing lawyer" in the subject of the litigation, a circumstance that would arguably diminish the risk of overreaching in the represented lawyer-party's contacts with other represented parties. *Pinsky*, 216 Conn. at 236.

<sup>10</sup> We join the dissent's rejection of "the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity -- a criminal law doctrine." Dissent at 354. As we stated in *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 667 P.2d 608 (1983), "because we are committed to the proposition that discipline is not imposed as punishment for the misconduct, then our primary concern is with protecting the public and deterring other lawyers from similar misconduct." *Id.* at 95.

he failed to recognize that the conflicts of interest existed, and the conclusion by the Board and hearing officer that Haley knew there was a conflict is well supported by the record. In particular, Haley went to members of Coresoft's board of directors for oral authorization regarding some of his actions. It is also undisputed that Haley's actions created the potential for harm to Coresoft and its shareholder/directors. Consequently, Haley is subject to standard 4.32, which makes suspension the presumptive sanction when a lawyer [\*\*\*25] knows of a conflict and causes potential injury to a client.<sup>11</sup>

[\*341] P26 Having determined that suspension is the presumptive sanction under the ABA *Standards*, we next turn to the aggravating and mitigating factors under standards 9.22 and 9.32. The hearing officer determined that three aggravating factors were present: a prior disciplinary offense, multiple offenses, and substantial experience in practice. See ABA *Standards* stds. 9.22(a), (d), (i). The hearing officer identified as mitigating factors Haley's cooperative [\*\*\*26] attitude and the substantial delay in the proceedings. See *id.* at stds. 9.32(e), (j).

[13] P27 As an initial matter, we note that the "prior disciplinary offense" aggravating factor is no longer present given our resolution of the RPC 4.2(a) issue. In finding that Haley had a prior disciplinary offense, the hearing examiner relied on an unrelated violation of RPC 4.2(a) for which Haley was censured in 1999. The conduct underlying that violation occurred in March 1996, and the subsequent grievance was filed sometime before May 10, 1996, when it was reported to Haley. See Ex. 27. Conversely, the findings of fact indicate that Highland's grievance against Haley relating to the violation of RPC 1.7 could not have been made to the WSBA earlier than July 1996. See DP at 68 (noting the two grievances leading to this matter were filed in July 1996 and February 1997). We have previously held that an after-the-fact offense operates as a prior offense for aggravating factor purposes as long as the lawyer knew he or she was under investigation for the older offense when committing the more recent offense. *Brothers*, 149 Wn.2d at 586. However, that holding has no application [\*\*\*27] in this case because nothing in the record suggests that [\*\*1271] Haley was under investigation for the RPC 1.7 violation when the so-called "prior offense" (Haley's March 1996 violation of RPC 4.2) occurred. As a result, we are left to consider only the two remaining mitigating and aggravating factors.

[14] P28 The mitigating factors present in this case, in particular the delay in the disciplinary proceedings, are significant enough to justify altering the presumptive sanction. In *Tasker*, this court found the delay in prosecution "so substantial" and "so compelling" as to reduce the presumptive [\*342] sanction from disbarment to a two-year suspension. 141 Wn.2d at 570. *Tasker's* violations occurred and began to be investigated by the WSBA in 1993-1994. *Id.* at 561-62. However, the WSBA's formal complaint against *Tasker* was not filed until February 1998. *Id.* at 562. In relying on delay as the factor tipping the balance toward suspension, the court recognized that *Tasker* did not cause the delay, that he was subject to the opprobrium of his legal community in the interim, and that the delay resulted from understaffing and slack prosecution by the WSBA. *Id.* at 568. [\*\*\*28] Here, Haley's violation of RPC 1.7 occurred in 1990-1991 but was not reported to the WSBA until July 1996. The formal complaint was not filed until November 21, 2000. Thus, the delay between the grievances and formal complaint in both *Tasker* and this case spanned approximately four years. We must also take note that the substantial delay between Haley's violations and the grievance have now resulted in a near 15-year delay in resolving this case, which weighs heavily in favor of altering the presumptive sanction.<sup>12</sup>

[15] P29 In contrast to the substantial delay factor, the two remaining aggravating factors are relatively insignificant in this case. First, the "substantial experience in practice" aggravating factor [\*\*\*29] is not marked by an exceedingly long period of prior practice. Haley became a member of the Washington bar in 1979 and began practicing law in 1982. Thus, at the time of the violation of RPC 1.7, Haley had been in practice approximately 8 to

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<sup>11</sup> Haley does contend that the Board erred in concluding that his violation of RPC 1.7 was done knowingly, suggesting that he was merely negligent in failing to obtain written consent rather than oral consent. This argument is without merit. There is no intent element related to obtaining informed written consent, which either exists or does not. If written consent does exist, there is simply no violation of the RPCs, and the ABA *Standards* for imposing discipline are inapplicable.

<sup>12</sup> Haley agreed not to present argument regarding the "substantial delay" factor in consideration for an extension of time before review by the Board. Clerk's Papers at 371. However, substantial delay is an unchallenged finding by the hearing officer, and this court remains free to consider its effect.

10 years. Second, the "multiple offenses" aggravating factor is largely obviated by our holding that Haley did not violate RPC 4.2(a). Instead, we are left only with the hearing officer's finding that "each count itself reflects multiple events constituting misconduct." DP at 67. While Haley's violation of RPC 1.7(a) and (b) occurred more than once during his representation of Coresoft between 1988 and 1991, we cannot [\*343] conclude that this fact weighs strongly against altering the presumptive sanction.

[16] P30 After establishing the presumptive sanction and weighing the mitigating and aggravating factors, we consider whether, in light of the two remaining *Noble* factors of proportionality and Board unanimity, the Board's recommendation should be altered. *Kuvara*, 149 Wn.2d at 259; *Noble*, 100 Wn.2d at 95-96. We are not persuaded that a downward departure from the presumptive sanction of suspension would be disproportionate [\*\*\*30] under these circumstances. As to unanimity, the Board was split as to the RPC 1.7 violation, with an 11-member majority recommending suspension and 2 dissenting members recommending reprimand. In considering the unanimity of the Board, we give less deference to the decision of a divided board. *Whitt*, 149 Wn.2d at 723. Although the division was not especially marked in this case, the lack of unanimity supports altering the presumptive sanction from suspension to reprimand. In sum, the substantial weight of the mitigating factors over the aggravating factors, along with the considerations required by the two *Noble* factors, leads us to conclude that reprimand rather than suspension is the appropriate sanction for Haley's violation of RPC 1.7.

## CONCLUSION

P31 We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests [\*\*1272] in a matter from contacting another party whom he knows to be represented by counsel. However, because we conclude that RPC 4.2(a) was impermissibly vague as applied to Haley, we apply our interpretation of RPC 4.2(a) prospectively only and thus dismiss count 2 in the complaint. We further conclude that, although the presumptive sanction [\*\*\*31] for Haley's knowing violation of RPC 1.7 is suspension, the mitigating factors, in particular the extensive delay in both reporting and prosecution, demand a more lenient sanction. We therefore depart from the Board's recommendation of a six-month [\*344] suspension and impose a reprimand for Haley's violation of RPC 1.7.

C. Johnson, Bridge, Chambers, and J.M. Johnson, JJ., concur.

**Concur by:** MADSEN; SANDERS

## Concur

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P32 MADSEN, J. (concurring) -- I agree with part one of Justice Sanders' concurrence. This court currently has a new set of RPCs pending before it. Because I agree with the majority that the better policy is to include self-represented lawyers within the prohibition of RPC 4.2(a), I would revise that rule in conjunction with the review of the RPCs and avoid the issue of prospectivity.

P33 SANDERS, J. (concurring) -- The majority holds that self-represented lawyers are "representing a client" under RPC 4.2(a) and therefore may not contact a represented party. But it refrains from sanctioning Haley, implicitly holding that the scope of RPC 4.2(a) is ambiguous. I concur only in the result, because the majority incorrectly construes RPC 4.2(a). The plain language of RPC 4.2(a) exempts self-represented lawyers. And the rule of lenity requires strict and narrow construction [\*\*\*32] of an ambiguous penal statute. We must apply RPC 4.2(a) prospectively just as we apply it today.

### I. THE PLAIN LANGUAGE OF RPC 4.2(a) PERMITS SELF-REPRESENTED LAWYERS TO CONTACT REPRESENTED PARTIES

P34 Court rules like the Code of Professional Responsibility "are subject to the same principles of construction as are statutes." *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). Thus, when interpreting a rule we give "the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it." *Heinemann v. Whitman County Dist. Court*, 105 Wn.2d 796, 802, 718 P.2d 789 (1986). If the

plain language of the rule is unambiguous, additional interpretation is unnecessary. See *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, [\*345] 947 P.2d 721 (1997); *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682-87, 80 P.3d 598 (2003).

P35 The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers. "*In representing a client*, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless [\*\*\*33] the lawyer has the consent of the other lawyer or is authorized by law to do so." RPC 4.2(a) (emphasis added). A "client" is "a person who consults or engages the services of a legal advisor," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 422 (2002), or a "person or entity that employs a professional for advice or help in that professional's line of work." BLACK'S LAW DICTIONARY 271 (8th ed. 2004). In other words, a "client" is a *third party* who engages a lawyer. Because self-represented lawyers have no client, see *Somers v. Statewide Grievance Comm.*, 245 Conn. 277, 287, 715 A.2d 712 (1998), under RPC 4.2(a) they may contact a represented party.

P36 The majority concedes that RPC 4.2(a) applies only when a lawyer is "representing a client" but nonetheless construes it to cover self-represented lawyers. Majority at 338. Apparently, the majority concludes that self-represented lawyers are "employing or engaging themselves for advice, help, or services." *Id.* at 335.

P37 This ingenious bit of legal fiction illustrates the wisdom of avoiding interpretations "conceivable in the metaphysical sense" when the plain language of a statute "is both [\*\*1273] necessary and sufficient." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). [\*\*\*34] Assuming that a self-represented lawyer represents a "client" certainly produces the majority's preferred outcome. Unfortunately, it does so only at the expense of coherence. Lawyers cannot retain themselves any more than *pro se* litigants can claim legal malpractice or ineffective assistance of counsel. See, e.g., *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (holding that "a defendant who elects to represent himself cannot thereafter complain [\*346] that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"); *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991); *Gall v. Parker*, 231 F.3d 265, 320 (6th Cir. 2000). Undoubtedly, wise lawyers follow their own counsel. But it is a neat trick indeed to advise oneself.

P38 The majority's claim to follow an emerging majority rule is unavailing. Indeed, it cites decisions from six states concluding that self-represented lawyers are their own clients. See *In re Segall*, 117 Ill. 2d 1, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons*, 184 W. Va. 183, 399 S.E.2d 894 (1990); [\*\*\*35] *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994); *Runsvold v. Idaho State Bar*, 129 Idaho 419, 925 P.2d 1118 (1996); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App. 1999); *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001). But none offers any more convincing a rationale for this curious conclusion than the majority. Conclusory statements cannot substitute for legal reasoning, and another court's error cannot justify our own.

P39 Likewise, the majority's reliance on the "purpose" of RPC 4.2(a) is misplaced. As the author of the court rules, we are "in a position to reveal the actual meaning which was sought to be conveyed." *Heinemann*, 105 Wn.2d at 802. But in the interest of certainty and consistency, we approach them "as though they had been drafted by the Legislature." *Id.* Whatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes. We may not expand the scope of a rule by fiat. If we conclude that self-represented lawyers should not contact represented parties, we should simply rewrite the rule to clearly prohibit that conduct. [\*\*\*36] Other states have already done so. Compare CAL. R. PROF. COND. 2-100 discussion § 2 (explicitly permitting self-represented lawyers to contact represented parties) with *In re Conduct of Smith*, 318 Ore. 47, 53 n.5, 861 P.2d 1013 (1993) (noting that DR 7-102, Oregon's equivalent to RPC 4.2, "was amended effective January 1991, to add the phrase, 'or in representing the lawyer's [\*347] own interests'"). Lawyers should not have to read slip opinions to divine their professional obligations.

II. THE RULE OF LENITY REQUIRES A CONSTRUCTION OF RPC 4.2(a) EXEMPTING SELF-REPRESENTED LAWYERS

P40 Even assuming that the plain language of RPC 4.2(a) is somehow ambiguous, the rule of lenity requires a strict and narrow construction exempting self-represented lawyers. The rule of lenity is a venerable canon of statutory interpretation, requiring courts "to interpret ambiguous criminal statutes in the defendant's favor." *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004). See also *United States v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) ("This being a criminal statute, it must be strictly construed, and any [\*\*\*37] ambiguity must be resolved in favor of lenity."); *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (holding "ambiguity should be resolved in favor of lenity"). While the Rules of Professional Conduct are only "quasi-criminal," *In re Discipline of Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952), the rule of lenity applies to both criminal and quasi-criminal statutes. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). The deciding factor is the nature of the sanction imposed.

P41 As a general rule, courts apply the rule of lenity to any statute imposing penal [\*\*1274] sanctions. See, e.g., *Kahler v. Kernes*, 42 Wn. App. 303, 308, 711 P.2d 1043 (1985) (applying rule of lenity to civil statute imposing penal sanction). "We are mindful of the maxim that penal statutes should be strictly construed." *United States v. Cook*, 384 U.S. 257, 262, 86 S. Ct. 1412, 16 L. Ed. 2d 516 (1966). And see Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, [\*\*\*38] 61 LAW & CONTEMP. PROBS. 33, 34 n.6 (1998) (noting that courts "have sometimes used the doctrine of lenity to interpret a statute narrowly in a civil case because the statute also has criminal sanctions"). A statute is penal if it "can be punished by imprisonment [\*348] and/or a fine" and remedial if it "provides for the remission of penalties and affords a remedy for the enforcement of rights and the redress of injuries." *State v. Eilts*, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980).

P42 The Rules of Professional Conduct are penal because they concern punishing an offender, not compensating a victim. Professional discipline "is punitive, unavoidably so, despite the fact that it is not designed for that purpose." *Little*, 40 Wn.2d at 430. See also *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (noting that disbarment "is a punishment or penalty imposed on the lawyer"); *In re Fordham*, 423 Mass. 481, 668 N.E.2d 816, 824 (1996) (stating that disciplinary sanctions constitute a punishment or penalty); *Stegall v. Miss. State Bar*, 618 So. 2d 1291, 1294 (Miss. 1993); *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 282, 729 P.2d 615 (1986); [\*\*\*39] *Gay v. Va. State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990) (referring to lawyer sanctions as "punishments"); *Comm. on Legal Ethics v. Hobbs*, 190 W. Va. 606, 439 S.E.2d 629, 634 (1993) (considering what steps would "appropriately punish" the attorney); and *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (holding that "disciplinary proceedings supplement the work of the criminal courts to maintain respect for the rule of law and protect the public"). See also *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 525, 29 P.3d 689 (2001) (characterizing medical discipline as "quasi-criminal" and penal); *Commonwealth v. Lundergan*, 847 S.W.2d 729, 731 (Ky. 1993) (finding Kentucky's Legislative Ethics Act a "penal statute" to which "the 'rule of lenity' is applicable"); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 14 (2002) (noting that "disciplinary proceedings seek many of the aims of criminal law and employ similarly punitive and stigmatizing penalties"). While the "purpose of disciplining an attorney is not [\*\*\*40] primarily to punish the wrongdoer," *In re Disciplinary Proceeding Against Selden*, 107 Wn.2d 246, 253, 728 P.2d 1036 (1986) (emphasis added), punishment is an important [\*349] purpose -- and a necessary consequence -- of professional discipline.

P43 Courts have long recognized that disbarment is "penal in its nature" and subject to the rule of lenity. *Moutray v. People*, 162 Ill. 194, 198, 44 N.E. 496 (1896) (holding statutes authorizing disbarment must be "strictly construed, and not extended by implication to things not expressly within their terms"). See also *Ruffalo*, 390 U.S. at 550-51 ("Disbarment . . . is a punishment or penalty imposed on the lawyer" involving "adversary proceedings of a quasi-criminal nature."); *Charlton v. Fed. Trade Comm'n*, 177 U.S. App. D.C. 418, 543 F.2d 903, 906 (1976)); *In re McBride*, 602 A.2d 626, 640-41 (D.C. 1992) (applying rule of lenity to statute governing disbarment). The same; holds for all other sanctions. "Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving [\*\*\*41] ambiguities in favor of the person charged." *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988).

P44 In his dissent, Chief Justice Alexander suggests that the Rules of Professional Conduct can tolerate a degree of vagueness. Dissent at 353-54. But RPC 4.2(a) is not vague. It is ambiguous. And the Rules of Professional Conduct certainly cannot tolerate ambiguity.

**[\*\*1275]** P45 A statute is *ambiguous* if it "refers to *P*, *P* can alternatively encompass either *a* or *b*, and it is beyond dispute that the defendant did *a*" and *vague* if it "refers to *X*, but we cannot tell whether the disputed event is an *X*." Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. AND MARY L. REV. 57, 62, 78 (1998). No one disputes what Haley did: While representing himself, he contacted a represented party. The only question is whether the term "representing a client" encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term "representing a client" is "susceptible to more than one reasonable meaning," it is ambiguous. *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003). **[\*\*\*42]**

**[\*350]** P46 Courts routinely apply the rule of lenity to ambiguous statutes. See, e.g., *United States v. Granderson*, 511 U.S. 39, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (applying lenity because statutory term ambiguous). And see generally Lawrence M. Solan, *supra*, at 117-20. And the rule of lenity is peculiarly appropriate to the Rules of Professional Conduct. We have recognized that "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." *In re Disciplinary Proceeding Against Krogh*, 85 Wn.2d 462, 483, 536 P.2d 578 (1975). See also *In re Discipline of Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952). Because lawyers "are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court," courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 5 cmts. b, c at 49, 50 (2000). See also Bruce A. Green, **[\*\*\*43]** *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 387 (1998) (suggesting "courts should be more accommodating of professional norms than the restatement contemplates" when interpreting ambiguous rules of professional conduct). Application of the rule of lenity reflects that caution. It demands that we adopt the stricter, narrower construction, excluding self-represented lawyers.

### III. CONCLUSION

P47 The majority objects to the plain language of RPC 4.2(a) only because it believes that permitting self-represented lawyers to contact represented parties would violate the "purpose" of the rule. But the putative "spirit and intent" of a rule can trump only a "strained and unlikely" interpretation. *State v. Wittenbarger*, 124 Wn.2d 467, 485, 880 P.2d 517 (1994). And the plain language of RPC 4.2(a) is neither strained nor unlikely. It prohibits a lawyer representing a client -- but not a self-represented lawyer -- from contacting a represented party. As the majority concedes, **[\*351]** several commentators and courts have found the plain language of essentially identical rules entirely unambiguous. Majority at 336-38. See, e.g., *Pinsky v. Statewide Grievance Comm.*, 216 Conn. 228, 236, 578 A.2d 1075 (1990); **[\*\*\*44]** CAL. R. PROF. COND. 2-100 discussion § 2; and RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000). We must not manufacture ambiguity and rely on legal fictions to arrive at a preferred result. Especially when we may simply write that result into law.

P48 I therefore concur in result.

**Dissent by:** ALEXANDER

## Dissent

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P49 ALEXANDER, C.J. (dissenting) -- I agree; with the majority that RPC 4.2(a) prohibits lawyers who are representing themselves from communicating directly with opposing, represented parties unless they first obtain the consent of the parties' counsel. I disagree, however, with the majority's decision to limit application of this important rule to future violators. I know of no authority that supports imposition of a rule of professional conduct prospectively only. I believe, therefore, that this court should suspend Jeffrey Haley from the practice of law for his violation of RPC 4.2(a). The violation **[\*\*1276]** is especially egregious in light of Haley's claim that he "studied the rule" before

directly contacting his opposing party,<sup>13</sup> and in view of the fact that he contacted the party a second time after the party's lawyer [\*\*\*45] warned him that doing so would violate RPC 4.2(a). Because the majority concludes that Haley should not be subjected to discipline for a violation of RPC 4.2(a), I dissent.

P50 The majority correctly observes that among states considering the question with which we are here presented, [\*\*\*352] the prevailing trend has been to apply RPC 4.2(a) to attorneys acting pro se, as was Haley, [\*\*\*46] and not just to attorneys representing someone other than themselves. The majority acknowledges, additionally, that in late 1996 and early 1997, when Haley twice attempted to negotiate a settlement without going through the opposing party's lawyer, at least four jurisdictions already had concluded that RPC 4.2(a) prohibited such contacts. Yet none of the four jurisdictions mentioned by the majority applied the rule to pro se attorneys on a prospective basis only, as the majority does here. Rather, all four jurisdictions applied the rule to the facts before them, as this court should do. See *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118 (1996) (attorney reprimanded because Idaho's version of RPC 4.2(a) "applies to prevent the pro se attorney from directly contacting a represented opposing party"); *In re Segall*, 117 Ill. 2d 1, 6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987) ("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. Consequently, an attorney who is himself a litigant may be [\*\*\*47] disciplined . . . when, as in the case at bar, he directly contacts an opposing party without permission from that party's counsel."); *Comm. on Legal Ethics v. Simmons*, 184 W.Va. 183, 185, 399 S.E.2d 894 (1990) (attorney suspended for six months); *Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994) (district court did not err in applying RPC 4.2 to prohibit an attorney from contacting his wife during their divorce). These four opinions, all cited by the majority, are sound and make it clear that at the time Haley engaged in the prohibited conduct, the weight of authority supported the disciplining of violators and did not even hint at the prospective-only application embraced by the majority in this case. In shielding Haley from application of RPC 4.2(a), the majority borrows from the reasoning of the Nevada Supreme Court in *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001). There, the Nevada court declined to punish an attorney's violation of the Nevada equivalent of [\*\*\*353] RPC 4.2(a) because of (a) the "absence of clear guidance" from the court and (b) "conflicting authority from other jurisdictions" as to whether the [\*\*\*48] rule applied to pro se attorneys. *Schaefer*, 117 Nev. at 512, 501. In effect, the majority establishes a new test: if there is any doubt about how a rule will be construed, a violator will not be punished. That is a dangerous message to send.

P51 Furthermore, whereas the *Schaefer* court relied on due process principles articulated by the United States Supreme Court in *Connally*<sup>14</sup> in applying the Nevada rule prospectively, it is worth noting that this court has never drawn from *Connally* the proposition that discipline is inappropriate just because a rule is being interpreted for the first time. In fact, in *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991), the only discipline case in which this court cited *Connally*, we affirmed sanctions against a physician for violating a statute [\*\*\*1277] prohibiting "moral turpitude" although we recognized "uncertainties associated with" the statutory language in question. *Haley*, 117 Wn.2d at 740. Thus, this court has previously declined to interpret *Connally* in the way the Nevada court did in *Schaefer* and the majority does here -- as if professional license holders [\*\*\*49] have a due process right to avoid discipline simply because a court is newly construing the rule in question. Such an interpretation will have far-reaching impact, as many discipline cases that come before this court raise an issue of construction. In declining to sanction Haley for violating RPC 4.2(a), despite the fact that Haley had "studied" the rule and should have known that the prevailing construction prohibited his conduct, the majority suggests that questionable conduct will be tolerated as long as there is no prior Washington court decision exactly on point.

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<sup>13</sup> See Br. of Resp't Lawyer at 16: "Before contacting Mr. Highland directly, I studied the rule. Being a person of common intelligence, I relied on the plain meaning of the rule." See also Reply Br. of Resp't Lawyer at 10: "Counsel for the Bar Association repeatedly asserts that I did no legal research or insufficient legal research on Rule 4.2. This position could not be more wrong. I read the rule with great care before I took action." Finally, on page 11 of his reply, Haley said, "I studied the rule and it was perfectly clear on the issue before me. Under modern rule of law, this meant that there was no reason to do more research."

<sup>14</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

P52 We must remember that our purpose in disciplining attorneys is to "protect the public and to preserve confidence in the legal system." *In re Disciplinary Proceeding* [\*354] *Against Curran*, 115 Wn.2d 747, 762, 801 P.2d 962 (1990) (quoting *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 282, 729 P.2d 615 (1986)). [\*\*\*50] In *Curran*, an attorney argued that he should not be punished for violating RLD 1.1(a) because, in forbidding actions that reflect "disregard for the rule of law," the rule was unconstitutionally vague. *Id.* at 758. This court said, "[W]e choose to give these words a narrowing construction. . . . This law is not so vague as to be unconstitutional, given this limiting construction." *Id.* We noted that "a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack." *Id.* at 759 (citing *Jordan v. DeGeorge*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951)). This court suspended the attorney, Curran, saying, "Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985)) (Brennan, J., dissenting)). Just as we disciplined Curran there, despite uncertainty about the rule in question, so should Haley be disciplined for violating RPC 4.2(a) in order to "protect the public and to preserve [\*\*\*51] confidence in the legal system." *Curran*, 115 Wn.2d at 762 (emphasis omitted) (quoting *Rentel*, 107 Wn.2d at 282).

P53 *Curran* also weighs against the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity -- a criminal law doctrine. We said in that case, "[T]he purposes of bar discipline do not precisely duplicate the purposes of the criminal law." *Curran*, 115 Wn.2d at 762 (citing *In re Disciplinary Proceeding Against Brown*, 97 Wn.2d 273, 275, 644 P.2d 669 (1982)). More notably, we have said numerous times that "punishment is not a proper basis for discipline." *Brown*, 97 Wn.2d at 275 (citing *In re Disciplinary Proceedings Against Purvis*, 51 Wn.2d 206, 223, 316 P.2d 1081 (1957)). In *In re Disbarment of Beakley*, 6 Wn.2d 410, 424, 107 P.2d 1097 (1940), we said:

[\*355] Neither disbarment nor suspension is ordered for the purpose of punishment, but wholly for the protection of the public. When a matter such as this comes before the court, the question presented is not: What punishment should be inflicted on this man? The question [\*\*\*52] presented to each of its judges is simply this: Can I, in view of what has been clearly shown as to this man's conduct, conscientiously participate in continuing to hold him out to the public as worthy of that confidence which a client is compelled to repose in his attorney?

Thus, this court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which, we have applied the rule of lenity to resolve ambiguity in the attorney's favor.

P54 In sum, because the purpose of attorney discipline is to protect the public, it is our duty to enforce RPC 4.2(a) in this case. [\*\*1278] The majority provides no authority for applying RPC 4.2(a) to pro se attorneys prospectively only. I would apply the rule to Haley and suspend him for six months.

Fairhurst, J., concurs with Alexander, C.J.