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ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 746

Application of RPC 4.2 to Lawyers Who Are Proceeding Pro Se in Legal Matters

The Advisory Committee on Professional Ethics has received several inquiries through the attorney ethics research assistance hotline about the application of Rule of Professional Conduct (RPC) 4.2 to lawyers who are proceeding pro se in legal matters. RPC 4.2 prohibits lawyers from communicating with a person who is represented by counsel about the subject of the representation without the other lawyer's consent. For the reasons set forth in this Opinion, the Committee finds that RPC 4.2 does not apply to pro se lawyers.

RPC 4.2 states, in pertinent part:

> **In representing a client**, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, . . . unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented.
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> [RPC 4.2 (emphasis supplied).]

This Rule protects a represented person from adverse lawyers who can overreach. Such conduct deprives the client of the benefit of the client's counsel, thereby interfering with the attorney-client relationship. The Rule also prevents lawyers from eliciting privileged, confidential, or sensitive information from the person that may not have been shared if the person had the benefit of discussing the questions and responses with counsel first. See Restatement (Third) of the Law Governing Lawyers, Vol. 2, § 99, comment b (ALI 2000).

While a party is permitted to speak directly with an adverse party, whether they are represented or not, a pro se lawyer has an advantage in such discussions due to the lawyer's legal training and experience. The American Bar Association (ABA), in Opinion 502 (September 28, 2022), found that pro se lawyers are prohibited by RPC 4.2 from communicating with persons who are represented by counsel. A decision by the Disciplinary Review Board (DRB), In re Horowitz, DRB 19-468 (November 18, 2020), found that a pro se lawyer violated RPC 4.2 when he made a customer complaint to employees of a vendor.

Many jurisdictions, as well as the ABA and the DRB, have construed the language of RPC 4.2 to find that pro se lawyers represent themselves as a client and so the prohibition applies to them. Oregon recently amended its version of RPC 4.2 to explicitly include pro se lawyers within the prohibition. Some other jurisdictions point to the opening phrase of RPC 4.2, "in representing a client," and find that the Rule does not apply to pro se lawyers because they are not representing clients. This is the position of Restatement (Third) of the Law Governing Lawyers, which states: "A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals . . . ." Id. at comment e.

The ABA, in Formal Opinion 502, decided that Model RPC 4.2 applies to lawyers acting pro se because "a pro se lawyer is representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle." Opinion 502, page 3. Because pro se lawyers "represent themselves as 'a client,' . . . 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 uncounseled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication." Opinion 502, page 3.

Significantly, there was a dissent to this ABA opinion. The dissent agrees that the Rule ought to prohibit pro se lawyers from contacting represented parties but finds that the language of the Rule does not so provide. "Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations." Opinion 502, page 7 (dissent). The dissent recommends that the Rule be amended rather than construe it in such a fashion that the meaning strays from the text. "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." Opinion 502, page 8 (dissent).

The DRB, in Horowitz, found that RPC 4.2 applied to a pro se lawyer. The case involved reciprocal discipline for a Florida lawyer. The lawyer had attended a 90-minute continuing legal education seminar that was offered by telephone in 2014. Decision, page 3. Registrants were told they could call with questions and the lawyer did so but was placed on hold for 15 minutes, his question was not answered, and he missed 20 minutes of the presentation while on the phone. Ibid. He later wrote a letter to an employee of the company complaining about this and demanding a refund. Ibid. Six months later, another employee of the company filed an ethics grievance against the lawyer, stating that the company has legal counsel and the lawyer made threats against a represented employee of the

company. Decision, pages 3-4. The Florida bar dismissed the grievance. Decision, page 4.

Thereafter, the lawyer wrote to the employee who had filed the grievance and stated that if he does not receive compensation, he would be filing suit. Decision, page 4. This prompted a second grievance to be filed by a company employee for contacting a represented party and demanding a refund in excess of the amount paid for the seminar. Ibid. The lawyer then consented to Florida discipline in the form of an admonition. Decision, page 8.

As the lawyer was also licensed in New Jersey, the Office of Attorney Ethics filed a reciprocal discipline complaint and the matter was heard by the DRB. The DRB found that the lawyer "repeatedly, and unapologetically, communicated with [the company's] employees, in violation of RPC 4.2" and knew that the company's employees were represented by counsel. Decision, page 13.

Significantly, the DRB stated:

> Respondent's argument that he did not violate RPC 4.2, because he was acting pro se, denies our state's clear disciplinary precedent holding that an attorney always is bound by the RPCs; that his duty was neither eliminated nor diminished by his pro se status in the litigation; and that a [lawyer] pro se party is prohibited from communicating with represented parties, without the consent of opposing counsel. See In the Matter of Thomas Kane, DRB (October 10, 2012) (attorney who acted pro se in a divorce proceeding against his wife was charged with two violations of RPC 4.2; we dismissed both charges, finding that the attorney had the prior consent of his adversary to contact his represented wife, not based on a finding that the Rule was inapplicable to the facts (slip op. at 19-20); In re Kane,

> 212 N.J. 476 (2012) (affirming Board's findings). Thus, we reject respondent's unsupported arguments to the contrary, and find that he violated RPC 4.2.
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> [Horowitz Decision, page 14.]

The DRB, however, decided to impose no discipline for this violation because his conduct was de minimis, the lawyer had retired from New Jersey practice, and "the public interest is fully protected without the need to discipline respondent." Decision, page 18. Two members of the DRB voted to dismiss, finding that the lawyer committed no misconduct. Ibid. Research did not reveal any discipline case other than Kane to support the DRB's decision.

The Committee finds that the ABA dissent and the Restatement (Third) present the better argument: to read the language "in representing a client" to include a lawyer acting pro se is a tortured and counterintuitive construction of the Rule. Ethics rules should be clear and straightforward; they should not be traps for the unwary. The language of RPC 4.2 simply does not apply to a pro se lawyer. That said, other ethics rules apply to a pro se lawyer's conduct. Lawyers who are proceeding pro se should always treat adverse parties with courtesy and consideration, not misrepresent facts or law, and refrain from overreaching, disrupting the represented person's client-lawyer relationship, or seeking to acquire uncounseled disclosures. RPC 3.2; RPC 8.4(c) and (d). Further, lawyers should counsel their clients not to engage in direct communications with an adverse pro se lawyer.

The Committee notes that if a lawyer is not proceeding pro se but, rather, is represented by counsel, RPC 4.2 does not prohibit that lawyer-party from speaking directly to the opposing party. The risk of overreaching is present whether the lawyer-party is represented or not but, according to the ABA and DRB, the lawyer is only prohibited from speaking to the opposing party when that lawyer is not represented by counsel. The prohibition – applying only when the lawyer is unrepresented – is inconsistent. The better approach is to caution lawyers to behave appropriately in both situations – when they are represented and when they are not – and to remind lawyers to advise their clients not to speak to adverse lawyer-parties outside of the presence of their own lawyers.

In sum, RPC 4.2 does not apply to lawyers who are proceeding pro se in legal matters, though other ethics rules apply to the conduct of such lawyers. Pro se lawyer-parties should always treat adverse parties with courtesy and consideration, not misrepresent facts or law, and refrain from overreaching, disrupting the represented person's client-lawyer relationship, or seeking to acquire uncounseled disclosures.