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ABA Formal Opinion 502 on Pro Se Lawyers: Molding Verbiage to Fit Policy

ABA Formal Opinion 502 clarifies that the prohibition against lawyers contacting an opposing party represented by counsel applies even to lawyers in the role of a pro se party.

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A lawyer's retention of the more nuanced concepts learned in their law school professional-responsibility course typically begins to fade shortly after they have taken and passed the Multistate Professional Responsibility Examination. However, Model Rule of Professional Conduct 4.2's general prohibition against unauthorized contact with a represented party with respect to the subject matter of the representation tends to stick with lawyers throughout their careers. The policy underlying the "no contact" or "anti-contact" rule is well expressed in Comment [1] to Rule 4.2:

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with a client-lawyer relationship and the uncounseled disclosure of information relating to their representation.

Most lawyers would agree that the policies underlying the "no contact" rule apply with equal force to lawyers who are pro se litigants, or who are otherwise personally adverse to represented parties. In Formal Opinion 502 of the ABA's Standing Committee on Ethics and Professional Responsibility, issued September 28, 2022, the majority of the committee concluded that pro se lawyers are subject to Rule 4.2's prohibition against unauthorized contact with a represented party.

Formal Opinion 502: The Majority and Dissent

Two members of the committee dissented. They agreed that pro se lawyers *should be* prohibited from contacting represented parties, but argued that the language of Rule 4.2 did not impose such a prohibition. Specifically, the dissenters focused on the introductory language of Rule 4.2, which states that the Rule applies only when a lawyer is "representing

a client". The dissenters maintained that the majority opinion violated the "surplusage canon", which requires that every word and phrase in a legal instrument be given effect, when possible.

Formal Opinion 502's majority opinion does not ignore the "in representing a client" verbiage, but asserts that a pro se lawyer is, in fact, his or her *own* "client." For those who do not find this characterization of a pro se lawyer to be entirely satisfactory, Formal Opinion 502's conclusion evokes one of the broader issues of legal philosophy of this era: What to do when the apparent policy underlying a statute, rule, or even a constitutional provision, does not necessarily fully align with a strict construction of that provision? One approach, suggested by the dissenters in Formal Opinion 502, is to amend the provision. Oregon for example, adopted a modified version of Model Rule 4.2, which states that the no-contact rule applies when the lawyer is "representing a client or the lawyer's own interests".

Reconciling the Rule with Reality

Formal Opinion 502, and its dissent, cite ample authority supporting either side of the argument. However, published dissents in ethics opinions, which are rare, pose a problem for those who look to such opinions for guidance. Should a lawyer seeking ethics guidance from an opinion issued by a committee that, presumably, comprises members having comparable expertise in legal ethics, necessarily adopt the majority view, simply because it commanded a majority of votes? Or, absent controlling authority in their own jurisdiction, are lawyers expected to independently assess the reasoning underlying the conflicting opinions of the presumed experts and adopt the conclusion that they think makes most sense, or, perhaps, best serves their ends?

A lawyer does not have to be an ethics maven to recognize that the most cautious course is usually the best course. This is particularly true because the Rules of Professional Conduct do not impose a duty of "zealous representation." Particularly when a lawyer is acting solely in their own personal interests, there should rarely, if ever, be a compelling reason to attempt to communicate with a represented party regarding the subject of the representation without first obtaining opposing counsel's consent. Therefore, notwithstanding the language-parsing debate among courts and ethics experts, lawyers are best served to trust instincts ingrained since law school, and steer well clear of Rule 4.2's "third rail."

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