STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2150
FAX: (212) 428-2155

A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

April 19, 2012

TO: All Interested Persons

FROM: John W. McConnell

SUBJECT: Proposed amendment of Rule 4.2 of the Rules of Professional Conduct

---

The New York State Bar Association (NYSBA) has proposed an amendment to Rule 4.2 of the Rules of Professional Conduct. (Exhibit A). The proposed amendment was approved by NYSBA's House of Delegates in January 2012 and is based on the report and recommendations of NYSBA's Committee on Standards of Attorney Conduct (COSAC). (Exhibit B).

Rule 4.2(a) precludes contact by a lawyer with a represented litigant without the prior consent of the litigant's attorney. Courts and ethicists have held this rule to bar such contact even where the lawyer is acting as a party in a matter, rather than as an advocate. The proposed amendment would clarify that, in such cases, the lawyer-litigant may contact an adversary litigant so long as reasonable advance notice is provided to the adversary's counsel.

Persons wishing to comment on this proposal should send their submissions by email to OCARule4-2comments@nycourts.gov or by regular mail to John W. McConnell, Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. The text of the proposed amendment and other explanatory materials can be obtained at www.nycourts.gov/rules/comments/.

Comments must be received no later than June 4, 2012.

EXHIBIT A

Proposed Amendment of Rule 4.2 of the Rules of Professional Conduct (22 NYCRR Part 1200)
For Recommendation to the Judicial Departments of the Appellate Division
April 3, 2012

Rule 4.2:

Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to 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 prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(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.

EXHIBIT B

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

VINCENT E. DOYLE III
President, New York State Bar Association

Connors & Vilardo, LLP
1000 Liberty Building
424 Main Street
Buffalo, NY 14202
716/852-5533
FAX 716/852-5849
ved@connors-vilardo.com

February 16, 2012

Honorable Luis A. Gonzalez
Presiding Justice
New York Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: Proposed Amendments to New York Rules of Professional Conduct

Dear Presiding Justice Gonzalez:

I am pleased to enclose a report prepared by our Association's Committee on Standards of Attorney Conduct and approved by our House of Delegates at its January 27, 2012 meeting, recommending two amendments to the Rules of Professional Conduct. The first proposal would amend Rule 4.2 to apply the bar on a lawyer's contact with an adversary represented by counsel to situations in which the lawyer is personally a party to a matter. The report notes that the current language of the Rule states that applies only to a lawyer "in representing a client"; however, the majority of ethics opinions and court decisions have concluded that the Rule should apply to lawyer-parties. This amendment would correct this anomaly.

The second proposal would amend Rule 1.2(g) to expand a cross-reference to other rules. The current language of the Rule provides, "A lawyer does not violate *this Rule* by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process" (emphasis supplied). However, as noted in the report, this reference should extend beyond Rule 1.2, and the proposed amendment would change this reference to "these Rules."

We commend these proposals to you for the Court's consideration. Joseph E. Neuhaus, chair of our Committee on Standards on Attorney Conduct, and I would be pleased to provide any additional information you may require or be of other assistance.

Respectfully yours,

Vincent E. Doyle III

Vincent E. Doyle III

C: Hon. Jonathan Lippman
Hon. A Gail Prudenti
John E. McConnell, Esq.
Joseph E. Neuhaus, Esq.

REPORT OF THE
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENTS TO

(i) RULE 4.2 TO ADDRESS CONTACTS WITH REPRESENTED ADVERSARIES BY LAWYERS PROCEEDING *PRO SE* OR REPRESENTED BY COUNSEL

AND TO

(ii) RULE 1.2(g) TO EXPAND A CROSS-REFERENCE TO OTHER RULES

Vincent E. Doyle III, President, New York State Bar Association
Joseph E. Neuhaus, Chair, Committee on Standards of Attorney Conduct

January 27, 2012

Introduction

The New York State Bar Association proposes two largely technical amendments to the New York Rules of Professional Conduct. The first is to address the application of the "no contact rule," which bars a lawyer from contacting an adversary represented by counsel, to situations in which the lawyer is personally a party to a matter, either proceeding *pro se* or represented by counsel. The overwhelming majority of bar association ethics opinions and court opinions have concluded that the Rule should bar the lawyer from communicating with his or her counterparty regarding the subject of the opposing counsel's representation unless the *pro se* or represented lawyer has the prior consent of opposing counsel. But the language of the Rule states that it applies only to a lawyer "in representing a client." The proposed amendment would correct this anomaly by adding a paragraph that specifically addresses the application of the Rule to lawyers proceeding *pro se* or when represented by counsel. The proposed amendment would also allow lawyer-parties acting *pro se* or represented by counsel to communicate with the counterparty after giving reasonable advance notice to opposing counsel pursuant to the terms of New York's unique Rule 4.2(b), formerly DR 7-104(B).

The second proposed amendment corrects a reference in Rule 1.2(g), which provides that a lawyer "does not violate *this Rule* by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process." (Emphasis added.) Read literally, the reference to "this Rule" limits the provision to Rule 1.2, so that it does not extend to Rule 1.1(c), which provides that a lawyer shall not "intentionally fail to seek the lawful objectives of the client through available means permitted by law and these Rules." Rule 1.1(c) is the language to which the historical

antecedent of Rule 1.2(g) referred. The proposal is to correct the reference to "this Rule" by changing it to "these Rules," which would encompass in particular the duties in Rule 1.1(c).

I. Proposed Amendment to Rule 4.2

Rule 4.2 Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to 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 prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(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.

The application of the current rule barring contact between a lawyer and an unrepresented party without prior consent is limited by its text to lawyers who are "representing a client." Its applicability to lawyers acting *pro se* or to lawyers represented by counsel in a matter is therefore at least uncertain. The proposed new subsection eliminates this ambiguity by codifying the determination of the overwhelming majority of courts and ethics committees to have considered this issue and expressly stating that lawyers acting *pro se* or who are represented by counsel in a matter are subject to the no-contact provision of Rule 4.2.

Numerous courts and bar ethics rules have concluded that the policies underlying Rule 4.2(a), which is essentially identical to Rule 4.2 of the ABA Model Rules[1] and of many other states, suggest that a lawyer proceeding *pro se* should be barred from contacting his or her represented adversary to essentially the same extent as the lawyer would be in representing a client.[2] Those policies include (i) guarding against the possibility that the lawyer will take advantage of, or be accused of taking advantage of, the represented adversary, and (ii) avoiding the risk of disrupting of the lawyer-client relationship between the adversary and the adversary's lawyer. These policies are implicated both where a lawyer represents a client and where the

---

[1] ABA Model Rule 4.2, which has no subsections, provides as follows: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

[2] *See Channing v. Equifax, Inc.*, 2011 U.S. Dist. LEXIS 124678, at *3 (E.D.N.C. Oct. 27, 2011) ("Though plaintiff proceeds pro se, he is still bound by the same rules of court and procedure that a lawyer must follow."); *Brown v. Washington State Univ.*, 2011 U.S. Dist. LEXIS 119224, at *4 (E.D. Wash. Oct. 14, 2011) ("The very same considerations behind [the rule's] prohibition on attorneys directly contacting represented parties are implicated when a *pro se* plaintiff contacts represented parties directly."); *Bisciglia v. Lee*, 370 F. Supp. 2d 874, 879 (D. Minn. 2005) (prohibiting *pro se* plaintiff from directly contacting represented parties under Minnesota Rule of Professional Conduct 4.2); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1120 (Idaho 1996) (the phrase "in representing a client" applies when an attorney is acting *pro se* "because this interpretation better effectuates the purpose" of Rule 4.2); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987) ("[A]n attorney who is himself a party to the litigation represents himself when he contacts an opposing party."); *In re Schaefer*, 25 P.3d 191, 199 (Nev. 2001) ("The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing *pro se*."); *In re Lucas*, 789 N.W.2d 73, 76 (N.D. 2010) (adopting the conclusion that "Rule 4.2 applies to attorneys representing themselves"); *Medina County Bar Ass'n v. Cameron*, 2011 WL 4862421, at *2 (Ohio Oct. 12, 2011) (attorney proceeding *pro se* violated Rule 4.2 by contacting an employee of the plaintiff regarding settlement); *In re Haley*, 126 P.3d 1262, 1271–72 (Wash. 2006) (Rule 4.2 "prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel."); *Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation."); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 260 (Tex. Ct. App. 1999) ("[W]e hold that an attorney's designation of counsel of record does not ... preclude the application of Rule 4.02(a) to his actions in contacting an opposing party."); D.C. Opinion 258 (1995); Hawaii Opinion 44 (2003); Illinois Opinion 96-09 (1997); N.C. Opinion 258 (1995); N.Y. State Opinion 879 (2011); Rhode Island Opinion 2002-04 (2002); N.Y. City Opinion 2011-1. *See generally* Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 830–831 (2009); Stephen J. Langs, Note, *Legal Ethics: The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421 (1997).

lawyer proceeds *pro se* or acts as a client, because in both situations the lawyer, by virtue of training and experience, has advantages over the typical nonlawyer adversary.

In particular, the New York State Bar Association Committee on Professional Ethics recently concluded:

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

N.Y. State Opinion 879 ¶ 12 (2011).

Similarly, the New York City Bar Committee on Professional and Judicial Ethics recently considered whether an attorney could communicate on his own behalf with a former client who was now represented by successor counsel in the same matter (for example, to collect fees or seek permission to destroy files). The Committee concluded:

> [W]hen a lawyer knows that the former client has secured new counsel, Rule 4.2 prohibits direct contact regarding any matter within the scope of the representation – even where the lawyer is acting *pro se* – unless the lawyer obtains the prior consent of successor counsel.

N.Y. City Opinion 2011-1.

It appears that there are only two published opinions to the contrary. The Connecticut Supreme Court concluded, based in part on the opening language of Rule 4.2, that a lawyer acting on his or her own behalf is not "representing a client" and is therefore not subject to that state's version of Rule 4.2(a). *Pinsky* v. *Statewide Grievance Committee*, 578 A.2d 1075, 1079

(Conn. 1990).[3] In *Dumas* v. *Medical Center*, 2011 U.S. Dist. LEXIS 81395, at *24–*25 (E.D. Mich. July 26, 2011), the court pointed to the language in the official comment in the Michigan rule that "parties to a matter may communicate directly with each other" to conclude that, as a party to a matter, a *pro se* plaintiff may contact the opposing party directly.[4] The comments to the California rule align with this view: "[T]he rule does not prohibit a member 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."[5] Minnesota's rule takes a middle approach, providing, "a party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the other lawyer[], or unless the other party manifests a desire to communicate only through counsel."[6]

The opinions that hold that the Rule applies to lawyers proceeding *pro se* do not generally attempt to reconcile the language of the Rule with the result reached. The New York State Bar opinion noted that the language was "problematic." N.Y. State Opinion 879 ¶ 3. The City Bar opinion observed that its conclusion "may not be fully supported by the language of the first clause of Rule 4.2, which lawyers might justifiably interpret as permitting contact whenever the attorney initiating the communication is acting *pro se* and thus not 'representing a client.'" This ambiguity in the rule is even greater when a lawyer is represented by counsel. While a lawyer acting *pro se* is arguably "representing a client" – himself or herself – a lawyer who has

[3] The Supreme Court also relied on language in the Connecticut version of Rule 4.2 providing that "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."

[4] Comment [11] to the New York Rules is slightly different. It says, "Persons represented in a matter may communicate directly with each other." The court in *Dumas* also relied on the First Amendment right to contact government officials; the adversary contacted in that case was the mayor of Flint.

[5] Cal. Rules of Prof'l Conduct R. 2-100 disc. (2008)

[6] Minn. Rules of Prof'l Conduct R. 4.2 (2007).

hired counsel cannot be said to be representing any party in the matter. Concerned that this tension between the text of the rule and a lawyer's obligation under the law might create "a trap for the unwary," the City Bar called on the Courts to "consider amending the rule to clarify its intended scope and purpose." N.Y. City Opinion 2011-1.

The NYSBA recommends removing this incongruity between the widely accepted application of the Rule and its text by codifying the result reached in the overwhelming majority of opinions (including the only New York opinions on the subject). We suggest adding a new subsection (c) to Rule 4.2 that expressly addresses lawyers who are acting *pro se* or are represented by counsel in a matter. This solution has the advantage of leaving undisturbed the language of Rule 4.2(a), which is familiar to lawyers because it has been in the disciplinary rules, essentially unchanged, for decades. The first clause of the proposed amendment thus provides that a lawyer proceeding *pro se* or represented by counsel in a matter is subject to paragraph (a), the basic prohibition on contacts with represented persons without consent.

The remainder of the proposed amendment addresses an unusual feature of New York's Rule. Paragraph (b) allows a lawyer to cause a client to communicate with a represented person, and to counsel the client with respect to those communications, provided that the lawyer gives reasonable advance *notice* to the person's counsel. Paragraph (b), although invoked relatively rarely, recognizes that there are occasions in which direct, but counseled, client-to-client communications are salutary and that the policies underlying the no-contact rule can be adequately protected by giving notice to, rather than obtaining consent of, opposing counsel in such situations. Such notice allows opposing counsel to counsel his or her client how, if at all, to respond to such communications. The proposed new rule expressly gives the same permission

that paragraph (b) provides lawyers representing clients to lawyers who are themselves clients or acting *pro se*.

We have considered a contrary view with respect to paragraph (b), which would focus on the fact that paragraph (b) does not permit communications by the lawyer himself or herself, but rather permits communications by others caused and counseled by the lawyer. On this view, the amendment would require consent of, not just notice to, opposing counsel for all communications by a *pro se* or represented lawyer. We have concluded, however, that such a rule would be unduly restrictive. Direct client-to-client communications do have utility, and on occasion opposing counsel can be an obstacle to resolving matters. Lawyers involved in a matter *pro se* or represented by counsel should have the same rights as other persons to communicate directly with a counterparty with the protection provided by reasonable advance notice to opposing counsel.

If the Courts adopt the proposed amendment, the State Bar proposes to add a brief explanatory Comment. In particular, the State Bar House of Delegates has provisionally approved new explanatory Comment [12A] to take effect when and if the Appellate Divisions adopt the substance of the proposed amendment to Rule 4.2. The additional Comment would provide as follows:

> [12A] When a lawyer is proceeding *pro se* in a matter, or is being represented by his or own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

II. Proposed Amendment to Rule 1.2(g)

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate ~~this Rule~~ these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

The internal reference at issue in Rule 1.2(g) currently limits the provision's applicability to "this Rule." Rule 1.2(g) therefore provides that conducting oneself with punctuality, civility, courtesy, and respect will not trigger a violation of Rule 1.2, and only Rule 1.2. Effectively, Rule 1.2(g) functions to prevent the reader from misconstruing Rule 1.2(a), which directs a lawyer to abide by the client's decisions in important matters. Subsection (g) ensures that

subsection (a) is not misread to suggest that a lawyer may ethically abide by a client's wishes that the lawyer be dilatory, engage in offensive tactics, or treat others disrespectfully. Because the limiting language "this Rule" prevents its application to other Rules, subsection (g) has only a very limited effect.

The principle underlying Rule 1.2(g), however, is derived from former Disciplinary Rule 7-101(A) where it followed immediately after the requirement of zealous representation:

> DR 7-101 [1200.32] Representing a Client Zealously
>
> A. A lawyer shall not intentionally:
>
> 1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 [1200.32] (B). *A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.* (Emphasis added.)

1. In this context, the purpose of the language now codified in revised form at Rule 1.2(g) served an additional function. It sought to prevent the reader from misconstruing the former zealous representation requirement, which is codified in the requirement in Rule 1.1(c) that a lawyer not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." The language in Rule 1.2(g), in its Code version, made clear that the profession did not condone offensive or uncivil behavior on behalf of a client in the name of zealous advocacy.

2. Amending the text of Rule 1.2(g) from "this Rule" to "these Rules" will ensure that the carve-out permitting courteous, punctual, inoffensive, and considerate behavior applies both to a lawyer carrying out a client's general objectives under Rule 1.2(a) and to a lawyer heeding the mandate to use all "reasonably available means permitted by law and these Rules" in

Rule 1.1(c). The minor change from "this Rule" to "these Rules" will make plain that civil behavior of the kind described in Rule 1.2(g) will not violate either Rule 1.2(a) or Rule 1.1(c).

In the event the Courts adopt the proposed amendment, the accompanying Comment would need to be aligned with the new language. The State Bar House of Delegates has provisionally approved the following minor change to Comment [16] to Rule 1.2, effective only if the Courts approve the substance of the proposed amendment:

> [16] Both Rule 1.1(c)(1) and Rule 1.2(a) require generally that a lawyer seek the client's objectives and abide by the client's decisions concerning the objectives of the representation; but those rules do not require a lawyer to be offensive, discourteous, inconsiderate or dilatory. Paragraph (g) specifically affirms that a lawyer does not violate ~~Rule 1.2~~ the Rules by being punctual in fulfilling professional commitments, avoiding offensive tactics and treating with courtesy and consideration all persons involved in the legal process. Lawyers should be aware of the New York State Standards of Civility adopted by the courts to guide the legal profession (22 NYCRR Part 1200 Appendix A). Although the Standards of Civility are not intended to be enforced by sanctions or disciplinary action, conduct before a tribunal that fails to comply with known local customs of courtesy or practice, or that is undignified or discourteous, may violate Rule 3.3(f). Conduct in a proceeding that serves merely to harass or maliciously injure another would be frivolous in violation of Rule 3.1. Dilatory conduct may violate Rule 1.3(a), which requires a lawyer to act with reasonable diligence and promptness in representing a client.

Respectfully submitted,

Vincent E. Doyle III
President