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LEGAL ETHICS—THE QUESTION OF EX PARTE COMMUNICATIONS AND PRO SE LAWYERS UNDER MODEL RULE 4.2—HEY, CAN WE TALK?

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NOTES

LEGAL ETHICS—THE QUESTION OF EX PARTE COMMUNICATIONS AND PRO SE LAWYERS UNDER MODEL RULE 4.2—HEY, CAN WE TALK?

INTRODUCTION

Under Model Rules of Professional Conduct (“Model Rules”) Rule 4.2 and Model Code of Professional Responsibility (“Model Code”) DR 7-104(A)(1),¹ ex parte communications² between lawyers and represented parties is prohibited. While this ethical tenet proscribing ex parte contact is easily applied to lawyers representing opposing parties, application of this principal is difficult at best when lawyers appear pro se.³ Because pro se lawyers act on behalf of their own interests, questions arise as to whether pro se attorneys are subject to the prohibitions against ex parte communications.⁴

1. See MODEL RULES OF PROFESSIONAL CONDUCT (“MODEL RULES”) Rule 4.2 (1996).

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 by law to do so.

Id.; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY (“MODEL CODE”) DR 7-104(A)(1) (1996).

During the course of his representation of a client a lawyer shall not: [c]ommunicate 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 authorized by law to do so.

Id.

2. Ex parte communications mean “contact between [lawyers] and [opposing parties] outside the presence of that party’s counsel.” S. Blake Parrish, Jr., Note, Public Service Electric & Gas Co. v. Associated Electric & Gas Ins. Serv., Ltd.: *An Expansive View of Rule 4.2 and Ex Parte Contacts with Former Employees*, 1991 UTAH L. REV. 647, 647 n.1 (1991). The term ex parte is defined as “by or for one party, done for, in behalf of, or on the application of, one party only.” BLACK’S LAW DICTIONARY 576 (6th ed. 1990).

3. The term pro se is defined as “[f]or one’s own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court.” BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).

4. See, e.g., Alicia L. Downey, Note, *Fools and Their Ethics: The Professional*

Lawyers have the same right to self-representation as non-lawyers.⁵ Indeed, lawyers have exercised this right in many types of cases.⁶ According to the Model Rules, however, lawyers are representatives of clients, officers of the court, and public citizens having unique responsibilities to the quality of justice.⁷ Unlike non-attorney pro se litigants, lawyers have professional obligations to obey specific ethical standards.⁸ Pro se lawyers may invariably violate professional responsibilities when acting on behalf of their own interests.⁹ Hence, there exist conflicts between lawyers' right to pro-

Responsibility of Pro Se Attorneys, 34 B.C. L. REV. 529 (1993). Downey discusses the general uncertainty of the applicability of disciplinary rules to pro se lawyers whereas this Note examines the applicability of a specific rule to pro se attorneys. Her Note provides an excellent source of background material concerning the application of ethical rules to pro se attorneys. This Note relies heavily on Downey's substantive effort and argument that pro se lawyers should be governed by appropriate ethical standards, e.g., MODEL RULES Rule 4.2 should apply to pro se attorneys under most circumstances, and points the researcher to Downey's Note for additional or further research and citations.

5. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 14.4 (1986); see also Downey, *supra* note 4, at 530, 533-35 for a detailed discussion on the history of attorneys' right to self-representation.

Downey explains that the right to appear pro se is rooted in American history and law, dating back to colonial America. See Downey, *supra* note 4, at 533. The colonists held in high regard "the virtues of self-reliance and a traditional distrust of lawyers." *Faretta v. California*, 422 U.S. 806, 826-32 (1975); see also Robert H. Abrams & Donald J. Dunn, *The Law Library's Institutional Response to the Pro Se Patron: A Post-Faretta Review*, 1 W. NEW ENG. L. REV. 47 (1978) (describing how law libraries can help pro se litigants achieve effective self-representation in light of *Faretta*).

Congress passed legislation in 1789 protecting a litigant's right to appear in federal court without a lawyer. See Downey, *supra* note 4, at 534 (citing WOLFRAM, at § 14.4. Present version of statute at 28 U.S.C. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally . . .")). A majority of state constitutions have guaranteed the right of self-representation or have impliedly guaranteed that right by allowing open access to courts for redress of civil grievances. See Downey, *supra* note 4, at 534 (citing Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641, 1641 n.2 (1987)).

6. See Downey, *supra* note 4, at 530 n.16 (citing *Kay v. Ehrler*, 499 U.S. 432 (1991) (civil rights claim); *Fox v. Boucher*, 794 F.2d 34 (2d Cir. 1986) (tort claim); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387 (4th Cir. 1980) (action against creditor under Truth in Lending Act); *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958) (criminal defense); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979) (action against government under Freedom of Information Act); *Presnick v. Esposito*, 513 A.2d 165 (Conn. App. 1986) (action against client for fee non-payment)).

7. See generally MODEL RULES Preamble.

8. See MODEL RULES; MODEL CODE. See *infra* Part I.B for a discussion of the specific ethical obligations imposed upon lawyers.

9. See *supra* note 6 and cases cited therein for examples of improper pro se attorney conduct.

ceed pro se and their ethical obligations to the legal process and system.

Unfortunately, the rules governing attorney conduct are silent concerning the ethics of attorney self-representation.¹⁰ Both DR 7-104(A)(1) and Rule 4.2 seem to assume the existence of attorney-client relationships between separate individuals.¹¹ The rules do not answer whether pro se lawyers act in representative capacities of "clients." Moreover, whether Rule 4.2 applies to pro se attorneys is left unanswered by various court interpretations.¹² Hence, it is not clear whether Rule 4.2 governs pro se attorneys engaged in ex parte communications.

This Note examines the uncertainty and confusion surrounding the applicability of ex parte standards to pro se lawyers. Part I.A reviews the development and evolution of current ex parte rules.¹³ Part I.B discusses how the ethical standards of objectivity, refraining from harassment, and avoiding the appearance of impropriety govern lawyers' professional responsibilities to courts and society.¹⁴ Although pro se attorneys are entitled to self-representation, Part II examines whether pro se attorneys should be subject to the same ethical concerns as other attorneys to maintain professional standards while promoting the integrity of the legal profession.¹⁵

In conclusion, this Note advocates the adoption of a rebuttable presumption that pro se attorneys violate Rule 4.2 when engaging in unauthorized ex parte communications.¹⁶ The presumption is re-

10. See Downey, *supra* note 4, at 532. See also Brett Barenholtz, Note, *Fees for the Taxpaying Fool: IRC Section 7430 Fee Awards to Pro Se Attorneys*, 38 CASE W. RES. L. REV. 408, 440 n.225 (1988) (ABA Model Code of Professional Responsibility is silent concerning the general applicability of rules to attorney self-representation).

11. Rule 4.2 states that "[i]n representing a client, a lawyer shall not communicate . . . with a person . . . represented by another lawyer." MODEL RULES Rule 4.2. (emphasis added); see also MODEL CODE DR 7-104(A)(1). "During the course of his representation of a client a lawyer shall not" engage in ex parte communication. *Id.* (emphasis added). See *supra* note 1 for the complete text of both rules.

12. See, e.g., *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994) (lawyer-husband proceeding pro se may not contact wife directly); *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (lawyer acting on own behalf not "representing a client" and therefore did not violate ethical duties when contacting represented opponent); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987) ("[A]ttorney who is himself a party to the litigation represents himself when he contacts an opposing party.").

13. See *infra* notes 29-112 and accompanying text.

14. See *infra* notes 113-186 and accompanying text.

15. See *infra* notes 187-242 and accompanying text.

16. See, e.g., CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR AS-

butted when attorneys demonstrate that their conduct otherwise satisfies the ethical obligations imposed by the Model Rules.¹⁷ This proposed framework recognizes the problems inherent in pro se ex parte communications that mandate the protection afforded by Rule 4.2 while also acknowledging that certain pro se ex parte communications may be made by attorneys in manners that do not implicate the concerns for which Rule 4.2 was initially promulgated.

I. BACKGROUND

The litigiousness of Americans is growing at an explosive rate.¹⁸ The cost of hiring lawyers is also rising.¹⁹ Consequently, more litigants are representing themselves.²⁰ The growth of pro se litigation implicates several concerns, such as pro se litigants' lack of knowledge of law and proper court procedure. Additionally, pro se litigants are apt to file frivolous actions and abuse the legal process to harass others.²¹

While general problems of pro se litigation have been studied, commentators have not afforded as much attention to pro se litigants who are also lawyers.²² Lawyers can subject the legal system

SOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 402 (3d ed. 1996) (citing D.C. Bar, Legal Ethics Comm., Op. 258 (1995) (pro se lawyers are prohibited from contacting represented opponents; pro se lawyers bring professional skill and legal knowledge to the table and retain presumptively unfair advantage over opposing parties)).

17. See *infra* note 210 for a discussion of how pro se lawyers can protect themselves from false claims of Rule 4.2 violations. See also *infra* note 210 for an explanation of why this Note's rebuttable presumption standard does not lead to an absolute bar against attorney self-representation in practice.

18. See, e.g., Amy Stevens, *Self-Representation in Court Can Save Money but Often at the Cost of Success*, WALL ST. J., June 3, 1991, at B1.

19. See *id.*

20. See *id.* See also Jene Stonesifer, *Going to Court for Child Support; Many Are Opting for Self-Representation*, WASH. POST, Dec. 8, 1992, at D5.

21. See Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1109 n.4 (1987); see also Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1639 (1994) (ex parte prohibitions are designed to address "imbalances in knowledge and skill between lawyers and adverse parties" by prohibiting lawyers from using superior legal knowledge and skills to manipulate laypersons); Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 351 n.3 (1988) (listing cases in which pro se litigants harassed opponents and wasted court resources).

22. For articles discussing the general right to appear pro se, see, e.g., Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 n.2 (1978) (citing Ira P. Robbins & Susan N. Herman, *Pro Se Litigation—Litigating Without Counsel: Faretta or For Worse*, 42 BROOK. L. REV. 629

to the same abuses as non-lawyers.²³ Unusual problems may arise when “[s]uch abuses . . . [are] perpetrated by pro se attorneys, because attorneys have [professional duties] to conform to certain ethical standards.”²⁴ These standards mandate that lawyers exercise legal objectivity, refrain from using the legal process to harass others, and avoid the appearance of impropriety.²⁵

Lawyers who ignore and violate these standards invariably violate provisions of the Model Code or Model Rules.²⁶ Unfortunately, the Model Rules and Model Code do not address attorney

(1976); David Rosenberg, *Self-Representation and the Criminally Accused—Evolution and Scope in the Federal Courts*, 13 CAL. W. L. REV. 269 (1976); Steven Sarfatti, Recent Development, *Criminal Defendants at the Bar of Their Own Defense*, 13 AM. CRIM. L. REV. 335 (1975); Kathleen Smyth Cook, Comment, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUM. RTS. L. REV. 553 (1975-76); Phil Miller, Note, *Faretta v. California: The Law Helps Those Who Help Themselves*, 28 HASTINGS L.J. 283 (1976); Marlee S. Myers, Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403 (1975); Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292 (1976)). But see Downey, *supra* note 4, at 530. Downey’s Note is a comprehensive examination of the applicability of ethical rules to attorney self-representation.

23. See Downey, *supra* note 4, at 531 n.17. Downey cites *Schild v. Rubin*, 232 Cal. App. 3d 755 (Cal. Ct. App. 1991). In *Schild*, two neighbors, both attorneys, brought actions against each other in a dispute over backyard basketball playing. Rubin was annoyed by the sound of the Schild family playing basketball in the afternoon. See *Schild*, 232 Cal. App. 3d at 758. In observing the harm to the legal system caused by these self-representing attorneys, the court of appeals quoted the trial court:

[W]hat we have [are] lawyers utilizing their own unlimited resources to accelerate petty neighborhood squabbles into a community war. You have even involved your neighbors, and you have in that manner disturbed the tranquility of a whole neighborhood, people taking sides, one against the other. . . . It appears to the Court and to the community . . . that the lawyers here are abusing the limited resources of the Court, which has a myriad of truly difficult matters pending before it You have by your conduct and by your position as lawyers embarrassed the Bar and the judicial system as a whole. You have subjected the whole system to ridicule and public scorn. And many people, [including] your fellow practitioners, I believe would find this kind of conduct intolerable.

Id. at 761 n.2; see also Downey, *supra* note 4, at 531 n.17 for a detailed discussion of this case.

24. Downey, *supra* note 4, at 531 (footnote omitted); see also MODEL RULES Preamble.

25. See MODEL RULES Scope (“The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.”); WOLFRAM, *supra* note 5, at §§ 1.1 (lawyers and public distrust), 10.2.1 (professional detachment), and 11.2 (lawyers and abusive litigation); Downey, *supra* note 4, at 531-32 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS (“ABA STANDARDS”) Theoretical Framework (1986) (discussing lawyers’ duties in relation to the Model Rules and Model Code)).

26. See Downey, *supra* note 4, at 532 (citing ABA STANDARDS Theoretical Framework; GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYER-

self-representation and the applicability of sanctions for violating professional ethical standards by pro se attorneys.²⁷ Indeed, “[t]he lack of clarity in [ethical] rules [] and the inconsistent application of them allows attorneys to practice loophole lawyering and evade ethical standards.”²⁸ Accordingly, the policy considerations behind Rule 4.2 must be considered in order to determine whether ex parte proscriptions apply to pro se lawyers.

A. *The Development and Application of Ex Parte Prohibition*

The design of Rule 4.2 prevents lawyers from taking advantage of uncounselled laypersons. Moreover, Rule 4.2 provides protection to represented persons from overreaching by adverse counsel. Hence, Rule 4.2 aspires to preserve the integrity of lawyer-client relationships as well as preserve the proper functioning of the judicial system.²⁹ Unfortunately, whether Rule 4.2 applies to pro se attorneys remains uncertain.

1. The Purpose for Ex Parte Proscriptions

The ABA asserts several reasons why lawyers’ ex parte communications with represented parties should be restricted. In 1934, the ABA originally stated that the prohibition against ex parte communications proposed “[t]o preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches.”³⁰ The ban on ex parte communication also serves to prevent opposing lawyers from “unfairly obtaining infor-

ING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 104 (2d ed. 1990 & Supp. 1991)).

27. See Barenholtz, *supra* note 10, at 440 n.225 (Model Code is silent regarding attorney self-representation); Downey, *supra* note 4, at 532.

28. David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEGAL ETHICS 283, 287 (1995).

29. See generally Carter v. Kamaras, 430 A.2d 1058 (R.I. 1981). See also N. Lee Cooper, *Courtesy Call: It Is Time to Reverse the Decline of Civility in Our Justice System*, A.B.A. J., Mar. 1997, at 8. Cooper declares that:

Confidence in the American justice system begins with the public perception of lawyers. As attorneys, therefore, we must constantly ask what we have done to deserve a better public image. As part of that process, we must ask what we have done to help achieve a fairer, more trustworthy and reliable system of justice.

Id. See *infra* Part I.B.3 for a discussion of attorney obligations to avoid the appearance of impropriety.

30. Parrish, *supra* note 2, at 648 (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934)). Parrish notes that the ABA has reaffirmed this policy in subsequent opinions. See Parrish, *supra* note 2, at 648 n.10 (citing ABA

mation" from parties who are questioned outside the presence of their counsel.³¹ Moreover, courts note that the rules prevent "situations in which [represented parties] may be taken advantage of by adverse counsel."³²

Similarly, Ethical Consideration ("EC") 7-18 of the Model Code provides:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason [lawyers] should not communicate on the subject matter of the representation of [clients] with [persons they know] to be represented in the matter by [other lawyers], unless pursuant to law or rule of court or unless [they have] the consent of the [opposing lawyers].³³

The rules governing ex parte contact are designed to avoid "conversations between a nonlawyer and an adverse lawyer [which might] lead to disputes about what was said, which may force the lawyer to become a witness."³⁴ Attorneys acting as witnesses risk violating ethical rules governing conflicts of interest.³⁵ Other justifications for ex parte prohibitions include: protecting clients from inadvertently disclosing privileged information, helping settle disputes through neutral experts, and avoiding the competing interests between a lawyer's duty to zealously represent his client and a lawyer's duty not to abuse an unprotected party.³⁶

Comm. on Ethics and Professional Responsibility, Informal Op. 1498 (1983); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991)).

31. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1498 (1983); *see also* Parrish, *supra* note 2, at 649 n.11 (citing Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053, 1054-55 (1987) (explaining the objectives of Rule 4.2)).

32. *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) (en banc); *see also* Jon S. Herreman, Note, *The Scope of the Disciplinary Rules Prohibiting Ex Parte Communication in a Corporate Context*, 40 DRAKE L. REV. 861, 862-64 (1991).

33. MODEL CODE ETHICAL CONSIDERATION ("EC") 7-18 (1996).

34. John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 686 (1979).

35. *See, e.g.*, MODEL CODE DR 5-101 (refusing employment when the interests of lawyers impair their independent professional judgment); DR 5-102 (withdrawing as counsel when lawyers become witnesses); MODEL RULES Rule 1.7 (conflict of interest); Rule 3.7 (lawyers as witnesses).

36. *See* Lewis Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977); *see also* Leubsdorf, *supra* note 34, at 686-87.

2. The Uncertainty of Appropriately Applying Ex Parte Proscriptions

Model Code DR 7-104(A)(1) and Model Rule 4.2 exhibit no substantive differences.³⁷ The ABA, however, attempted to make the Model Rules easier to interpret and apply than the Model Code.³⁸ The Model Code's "tripartite" format of Canons, Ethical Considerations, and Disciplinary Rules was replaced with black-letter rules and comments in the nature of the American Law Institute's Restatements of Law.³⁹ The Comment to Rule 4.2 provides that "parties to a matter may communicate directly with each other."⁴⁰ The Comment enumerates a significant exception to the general ex parte proscription in that Rule 4.2 does not apply to clients of lawyers.

The ABA's Comment is an attempt to clarify the scope of Rule 4.2. Ironically, however, the Comment contributes to the ambiguity surrounding Rule 4.2's application to pro se lawyers. Whether pro se lawyers are considered "parties to matters" and not governed by Rule 4.2's proscription is not answered by the Model Rules nor by the Model Code.⁴¹ Courts are unable to agree on whether pro se lawyers represent "clients" and thus are subject to ex parte contact prohibitions.⁴²

One theory holds that pro se lawyers are not employed or in the representative capacity of clients, given that attorneys cannot be employees or agents of themselves.⁴³ Thus, pro se lawyers are "par-

37. See *supra* note 1 for a comparison of the text of each rule.

38. Following extensive studies conducted by the ABA's Commission on Evaluation of Professional Standards, the ABA House of Delegates adopted the Model Rules of Professional Conduct on August 2, 1983. See Parrish, *supra* note 2, at 650 (citing MODEL RULES Preface (1986)).

39. See Parrish, *supra* note 2, at 650; see also CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 3-4 (1987); Robert J. Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1, 5-6 (1980) (discussing format changes in Model Rules).

40. MODEL RULES Rule 4.2 cmt.1.

41. See Downey, *supra* note 4, at 551-54; Barenholtz, *supra* note 10, at 440 n.225 (ABA Model Code of Professional Responsibility is silent concerning the general applicability of rules to attorney self-representation).

42. Compare *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994) (pro se attorney considered representing a client) with *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075 (Conn. 1990) (holding that an attorney did not represent a client by acting on his own behalf).

43. See *Presnick v. Esposito*, 513 A.2d 165, 167 (Conn. App. 1986); *O'Neil v. Berigan*, 452 A.2d 337, 344 (D.C. App. 1982).

ties to matters" having independent rights not abrogated by professional status and accompanying ethical concerns.⁴⁴ Some commentators assert that direct communication between lawyer-litigants and opposing parties may save resources and expedite litigation by eliminating middle-men.⁴⁵ Furthermore, there may exist situations where Rule 4.2's protection is not necessary, e.g., in the case of amicable proceedings or suits involving sophisticated and experienced litigants.⁴⁶ This theory asserts that lawyer self-representation supersedes the Model Rules which govern professional status. Hence, one extreme response to the issue is simply not to apply Rule 4.2 to pro se lawyers.⁴⁷

For example, in *Pinsky v. Statewide Grievance Committee*,⁴⁸ the Connecticut Supreme Court held that a lawyer, acting on his own behalf, may directly contact an opposing party without consent of the adverse party's lawyer.⁴⁹ Attorney Irving J. Pinsky maintained his office in New Haven, Connecticut, in a building owned by the Bank of Boston.⁵⁰ The manager of the building was an employee of the Bank of Boston named Eric Connery.⁵¹ The bank sought to evict Pinsky from the building.⁵² While Pinsky did not appear pro se, retaining outside counsel to represent him in the eviction action, he nonetheless acted on his own behalf in response to the bank's action.⁵³ Pinsky sent a letter to Connery's home expressing "his

44. See MODEL RULES Rule 4.2 cmt.1; see also Downey, *supra* note 4, at 553.

45. See Leubsdorf, *supra* note 34, at 686-87. But see Kurlantzik, *supra* note 36, at 145-46.

46. See Kurlantzik, *supra* note 36, at 145-46; see also Downey, *supra* note 4, at 551 n.197. Downey cites *People ex rel. Brazen v. Finley*, 497 N.E.2d 1013 (Ill. App. Ct. 1986), *aff'd*, 519 N.E.2d 898 (Ill. 1988), as an example of when attorney self-representation does not compromise ethical obligations. Downey notes that *Brazen* did not involve the credibility of the pro se lawyer as the entire case was a question of law rather than fact. See *Brazen*, 497 N.E.2d at 1016. "[T]he attorney-plaintiff's motives were beyond reproach In fact, Brazen's actions conformed with the attorney's duty to work for law reform" Downey, *supra* note 4, at 551 n.197 (citing *Brazen*, 497 N.E.2d at 1016).

47. See, e.g., *In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985); *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990); *Theobald v. Botein, Hays, Sklar & Herzberg*, 465 F. Supp. 609 (S.D.N.Y. 1979); *Borman v. Borman*, 393 N.E.2d 847 (Mass. 1979).

48. 578 A.2d 1075 (Conn. 1990).

49. See *id.* at 1079.

50. See *id.* at 1076.

51. See *id.*

52. See *id.* The opinion gives no reason as to why Pinsky was being evicted. "The bank . . . began a summary process action against [Pinsky], seeking to evict him from the building." *Id.*

53. See *id.*

frustration with the events surrounding the eviction, and threatened to initiate legal action against Connery."⁵⁴

Subsequently, Connery filed a complaint with the Statewide Grievance Committee charging Pinsky with violation of Connecticut's Rule 4.2 of the Rules of Professional Conduct for sending the letter directly to him.⁵⁵ The Committee concluded that Pinsky was representing a client, namely himself, and had violated Rule 4.2 and reprimanded him.⁵⁶

In May, 1989, Pinsky appealed this reprimand to the Superior Court in the Judicial District of New Haven.⁵⁷ Pinsky argued he was not representing a client at the time of his contact with Connery. Hence, his actions were not governed by Rule 4.2.⁵⁸ The trial court agreed and sustained Pinsky's appeal,⁵⁹ rescinded the Committee's reprimand, and ordered an appropriate publication to that effect be published in the Connecticut Law Journal.⁶⁰

The Committee appealed and the Appellate Court transferred the matter to the Connecticut Supreme Court.⁶¹ The Connecticut Supreme Court stated:

Contact between litigants, . . . is specifically authorized by the comments under Rule 4.2: "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.*" The language of Rule 4.2 and the comments thereto, limit the restriction on communications with represented parties to those situations where the attorney is "representing a client." Here, [Pinsky] was not "representing a client."⁶²

Finding that the letter Pinsky sent Connery "was a communication

54. *Id.* at 1076-77.

55. *See id.* See MODEL RULES Rule 4.2 and MODEL CODE DR 7-104(A)(1), *supra* note 1 for the text of each provision.

56. *See Pinsky*, 578 A.2d at 1077. The court's opinion, however, does not detail what consisted of this reprimand. Generally, a reprimand is defined as "[t]o reprove severely; to censure formally, especially with authority." BLACK'S LAW DICTIONARY 1302 (6th ed. 1990).

57. *See Pinsky*, 578 A.2d at 1077.

58. *See id.*

59. *See id.* But see *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987) ("An attorney who is himself a party to the litigation represents himself when he contacts an opposing party.").

60. *See Pinsky*, 578 A.2d at 1077.

61. *See id.*

62. *Id.* at 1079 (emphasis in original).

between litigants,” the court held that Pinsky had a right to make such communication because he was not representing a client.⁶³ The court noted that “[t]here was no evidence that suggests that the letter was written by [Pinsky] in a representative capacity.”⁶⁴ The court concluded by saying that Pinsky’s conduct may have been imprudent, but it did not violate Rule 4.2.⁶⁵

Similarly, pro se lawyers in California may directly contact represented parties without consent of opposing counsel.⁶⁶ The California State Bar in its opinion of Rule 2-100⁶⁷ reasoned that attorney-litigants have independent rights that professional status should not invalidate.⁶⁸ Rather than prevent pro se lawyers from directly communicating with adverse parties, “the commentary to the California rule suggests that to avoid abusive practices, the burden is on the opposing party’s counsel to warn his or her client against participating in such communications.”⁶⁹ Hence, pro se lawyers are permitted to directly contact opposing parties without counsel’s consent.

An opposing view holds that attorneys who are themselves parties to litigation represent themselves, and are therefore “clients” under the comment to Rule 4.2.⁷⁰ Courts adopting this inter-

63. *Id.* But see *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994). “The Illinois Supreme Court reached the opposite conclusion and held: ‘An Attorney who is himself a party to the litigation represents himself when he contacts an opposing party.’” *Id.* (quoting *In re Segall*, 509 N.E.2d at 990).

64. *Pinsky*, 578 A.2d at 1079.

65. *See id.*

66. *See Downey*, *supra* note 4, at 553 (citing ST. B. CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100 Discussion (1989)). Downey cites both California and Michigan’s Rules of Professional Conduct Rule 4.2 as examples of different jurisdictions applying substantially similar rules under conflicting interpretations. *See Downey*, *supra* note 4, at 552-54. *See infra* notes 99-107 and accompanying text for a discussion of Michigan’s Rule 4.2.

67. *See* ST. B. CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100. This rule states, in relevant part:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. . . . This rule shall not prohibit . . . [c]ommunications otherwise authorized by law.

Id.; *see also Downey*, *supra* note 4, at 553. *See supra* note 1 for the text of MODEL RULES Rule 4.2 and MODEL CODE DR 7-104(A)(1).

68. *See* ST. B. CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100 Discussion (1989); Downey, *supra* note 4, at 553.

69. Downey, *supra* note 4, at 553 (citing ST. B. CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100 Discussion (1989)).

70. *See, e.g., Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994).

pretation maintain that “[a] party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of [Rule 4.2] merely because opposing counsel is also a party to the litigation.”⁷¹ This view holds that pro se lawyers do not have independent rights superseding the Model Rules; hence, another extreme response to the issue is completely banning pro se lawyer ex parte communications.⁷²

For example, on August 25, 1994, the Supreme Court of Wyoming decided *Sandstrom v. Sandstrom*.⁷³ Mr. and Mrs. Sandstrom married on February 20, 1981.⁷⁴ Mrs. Sandstrom separated from Mr. Sandstrom in July, 1987.⁷⁵ Mr. Sandstrom petitioned for dissolution of the marriage in September, 1988.⁷⁶ The couple divorced in Florida in 1991.⁷⁷ Mr. Sandstrom, an attorney, handled the divorce pro se, while Mrs. Sandstrom retained counsel.⁷⁸

During the legal proceeding, Mr. Sandstrom contacted Mrs. Sandstrom without the consent of her lawyer to discuss settling their differences.⁷⁹ Mrs. Sandstrom complained and the lower court ordered Mr. Sandstrom to have no ex parte contact with Mrs. Sandstrom.⁸⁰ Mr. Sandstrom appealed the state district court’s order enjoining him from having ex parte contact with Mrs. Sandstrom.⁸¹ According to Mr. Sandstrom, the district court’s order was an improper restraining order.⁸²

The Wyoming Supreme Court ruled that Mr. Sandstrom, as an attorney licensed to practice in Wyoming “was, therefore, an officer of the court and subject to the control of the courts.”⁸³ Citing Rule 4.2 of the Wyoming Rules of Professional Conduct for Attorneys at Law, the court held that Mr. Sandstrom, as a party to the litigation, represented himself when he contacted Mrs. Sandstrom.⁸⁴ The

71. *Id.*

72. *See, e.g.,* Porter v. Arco Metals Co., 642 F. Supp. 1116 (D. Mont. 1986); *Bobele v. Superior Court*, 245 Cal. Rptr. 144 (Cal. Ct. App. 1988).

73. 880 P.2d 103 (Wyo. 1994).

74. *See Sandstrom v. Sandstrom*, 617 So. 2d 327, 328 (Fla. Dist. Ct. App. 1993).

75. *See id.*

76. *See id.*

77. *See Sandstrom*, 880 P.2d at 104.

78. *See id.*

79. *See id.* at 109.

80. *See id.* at 105.

81. *See id.* at 108.

82. *See id.*

83. *Id.* at 108.

84. *See id.* Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of

court stated that the rule “is designed to protect litigants represented by counsel from direct contacts by opposing counsel. 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.”⁸⁵

The court observed that “the need for such protection [was] especially evident under the facts of this case.”⁸⁶ Mrs. Sandstrom was in the hospital when Mr. Sandstrom contacted her about settling their differences.⁸⁷ Mrs. Sandstrom says she asked Mr. Sandstrom to contact her attorney and that Mr. Sandstrom ignored her request.⁸⁸ The Wyoming Supreme Court concluded that “[t]he wife was entitled to be protected by Rule 4.2. The district court did not err when it ordered the husband to have no further ex parte contacts with the wife.”⁸⁹

Another example is *In re Segall*.⁹⁰ An attorney incurred huge credit card debts.⁹¹ Subsequently, a complaint was filed against the lawyer to recover the unpaid balances.⁹² The attorney, appearing pro se, contacted the complainant directly by tendering payment in settlement of the debts.⁹³ Unfortunately, the pro se attorney never

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.

Id.; see also MODEL CODE DR 7-104(A)(1), *supra* note 1. See generally Burke, *supra* note 21, at 1639. Burke comments:

The rule prevents attorneys from communicating about the subject of representation with parties they know to be represented by counsel, unless the party's lawyer is present or consents to the communication, or the law authorizes direct communication. The rule originally was designed to address imbalances in knowledge and skill between lawyers and adverse parties by preventing attorneys from using their superior legal skills to manipulate laypersons.

Id. (footnotes omitted). But see MODEL RULES Rule 4.2 cmt.1. “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 . . .” *Id.* (emphasis added).

85. *Sandstrom*, 880 P.2d at 109 (quoting *In re Segall*, 509 N.E.2d 988, 990 (1987)).

86. *Id.*

87. *See id.*

88. *See id.*

89. *Id.*

90. 509 N.E.2d 988 (Ill. 1987).

91. *See id.* at 989. The attorney incurred credit card debts amounting to more than \$24,000. *See id.*

92. *See id.*

93. *See id.* The attorney tendered payment of \$144.36 as an offer of settlement

received the complainant's lawyers' consent to communicate directly with the complainant.⁹⁴

The attorney argued that his communication was made on his own behalf as litigant to the matter and was not in the course of "his representation of a client."⁹⁵ The Supreme Court of Illinois held that the attorney, as a party to the litigation, was representing himself when he contacted the complainant.⁹⁶ The attorney was subject to Illinois' Code of Professional Responsibility Disciplinary Rule 7-104(A)(1).⁹⁷ The attorney was suspended from the practice of law for two years for violating DR 7-104(A)(1) because he contacted the opposing party without counsel's prior consent.⁹⁸

Similarly, a Michigan State Bar Committee on Professional and Judicial Ethics opinion states that Michigan's Rule 4.2⁹⁹ applies to pro se lawyers to prohibit them from directly communicating with parties represented by counsel.¹⁰⁰ A pro se lawyer asked whether it was permissible, as party to a matter himself, to settle a dispute with an opposing party without the authority or consent of the party's counsel.¹⁰¹ The Michigan Committee ruled that Rule 4.2 applied to the self-represented attorney to prevent him from directly contacting the opposing party without counsel's consent.¹⁰²

The Committee gave several reasons for prohibiting direct contact with represented parties.¹⁰³ First, the rule is designed to protect non-lawyers from making unintentional and harmful

and payment of the debts, including "any and all claims, causes of action and matters in dispute." *Id.*

94. *See id.*

95. *Id.* at 990.

96. *See id.*

97. *See id.* Illinois adopted MODEL CODE DR 7-104(A)(1). *See id.* *See supra* note 1 for the text of DR 7-104(A)(1).

98. *See In re Segall*, 509 N.E.2d at 991.

99. *See Downey, supra* note 4, at 552-53. MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Id. Downey cites both California and Michigan's Rules of Professional Conduct Rule 4.2 as examples of different jurisdictions applying substantially similar rules under conflicting interpretations. *See Downey, supra* note 4, at 552-54. *See supra* notes 66-69 and accompanying text for a discussion of California's Rule 2-100; *See also* MODEL RULES Rule 4.2, *supra* note 1 (identical rule).

100. *See* MICH. ST. B. CI-1206, at 3; Downey, *supra* note 4, at 552.

101. *See* MICH. ST. B. CI-1206, at 1; Downey, *supra* note 4, at 552-53.

102. *See* MICH. ST. B. CI-1206, at 3; Downey, *supra* note 4, at 553.

103. *See* MICH. ST. B. CI-1206, at 2-3; Downey, *supra* note 4, at 553.

admissions.¹⁰⁴ Secondly, the rule prevents lawyers from “unfairly employing superior negotiating and interrogation skills to the non-attorney’s detriment.”¹⁰⁵ Finally, the rule “preserve[s] the protective and insulating role of counsel.”¹⁰⁶ The Committee concluded that the policies supporting Rule 4.2 remain in effect when one party is a self-represented lawyer, and thus, prohibit direct communication between pro se lawyers and opposing parties.¹⁰⁷

In sum, DR 7-104(A)(1) and Rule 4.2 are designed to protect represented clients from improper attorney communication and contact.¹⁰⁸ The rules “prevent situations in which [represented parties] may be taken advantage of by adverse counsel; the presence of the party’s attorney theoretically neutralizes the contact.”¹⁰⁹ The rules are designed to address “imbalances in knowledge and skill between lawyers and adverse parties” by prohibiting lawyers from using their legal knowledge and skills to manipulate laypersons.¹¹⁰

Unfortunately, courts and the rules themselves do not satisfactorily answer whether and when ex parte proscriptions should apply to pro se lawyers.¹¹¹ Attorneys should be held to high ethical standards when dealing with nonlawyers.¹¹² Accordingly, the ethical obligations of lawyers to refrain from improper conduct and appearance must be considered in order to determine whether and when Rule 4.2 applies to proscribe the ex parte behavior of pro se attorneys.

104. See MICH. ST. B. CI-1206, at 2; Downey, *supra* note 4, at 553; Herreman, *supra* note 32, at 862-63; Leubsdorf, *supra* note 34, at 686.

105. Downey, *supra* note 4, at 553 (citing MICH. ST. B. CI-1206, at 2-3); see also Herreman, *supra* note 32, at 862-63.

106. Downey, *supra* note 4, at 553 (citing MICH. ST. B. CI-1206, at 2).

107. See MICH. ST. B. CI-1206, at 3; Downey, *supra* note 4, at 553.

108. See *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) (en banc).

109. *Id.*

110. *Burke*, *supra* note 21, at 1639 (footnote omitted).

111. Indeed, “[i]nterpretation of attorney ethical rules, however, should be clear and consistent with the goal of maintaining high standards of integrity.” *Green*, *supra* note 28, at 287. Moreover, the Supreme Court states that:

[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.” While lawyers act in part as “self-employed businessmen,” they also act “as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.”

Id. (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (citations omitted)).

112. See *Green*, *supra* note 28, at 287.

B. *Attorney Ethics*

Attorneys play three roles in the legal system when representing clients: representatives of clients, officers of the court, and public citizens.¹¹³ Each role is accompanied by professional responsibilities and ethical obligations as established in the Model Rules Preamble that overlap and intersect with one another.¹¹⁴ Lawyers serve the interests of their clients by meeting these obligations and “also the public interest by ensuring the proper administration of justice.”¹¹⁵

The ethical obligations of lawyers in their legal, professional, and personal roles guard and protect not only attorneys, but clients and the legal system as well. These rules are found in the ABA Model Rules and the Disciplinary Rules of the Model Code.¹¹⁶ These standards mandate that lawyers remain objective in exercising legal judgment, refrain from using the legal process for the purpose of harassing others, and avoid the appearance of impropriety.¹¹⁷ Moreover, these standards apply to pro se litigants.¹¹⁸

1. The Objectivity Requirement

Lawyers are required to maintain objectivity so that they may exercise competent and independent legal judgment.¹¹⁹ Such judgment is “necessary to protect both the interests of the client and those of the legal system.”¹²⁰ The Model Rules and Model Code reflect the obligation of objectivity in rendering legal advice and

113. See MODEL RULES Preamble. See Downey, *supra* note 4, at 535-37 for an in-depth discussion on the role of pro se attorneys as officers of the court and public citizens. Downey thoroughly examines the broad ethical requirements of objectivity, refraining from harassment, and avoiding the appearance of impropriety as standards that govern all attorney conduct, pro se or otherwise. This Note relies heavily on Downey's examination and points the researcher to Downey's Note for additional or further research and citations.

114. See MODEL RULES Preamble. “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” *Id.*

115. Downey, *supra* note 4, at 535 (footnote omitted); see also WOLFRAM, *supra* note 5, at § 1.1.

116. See generally MODEL RULES and MODEL CODE.

117. See, e.g., MODEL RULES Preamble; MODEL CODE Preamble. See generally Downey, *supra* note 4.

118. See generally Downey, *supra* note 4 for a discussion of the applicability of ethical rules to pro se attorneys.

119. See WOLFRAM, *supra* note 5, at § 10.2.1 (a lawyer's detachment is essential to the proper functioning of the legal system); Downey, *supra* note 4, at 537.

120. Downey, *supra* note 4, at 537 (footnote omitted).

deciding whether to take legal action.¹²¹ Hence, attorney objectivity serves effective client representation and ensures the fair administration of justice while promoting the public interest.¹²²

For example, in *Duke v. United States*,¹²³ the United States Court of Appeals for the Ninth Circuit affirmed the conviction of an attorney who attempted to defend himself pro se.¹²⁴ The attorney in *Duke* was charged with aiding in the illegal importation of exotic birds from Mexico.¹²⁵ The court of appeals refused to reverse the conviction, stating that Duke himself was to blame for any confusion from his lack of objectivity.¹²⁶ The court went on to say that Duke should have appreciated the harm he was doing to his own case by representing himself.¹²⁷ Duke's lack of objectivity resulted in a conviction which was upheld on appeal.¹²⁸

Duke is a good example of the effect of a pro se lawyer's lack of objectivity.¹²⁹ Pro se attorneys, "regardless of experience, will lack the requisite objectivity to decide how best to frame the issues, order the evidence and cross-examine hostile witness."¹³⁰ In order to effectively and ethically serve the interests of clients and uphold the adversarial process, lawyers must exercise objectivity.¹³¹

Objectivity is implicitly required in the various rules governing

121. See, e.g., MODEL RULES Rule 1.2 cmt.6 ("A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct."); Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); see also MODEL CODE DR 5-101 (lawyers should not undertake employment that may impair independent judgment); MODEL CODE Canon 5 (lawyers should exercise independent judgment on behalf of clients).

122. See, e.g., MODEL CODE Preamble ("So long as [lawyers] are guided by [objectivity], the law will continue to be a noble profession.").

123. 255 F.2d 721 (9th Cir. 1958). See Downey, *supra* note 4, at 542 for further discussion concerning the significance of *Duke*.

124. See *Duke*, 255 F.2d at 730.

125. See *id.* at 723.

126. See *id.* at 725.

127. See *id.*

128. See *id.* at 730.

129. See generally *id.* See Downey, *supra* note 4, at 541-50 for a comprehensive review of cases in which attorney self-representation have violated ethical standards.

130. Downey, *supra* note 4, at 546 (citing *Kay v. Ehrler*, 499 U.S. 432, 437 (1991)) ("In the unpredictable atmosphere of the courtroom, . . . separate counsel ensures that reason, and not the client's emotion, dictates trial strategy. Self-representation by an attorney may often result in less effective lawyering than representation by separate counsel.") (footnotes and citation omitted).

131. See Downey, *supra* note 4, at 540. MODEL CODE EC 9-4 provides:

Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or

attorney conduct concerning a client's case.¹³² Lawyers must afford honest opinions about actual consequences of a client's case under existing law.¹³³ Attorneys must protect client interests from subversion by an attorney's own interests.¹³⁴ Lawyers can provide the most effective representation for clients by adhering to these objectivity rules and not violating ethical obligations.¹³⁵

The objectivity requirement allows attorneys to withdraw from employment if they feel their legal judgment will be hampered or impaired by a client's objectives or other unlawful actions the client wishes the attorney to take.¹³⁶ Attorneys should not accept "proffered employment if . . . personal interests or desires will . . . affect adversely the advice to be given or services to be rendered the prospective client."¹³⁷ Thus, in addition to effective client representation, the fair administration of justice and the public interest will be better served by attorney objectivity.¹³⁸

The objectivity requirement mandates that lawyers refuse or withdraw from employment when clients demand actions that violate rules of professional conduct and the law.¹³⁹ Objective legal

would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

Id.

132. See MODEL RULES Rule 1.1 ("A lawyer shall provide competent representation to a client."); see also MODEL CODE DR 6-101(A)(1), which provides that lawyers shall not handle matters "which [they know] or should know that [they are] not competent to handle, without associating [themselves] with [] lawyer[s] who [are] competent to handle it." *Id.* DR 6-101(A)(2) requires "preparation adequate in the circumstances." *Id.*

133. See MODEL RULES Rule 1.2 cmt.6 ("A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct.").

134. See MODEL RULES Rule 1.7 (lawyers must avoid conflicts of interest); see also MODEL CODE DR 5-101(A) ("[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests."); DR 5-105(A) ("[A lawyer] shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment.").

135. See MODEL RULES Preamble.

136. See MODEL RULES Rule 1.16(b)(3) (declining or terminating representation); see also MODEL CODE DR 2-110(C) (attorneys may withdraw from employment if clients insist "that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules").

137. MODEL CODE EC 5-2.

138. See MODEL CODE Preamble ("So long as [lawyers] are guided by [objectivity], the law will continue to be a noble profession.").

139. See MODEL RULES Rule 1.16(a)(1) (lawyers shall not represent clients or

judgment should filter frivolous claims for the legal system and prevent the abuse of the legal process.¹⁴⁰ The objectivity requirement ensures fairness not only to attorneys and clients, but to the adversarial system as well.¹⁴¹

2. The Legitimate Purpose Requirement

Whether on behalf of clients or on behalf of their own interests, lawyers should use the legal process for legitimate purposes and not to harass or threaten others.¹⁴² Lawyers are required to withdraw from employment if clients demand that attorneys abuse the law's procedures.¹⁴³ Lawyers who engage in harassment through the legal process or abusive conduct injure both the target of the harassment and the legal system.¹⁴⁴

For example, in *Fox v. Boucher*,¹⁴⁵ the United States Court of Appeals for the Second Circuit held that a pro se attorney's lawsuit involving one of the lawyer's tenants was an abuse of the legal process.¹⁴⁶ Attorney Fox, a New York resident and owner of rental property in Massachusetts, refused to return his tenant's security deposit after the tenant lawfully requested it from him.¹⁴⁷ The tenant brought a small claims action against Fox in Massachusetts to recover the security deposit. Fox counterclaimed for \$5,000 compensatory damages.¹⁴⁸

At trial, the lower court concluded that Fox's action was frivo-

withdraw from employment if "the representation will result in violation of the rules of professional conduct or other law").

140. See WOLFRAM, *supra* note 5, at § 11.2.2.

141. See generally WOLFRAM, *supra* note 5, at § 10.2.1; Downey, *supra* note 4, at 540.

142. See MODEL RULES Preamble.

143. See MODEL RULES Rule 1.16(a)(1) (lawyers shall not represent clients if the representation "will result in violation of the rules of professional conduct or other law"). Such actions violate Rule 3.1 (meritorious claims and contentions) and Rule 4.4 (respect for rights of third persons) of the Model Rules, and likewise, DR 2-109(A) (acceptance of employment) and DR 2-110 (withdrawal from employment) of the Model Code.

144. See MODEL RULES Preamble; Downey, *supra* note 4, at 539.

145. 794 F.2d 34 (2d Cir. 1986). See Downey, *supra* note 4, at 547 for further discussion on the significance of *Fox*.

146. See *Fox*, 794 F.2d at 38.

147. See *id.* at 36. In a telephone call, the tenant's father demanded the return of the security deposit, and Fox refused. See *id.* Fox claimed that the father called him a "rich lawyer," and then Fox threatened to bring suit. See *id.*

148. See *id.* at 36. Additionally, Fox sued for punitive damages for mental and physical suffering stemming from the telephone conversation. See *id.* After losing on all his defenses and counterclaims at state trial, Fox sued the tenant's father in New York court for \$100,000 in tort and punitive damages. See *id.* at 36-37. The case was

lous and in bad faith.¹⁴⁹ When Fox moved to vacate the judgment in favor of the tenant, the trial judge imposed sanctions against Fox.¹⁵⁰ On Fox's pro se appeal, the Second Circuit noted that, as a lawyer, Fox should have known his allegations were flimsy and frivolous.¹⁵¹ In sum, the court of appeals found sanctions appropriate when a pro se attorney brings frivolous actions in order to harass others.¹⁵²

The legitimate purpose requirement reflects the notion that when lawyers generate frivolous cases or engage in harassment through the legal process using abusive tactics, lawyers victimize not only the targets of harassment, but the legal system as well.¹⁵³ Lawyers have "a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."¹⁵⁴ Conduct that violates the legitimate purpose requirement also violates ethical obligations to improve the legal system and not to hinder the administration of justice.¹⁵⁵

The legal profession expects attorneys to meet the obligations associated with their role as officers of the court and public citizens outside of attorney-client relationships.¹⁵⁶ By meeting these obligations, lawyers preserve society's trust and confidence in the legal profession by ensuring that the legal system maintains its integrity.¹⁵⁷ Additionally, the pursuit of high ethical standards encourages public trust in the legal profession and the legal system.¹⁵⁸

As officers of the court, lawyers have an obligation to show

removed on diversity grounds to the Federal District Court for the Southern District of New York where it was dismissed on summary judgment. *See id.* at 37.

149. *See id.*

150. *See id.* The trial judge imposed a \$4,000 sanction on Fox under Federal Rule of Civil Procedure 11. *See id.* at 37-38.

151. *See id.* at 37. The court noted that such sanctions are particularly well suited to punish attorneys who, as parties to an action, engage in harassing litigation. *See id.*

152. *See id.* at 38.

153. *See generally* MODEL RULES Preamble; Downey, *supra* note 4, at 539.

154. MODEL RULES Rule 3.1 cmt.1; *see also* MODEL CODE DR 7-102(A)(1) (lawyers shall not "file . . . suit[s] . . . when [they] know[] . . . that such action would serve merely to harass or maliciously injure another").

155. *See* MODEL CODE DR 7-102(A)(1) (prohibiting lawyers from filing frivolous actions); *see also* MODEL RULES Rule 3.1 cmt.1 ("The [lawyer] has a duty . . . not to abuse legal procedure.").

156. *See* MODEL RULES Preamble ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.").

157. *See* MODEL RULES Preamble; *see also* MODEL CODE Preamble ("Lawyers, as guardians of the law, play a vital role in the preservation of society."); Downey, *supra* note 4, at 535-37.

158. *See* Downey, *supra* note 4, at 536.

respect for the legal system and for those who serve it.¹⁵⁹ Lawyers engaging in questionable conduct may violate ethical obligations as officers of the court.¹⁶⁰ The consequent harm to the public's faith discredits the legal profession's integrity, which lawyers have an obligation to uphold.¹⁶¹ Hence, lawyers, as officers of the court, must refrain from using the legal process for purposes of harassment or intimidation.¹⁶²

3. Avoiding the Appearance of Impropriety Requirement

Attorneys are chastised for having more concern with personal gain and profit than in pursuing justice.¹⁶³ The legal profession is sensitive to the effect that image has on the public's trust in lawyers.¹⁶⁴ In addition to the objectivity requirement and rules prohibiting harassing actions, there are rules that define a lawyer's responsibility to avoid the appearance of impropriety. These rules forbid lawyers from delaying litigation at the expense of justice,¹⁶⁵

159. The MODEL RULES Preamble states:

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Id.; see also MODEL CODE EC 9-6 ("[Lawyers] owe[] a solemn duty . . . to encourage respect for the law and for the courts and the judges thereof.").

160. Cf. Downey, *supra* note 4, at 540.

161. See Downey, *supra* note 4, at 540 (citing MODEL RULES 8.1-8.5 (maintaining the integrity of the legal profession)).

162. See MODEL RULES Preamble; see also Downey, *supra* note 4, at 535.

163. See James E. Brill, *Dan Quayle Was Right: Too Many Lawyers Focusing on Fees, Not on Clients*, A.B.A. J., Feb. 1992, at 86 ("There are too many lawyers who apparently have missed the courses on professionalism and who have confused a scorched-earth approach to every legal matter with the duty of zealous representation."); see also Green, *supra* note 28, at 287.

The legal profession is one of the most cynically viewed professions in this country, perhaps in large part because lawyers are perceived to manipulate the law. Many people might agree with Shakespeare's butcher that "the first thing we do, let's kill all the lawyers." To many, the term "ethical attorney" is an oxymoron. Critics often label attorneys "hired guns."

Id. (footnotes omitted); see also Cooper, *supra* note 29, at 8 ("Confidence in the American justice system begins with the public perception of lawyers.").

164. See Brill, *supra* note 163, at 86; Green, *supra* note 28, at 286 ("'Loophole lawyering' occurs when an attorney is less concerned with applying the whole law than with finding a way to accomplish the goals of the client by exploiting a perceived ambiguity in the language of the rule or statute. The practice of loophole lawyering appears to be widespread.") (footnotes omitted).

165. See MODEL RULES Rule 3.2 (attorneys should expedite litigation); MODEL

failing to cooperate in discovery,¹⁶⁶ engaging in disruptive conduct before the court,¹⁶⁷ communicating with represented parties without consent of opposing counsel,¹⁶⁸ and disregarding the rights of third persons.¹⁶⁹ These rules govern attorney conduct in order to protect not only attorneys, but also clients and the legal system.¹⁷⁰

The importance of avoiding the appearance of impropriety is fully explained in Canon 9 of the Model Code.¹⁷¹ Society's confidence in law and in lawyers may be undermined by improper or irresponsible lawyer behavior.¹⁷² The success of the adversarial and legal system requires Americans to "have faith that justice can be obtained through our legal system."¹⁷³ By upholding the integrity and honor of the legal profession, lawyers promote public confidence and faith in the legal system.¹⁷⁴ Society's trust and belief in the legal system is necessary for the "[c]ontinuation of the American concept that we are to be governed by rules of law."¹⁷⁵ Thus,

CODE DR 7-101(A)(1) (attorneys do not violate duty to represent clients zealously "by being punctual in fulfilling all professional commitments"); *see also* Downey, *supra* note 4, at 539.

166. *See* MODEL RULES Rule 3.4 (lawyers shall be fair to opposing parties and counsel); MODEL CODE DR 7-102(A)(5) (lawyers shall not "knowingly make a false statement of law or fact"); *see also* Downey, *supra* note 4, at 539.

167. *See* MODEL RULES Rule 3.5 (lawyers shall not disrupt the impartiality or decorum of the tribunal); MODEL CODE DR 7-106(C)(6) (lawyers shall not engage in "undignified or discourteous conduct which is degrading to a tribunal"); *see also* Downey, *supra* note 4, at 539.

168. *See* MODEL RULES Rule 4.2 (attorneys must not communicate with represented parties without consent of opposing counsel); MODEL CODE DR 7-104(A)(1) (substantially identical to Rule 4.2); *see also* Downey, *supra* note 4, at 539.

169. *See* MODEL RULES Rule 4.4 (lawyers must not use harassing or burdening tactics against others); MODEL CODE DR 7-108(E) ("[Lawyers] shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror."); *see also* Downey, *supra* note 4, at 539.

170. *See* MODEL RULES Preamble.

[D]ifficult ethical problems arise from conflict[s] between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person The Rules of Professional Conduct prescribe terms for resolving such conflicts Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Id.

171. *See generally* MODEL CODE Canon 9.

172. *See* MODEL CODE EC 9-2 ("Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer.").

173. MODEL CODE EC 9-1 (footnote omitted).

174. *See id.* ("A lawyer should promote public confidence in our system and in the legal profession."); *see also* EC 9-6 ("[A lawyer] owes a solemn duty to uphold the integrity and honor of his profession.").

175. MODEL CODE EC 9-1.

by avoiding impropriety and even the appearance of impropriety, lawyers promote the confidence, respect, and trust of society in lawyers themselves and the legal system and profession.¹⁷⁶

Courts have long stressed the importance of avoiding even the appearance of impropriety.¹⁷⁷ As stated by the Connecticut Supreme Court in 1928: "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity."¹⁷⁸ Similarly, the Nebraska Supreme Court has noted that lawyers should not only avoid actual impropriety, but the mere appearance of impropriety as well.¹⁷⁹ Finally, in *State Board of Law Examiners v. Sheldon*,¹⁸⁰ the Wyoming Supreme Court remarked:

The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession.¹⁸¹

Lawyers have obligations as officers of the court and public citizens both in professional responsibilities to clients and in business and personal affairs.¹⁸² Maintaining professional ethical standards ensures the fair administration of justice.¹⁸³ Individual rights suffer if lawyers fail to meet the ethical standards required to carry out their roles.¹⁸⁴ Lawyers violating these ethical standards injure

176. See MODEL CODE EC 9-6 (a lawyer has a duty to "conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of . . . the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety") (footnote omitted).

177. See, e.g., *Erwin M. Jennings Co. v. DiGenova*, 141 A. 866 (Conn. 1928); *State ex rel. Nebraska State Bar Ass'n v. Richards*, 84 N.W.2d 136 (Neb. 1957); *State Bd. of Law Examiners v. Sheldon*, 7 P.2d 226 (Wyo. 1932).

178. *DiGenova*, 141 A. at 868.

179. See *Richards*, 84 N.W.2d at 145 (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 49 (1957)).

180. 7 P.2d 226 (Wyo. 1932).

181. *Id.* at 227 (quoting *People ex rel. Cutler v. Ford*, 54 Ill. 520, 522 (1870)).

182. See MODEL RULES Preamble.

183. See *id.*

184. See MODEL CODE Preamble. See also *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). The report states:

A true sense of professional responsibility must derive from an understanding

the legal profession's goal of serving society, which, in turn, adversely affects the public's trust in the legal system.¹⁸⁵ In sum, lawyers have an unique relationship with courts and society that define their conduct in meeting the ethical standards established by the Model Rules and Model Code.¹⁸⁶

II. ANALYSIS

Lawyers have the same right to self-representation as non-lawyers.¹⁸⁷ Indeed, lawyers have exercised this right in a number of cases.¹⁸⁸ Unlike non-attorney pro se litigants, however, lawyers have professional obligations to obey specific ethical standards.¹⁸⁹ Pro se lawyers may invariably violate professional responsibilities when acting on behalf of their own interests.¹⁹⁰ Hence, whether pro se attorneys are subject to the same ethical concerns as other attorneys must be answered by recognizing attorneys' right to proceed pro se while embracing their ethical obligations to the legal process and system.¹⁹¹

of the reasons that lie back of specific restraints. . . . The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Id.

185. See MODEL RULES Preamble; see also MODEL CODE EC 9-6 ("Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public.").

186. See generally MODEL RULES Preamble and MODEL CODE Preamble.

187. See WOLFRAM, *supra* note 5, at § 14.4; Downey, *supra* note 4, at 533-35; see also Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641, 1641 n.2 (1987) (listing state constitutions and statutes granting right of self-representation).

188. See, e.g., *Kay v. Ehrler*, 499 U.S. 432 (1991) (civil rights claim); *Fox v. Boucher*, 794 F.2d 34 (2d Cir. 1986) (tort claim); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387 (4th Cir. 1980) (action against creditor under Truth in Lending Act); *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958) (criminal defense); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979) (action against government under Freedom of Information Act); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994) (marriage dissolution); *Presnick v. Esposito*, 513 A.2d 165 (Conn. App. 1986) (action against client for fee non-payment); see also Downey, *supra* note 4, at 530 n.16.

189. See MODEL RULES Preamble; MODEL CODE Preamble; Downey, *supra* note 4, at 531.

190. See *supra* note 6 and cases cited therein for examples of improper pro se attorney conduct.

191. See generally Downey, *supra* note 4, at 531.

A. *Extreme Approaches Do Not Resolve the Conflict*

Conflicts exist between lawyers' right to proceed pro se and their accompanying responsibilities to the legal system.¹⁹² Pro se lawyers may fail to exercise objectivity and allow emotion to obscure legal judgment.¹⁹³ Lack of objectivity may result in substandard advocacy and burden the legal system.¹⁹⁴ Moreover, pro se lawyers might easily initiate legal actions to harass or intimidate others.¹⁹⁵ These practices undermine the obligations of lawyers to uphold the legal system and facilitate the fair administration of justice.¹⁹⁶ Unfortunately, whether Model Rules Rule 4.2 or Model Code DR 7-104(A)(1) govern ex parte conduct of pro se lawyers remains undecided.¹⁹⁷

There are two reasons for this uncertainty. First, the Model Rules and the Model Code, together with their accompanying commentary and footnotes are silent concerning the issue of pro se lawyers.¹⁹⁸ Second, the language of the Model Rules and of the Model Code appear to logically presuppose the existence of separate clients.¹⁹⁹ Hence, it is not clear whether Rule 4.2 or DR 7-104(A)(1) govern pro se attorneys engaged in ex parte communications.

The Model Rules and Model Code are built on maintaining the confidence, integrity, and respect of the legal system.²⁰⁰ Ethical standards such as Rule 4.2 serve to uphold the legal system's integ-

192. See generally *Kay v. Ehrler*, 499 U.S. 432 (1991); *Fox v. Boucher*, 794 F.2d 34 (2d Cir. 1986); *Automotive Twins, Inc. v. Klein*, 82 A.2d 146 (Conn. 1951); MODEL CODE Preamble ("Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.").

193. See, e.g., *Kay*, 499 U.S. at 437; *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir. 1980); *Duke v. United States*, 255 F.2d 721, 725 (9th Cir. 1958).

194. See, e.g., *Duke*, 255 F.2d at 721.

195. See, e.g., *Fox*, 794 F.2d at 34; *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994).

196. See generally MODEL RULES Preamble.

197. See, e.g., *Barenholtz*, *supra* note 10, at 440 n.225; *Green*, *supra* note 28, at 293-94. "Model Rule 4.2 . . . is a prime example of an ambiguous rule. This . . . rule has been applied differently by various courts and has been interpreted differently by numerous commentators." *Id.* at 294 (alteration in original) (footnote omitted). See *Downey*, *supra* note 4, at 554-58 for an extensive analysis as to whether the Model Rules and Model Code generally are applicable to pro se attorneys.

198. See *Barenholtz*, *supra* note 10, at 440 n.225.

199. See *Downey*, *supra* note 4, at 532. Rule 4.2 states that "[i]n representing a client, a lawyer shall not communicate . . . with a person . . . represented by another lawyer." MODEL RULES Rule 4.2. DR 7-104(A)(1) states that "[d]uring the course of his representation of a client a lawyer shall not" engage in ex parte communication. MODEL CODE DR 7-104(A)(1).

200. See MODEL RULES Preamble; MODEL CODE Preamble ("The possible loss of

rity.²⁰¹ Disregarding Rule 4.2 fails "to protect non-attorney parties from making inadvertent, harmful admissions."²⁰² Dismissing Rule 4.2 will not "prevent [attorneys] from unfairly employing superior negotiating and interrogation skills to [a] non-attorney's detriment."²⁰³ The above response not only ignores the specific application of Rule 4.2, but the ethical obligations of objectivity, refraining from harassment, and avoiding the appearance of impropriety as well. Overlooking these ethical responsibilities compromises the autonomy of the legal profession and society's interest which lawyers serve.²⁰⁴ Hence, not applying Rule 4.2 to pro se lawyers may directly harm opposing parties as well as the public interest and the administration of justice.²⁰⁵

Conversely, another interpretation of the issue rigidly applies Rule 4.2 in every case.²⁰⁶ The theory adopted in *Sandstrom* holds that attorneys who are themselves parties to litigation represent themselves when contacting opposing parties.²⁰⁷ This response, however, that lawyers are their own clients does not address whether pro se lawyers have independent rights as parties to matters that professional status should not abolish.²⁰⁸ Hence, this view fails to afford a proper standard to govern pro se lawyers because a

that respect and confidence is the ultimate sanction."); WOLFRAM, *supra* note 5, at § 10.2.1.

201. See, e.g., WOLFRAM, *supra* note 5, at § 10.2.1. See generally Downey, *supra* note 4.

202. Downey, *supra* note 4, at 553 (footnote omitted); see also Kurlantzik, *supra* note 36, at 138-39. Kurlantzik states:

The fundamental fact which stimulates our concern is the imbalance in knowledge and skill between the lawyer and the adverse party, who is generally a layman. . . . [T]he lawyer can exercise his relative advantage by speaking to the layman alone outside the presence of others. In such circumstances there is a substantial prospect of avoiding discovery of what actually occurred, and such a prospect of avoidance would presumably encourage lawyers both to communicate and, in turn, to yield to temptation to mislead.

Id. (footnote omitted).

203. Downey, *supra* note 4, at 553; see also Kurlantzik, *supra* note 36, at 138-39.

204. See MODEL RULES Preamble.

205. See Downey, *supra* note 4, at 555 ("When there are [ethical] violations by pro se attorneys and no predictable or definable professional disciplinary consequences, the administration of justice may suffer.").

206. This interpretation ignores the possibility that professional status does not abrogate individual rights. See Downey, *supra* note 4, at 553; see also *In re Segall*, 509 N.E.2d 988, 991 (Ill. 1987) (Clark, C.J. dissenting). In his dissenting opinion, Chief Justice Clark notes that "the majority simply states, *without citation to authority*," that lawyers represent themselves when parties to litigation. *Id.* (emphasis added).

207. See *Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994); see also *In re Segall*, 509 N.E.2d at 990.

208. See Downey, *supra* note 4, at 553.

total ban of *ex parte* communication does not recognize independent rights *pro se* attorneys enjoy as parties to legal matters.²⁰⁹

Unfortunately, extreme approaches do not adequately resolve the issue. A balance must be struck between the above approaches to Rule 4.2's applicability to *pro se* lawyers. This balance must recognize the interests of *pro se* lawyers as well as the competing interests of the legal system. Accordingly, the proper standard must reconcile attorneys' right to self-representation with their ethical obligations to clients, courts, and society.

B. *The Conflict Resolved*

This Note advocates the adoption of a rebuttable presumption²¹⁰ that *pro se* attorneys violate Rule 4.2 when engaging in un-

209. See MODEL RULES Rule 4.2 cmt.1; WOLFRAM, *supra* note 5, at § 14.4; Downey, *supra* note 4, at 533-35.

210. A rebuttable presumption that attorneys violate *ex parte* rules, on its own, may work as a bar on *pro se* attorney contact in practice because attorneys might not rationally risk having to defend their actions against opposing parties. Lawyers can protect themselves from false claims of Rule 4.2 violations under a rebuttable presumption standard in two ways. First, obviously, *pro se* lawyers can obtain "the consent of the other lawyer" or receive court authority. MODEL RULES Rule 4.2. Rule 4.2 states that communications between lawyers and opposing parties do not violate the rule when "authorized by law." *Id.* The "authorized by law" exception is satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel—such as court rules providing for service or process on a party, or a statute authorizing a government agency to inspect certain regulated premises. Further, in appropriate circumstances, a court order could provide the necessary authorization.

CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 403 (3d ed. 1996) (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995)). Hence, *pro se* lawyers can protect themselves from false claims of Rule 4.2 violations by obtaining consent from opposing lawyers to engage in particular *ex parte* contacts or with permission from appropriate sources of law, including court orders.

Secondly, *pro se* lawyers can protect themselves from false claims with ethics grievance procedures. Before reaching the issue of whether Rule 4.2 applies to *pro se* lawyers, opposing parties must show that there exists probable cause to believe that unauthorized *ex parte* contact was made. See, e.g., CONNECTICUT PRACTICE BOOK § 27F(d) (1996) ("The grievance panel . . . shall investigate each complaint to determine whether probable cause exists that the attorney is guilty of misconduct."). Since *ex parte* contacts, by definition, are likely to take place privately between *pro se* lawyers and opposing parties, opposing parties should be prevented from using Rule 4.2 as leverage in legal proceedings by requiring any alleged *ex parte* violation to be specially pleaded, much like the requirement of Rule 9(b) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Pleading with particularity affords ethics tribunals opportunities to determine whether there exists probable cause to believe Rule 4.2 violations have occurred. If probable cause does not exist

authorized *ex parte* communications.²¹¹ This presumption is overcome by an attorney's showing that his conduct otherwise satisfies the ethical obligations imposed by the Model Rules and Model Code.²¹² This standard strikes a balance between the above extremes and is flexible enough to permit courts to decide when the rule's protection is warranted and is in the interest of opposing parties.²¹³

then the complaint should be dismissed. *See, e.g.*, CONNECTICUT PRACTICE BOOK § 27F(d)-(g). Hence, pro se attorneys are protected from false claims of Rule 4.2 violations by requiring that opposing parties present reasonable grounds to believe that unauthorized contact was made.

Moreover, *Pinsky* illustrates the number of hurdles that should be overcome to pursue ethics violations against attorneys concerning Rule 4.2. *See Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1077 (Conn. 1990). The *ex parte* complaint in *Pinsky* was reviewed by four separate tribunals, all of which found the attorney innocent of any ethics violation. *See id.* The complaint was examined by a grievance panel, a reviewing committee, the state trial court, and ultimately the state high court. *See id.* Similarly, by requiring opposing parties to plead Rule 4.2 violations with particularity under looming shadows of preliminary investigations, grievance panels, reviewing committees, appellate tribunals, and possibly state supreme courts, these hurdles afford pro se lawyers enough protection to insure that opposing parties do not wield an unfair "ethics" sword over attorneys proceeding pro se.

In sum, the policy considerations supporting this Note's proposed rebuttable presumption standard advocate that attorneys do not engage in self-representation. However, such a standard does not lead to an absolute bar against attorney self-representation in practice. First, pro se attorneys can protect themselves through authorized *ex parte* contact. *See, e.g.*, MODEL RULES Rule 4.2. Secondly, pro se attorneys can protect themselves from false claims through grievance procedures requiring that opposing parties sufficiently prove their Rule 4.2 complaints, i.e., that there exists probable cause to believe that unauthorized *ex parte* contact was made. *See, e.g.*, *Pinsky*, 578 A.2d at 1077; CONNECTICUT PRACTICE BOOK § 27F.

211. Certainly, "[i]t is a lofty goal to draft valuable ethical codes. It should not, however, be a goal that is easily abandoned." Green, *supra* note 28, at 288.

Charles Wolfram notes that "[a] code of rules that is clear and fair can serve an important educational role by instructing receptive readers on what is considered right and wrong." Drafters of ethical codes, however, are not given free range to determine all ethical conduct. Drafters realize that any restriction by the codes that attorneys find too intrusive upon the attorneys' goals to serve their clients and make money will be faced with open opposition and will not be followed.

Id. (footnotes omitted) (quoting WOLFRAM, *supra* note 5, at § 2.6.1); *see also* CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 402 (3d ed. 1996) (citing D.C. Bar, Legal Ethics Comm., Op. 258 (1995) (pro se lawyers may not communicate with represented opponents; pro se lawyers bring their professional skills and legal knowledge to the table and retain presumptively unfair advantage over opposing parties)).

212. *See supra* Part I.B for a discussion of specific ethical obligations imposed upon lawyers.

213. *See, e.g.*, Kurlantzik, *supra* note 36, at 155.

It would seem that these costs [in prohibiting direct communication] are not a very high price to pay for the benefits of the rule. Some of the costs might be

Some commentators advocate that direct communication between attorney-litigants and opposing parties may save time, money, and resources by avoiding the need to go through middlemen.²¹⁴ Additionally, overzealous, intimidating, or greedy representation by retained counsel may hinder the administration of justice rather than expedite the legal process.²¹⁵ There may even be situations where the protection of Rule 4.2 is not needed, such as "circumstances in which attorney self-representation harms no one, does not interfere with the normal workings of the legal system and actually presents a better alternative to obtaining counsel."²¹⁶

For example, *ex parte* communication may have been beneficial in the *Sandstrom* case.²¹⁷ The *pro se* attorney-husband, if afforded an opportunity to show that he complied with his ethical responsibilities, might have argued that he was not injuring any of the parties involved; indeed, communication between husband and wife may have alleviated some of the emotional pain associated with the divorce. The attorney might have argued that his contact did not interfere with the normal workings of the legal system and may have expedited the divorce proceedings.²¹⁸ Moreover, the attorney might have argued that the particular circumstances presented a better alternative to obtaining outside counsel because the parties could have settled their differences as husband and wife rather than attorney and litigant.

Conversely, the court might have considered that the wife was a hospital patient when the attorney tried to contact her.²¹⁹ The wife asserted that she asked her husband to talk with her attorney

mitigated by better training and socialization of lawyers. In addition . . . the rule contains some built-in flexibility . . . the lawyer can judge in each case whether the rule's protection is required and whether it is in the client's interest to engage in such communication.

Id.; MODEL CODE Preamble. "In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him." *Id.*

214. See, e.g., Kurlantzik, *supra* note 36, at 154; Downey, *supra* note 4, at 551 n.197 (citing *People ex rel. Brazen v. Finley*, 497 N.E.2d 1013 (Ill. App. Ct. 1986), *aff'd*, 519 N.E.2d 898 (Ill. 1988)); Pinsky v. Statewide Grievance Comm., 578 A.2d 1075 (Conn. 1990).

215. See Kurlantzik, *supra* note 36, at 154.

216. Downey, *supra* note 4, at 556 (citing *People ex rel. Brazen v. Finley*, 497 N.E.2d 1013, 1017 (Ill. App. Ct. 1986)); see also Kurlantzik, *supra* note 36, at 154.

217. See *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994).

218. See Downey, *supra* note 4, at 556.

219. See *Sandstrom*, 880 P.2d at 109.

about the divorce but the husband refused.²²⁰ Moreover, the court might have considered the surrounding circumstances associated with Mr. and Mrs. Sandstrom's particular divorce proceedings, e.g., whether the proceedings were relatively amicable or difficult. By allowing the attorney an opportunity to present arguments under a rebuttable presumption, the court could have weighed the benefits of ex parte communication in this case against the possible harm to the wife.²²¹ Balancing these interests would have allowed the court to protect both the independent interests of the attorney as a party to the matter and the interests of the wife, the court, and the public interest.

Similarly, the attorney in *Pinsky* should have been afforded an opportunity to prove whether his ex parte contact satisfied the ethical requirements of objectivity, refraining from harassment, and avoiding the appearance of impropriety.²²² To rebut the presumption that his conduct violated Rule 4.2, the attorney might first have argued that his contact did not actually harm the interests of the opposing party; the attorney maintained objectivity.²²³ Secondly, the attorney might have argued that the possibility of any harm was nominal because all parties involved were sophisticated business litigants; the attorney refrained from harassment.²²⁴ Finally, the attorney might have argued that his ex parte contact did not interfere with the normal workings of the legal system; the attorney avoided the appearance of impropriety.²²⁵ If the court determined that the attorney's conduct overcame the presumption of Rule 4.2's application, then the attorney's ex parte contact was permissible.²²⁶

Conversely, the court might have considered that the attorney's ex parte contact occurred at the private home of the opposing party.²²⁷ Moreover, the attorney never identified himself as an at-

220. See *id.*

221. See *supra* Part I.A for a discussion of the reasons why ex parte prohibitions are imposed despite the possible advantages gained through such contact.

222. See generally *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075 (Conn. 1990). See *supra* notes 48-65 and accompanying text for a detailed discussion of the *Pinsky* case.

223. See *supra* notes 119-141 and accompanying text for a discussion of attorneys' ethical requirement of objectivity.

224. See *supra* notes 142-162 and accompanying text for a discussion of attorneys' ethical requirement of using the law for legitimate purposes and refraining from harassing conduct.

225. See *supra* notes 163-186 and accompanying text for a discussion of attorneys' ethical requirement of avoiding the appearance of impropriety.

226. See *Pinsky*, 578 A.2d at 1077-80.

227. See *id.* at 1076.

torney.²²⁸ Finally, the attorney threatened retaliatory legal action.²²⁹ These factors tend to undermine the attorney's obligations to objectivity, refraining from harassment, and avoiding the appearance of impropriety.²³⁰ If the court determined that the attorney did not sufficiently show that he satisfied his ethical obligations, Rule 4.2 applied and the attorney was subject to sanctions.²³¹

Lawyers are representatives of clients, officers of the court, and public citizens having unique responsibilities to the quality of justice according to the Model Rules.²³² The conflict between pro se lawyers' ethical obligations and their independent rights as parties to legal matters to communicate directly with opposing parties frustrates their service to the public interest and the proper administration of justice. "When attorneys in their professional capacity engage in conduct that is purely self-serving, they . . . violate the obligations attending their role as public citizen. The resulting loss of faith by the public compromises the integrity of the legal profession, which the attorney has a duty to uphold."²³³ When pro se lawyers communicate directly with opposing parties without proper authority or consent, pro se lawyers engage in self-serving conduct.²³⁴ Such self-serving conduct may violate the ethical requirements of objectivity, refraining from harassment, and avoiding the appearance of impropriety.²³⁵

Regardless of whether pro se attorneys are said to represent clients or not, the ethical obligations of objectivity, refraining from harassment, and avoiding the appearance of impropriety supporting the application of Rule 4.2 govern attorney conduct.²³⁶ Pro se at-

228. *See id.*

229. *See id.* at 1077.

230. *See supra* notes 119-186 and accompanying text for a discussion of these attorney ethical obligations.

231. *See Pinsky*, 578 A.2d at 1078 (the court possesses inherent authority to regulate and discipline members of the bar).

232. *See* MODEL RULES Preamble.

233. Downey, *supra* note 4, at 540.

234. *See* MODEL CODE Preamble; MODEL RULES Preamble; MODEL CODE EC 9-6.

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Id. (footnote omitted).

235. *See generally* MODEL RULES Preamble.

236. *See generally* Downey, *supra* note 4 for a discussion of why ethical principles are applicable to pro se attorneys.

torneys may lack objective legal judgment in contacting opposing parties.²³⁷ Pro se attorneys may be tempted to intimidate, harass, or manipulate opposing parties through ex parte contact.²³⁸ Moreover, pro se lawyers may give the impression of impropriety by communicating with opposing parties without proper authority or consent.²³⁹ These self-serving practices violate obligations to the proper administration of justice.²⁴⁰ This in turn compromises the duty to maintain the integrity of the legal profession.²⁴¹

Hence, pro se attorneys should be subject to Rule 4.2 and governed by the ethical principles of objectivity, refraining from harassment, and propriety except to the extent that courts shall determine when ex parte communications are in the interests of opposing parties, the legal process, and do not undermine society's confidence or respect for the legal system.²⁴² This standard recognizes the right of attorneys to self-representation and the independent rights enjoyed as parties to legal matters while embracing the ethical obligations lawyers must meet to uphold the integrity of the legal profession.

CONCLUSION

Lawyers have the same right to proceed pro se as other individual litigants. The right to self-representation is rooted in American history. Ethical lawyers, however, should be aware of the principles governing their conduct so as not to violate professional

237. See, e.g., *Kay v. Ehrler*, 499 U.S. 432 (1991); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387 (4th Cir. 1980); *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958). See generally *Downey*, *supra* note 4, at 543-46.

238. See, e.g., *Schild v. Rubin*, 232 Cal. App. 3d 755 (Cal. Ct. App. 1991); *Fox v. Boucher*, 794 F.2d 34 (2d Cir. 1986); *Downey*, *supra* note 4, at 547-48; *McLaughlin*, *supra* note 21, at 1109 n.4; *Burke*, *supra* note 21, at 1639; *Nichols*, *supra* note 21, at 351 n.3 (listing cases in which pro se litigants harassed opponents and wasted court resources).

239. See *supra* note 163 for comments concerning the cynicism held toward lawyers.

240. See generally MODEL RULES Preamble.

241. See *Brill*, *supra* note 163, at 86.

I submit that the only reason that we lawyers have licenses granting us the exclusive right to practice law is to provide us with an opportunity to serve our clients. We must never lose sight of this principle and we must always do our best to serve them—for if we do not, other groups will rush in to provide services demanded by our former clients.

If, through our greed or neglect or inefficiency, we fail to serve the public, we will deserve to lose our exclusive franchises to provide legal services

Id.

242. "Ethical [standards] should be a resource that [attorneys] can consult to find explicit guidance regarding ethical and moral obligations." *Green*, *supra* note 28, at 289.

obligations to the legal system. Pro se attorneys may harm their cases by an inability to remain objective. Moreover, some attorney actions appear self-serving, resulting in the loss of faith by the public. This compromises the integrity of the profession.

Unfortunately, the rules governing attorney conduct are silent concerning the ethics of attorney self-representation. Indeed, Rule 4.2 seems to assume the existence of attorney-client relationships between separate individuals. Further, whether Rule 4.2 applies to pro se attorneys is left unanswered by the courts' various interpretations. In response to this uncertainty, this Note presents a straightforward approach to resolve the problem.

Whether pro se attorneys represent clients or not is irrelevant in determining the applicability of Rule 4.2. Pro se attorneys who communicate about legal matters with opposing parties may engage in self-serving conduct. Such conduct violates the ethical standards of objectivity, refraining from harassment, and avoiding the appearance of impropriety. Such conduct thwarts the legal profession's ethical aspirations to serve the public interest. Additionally, self-serving conduct violates the duty to the proper administration of justice. This compromises the obligation to maintain the integrity of the legal profession and is unethical. Unethical attorney self-representation injures not only attorneys and opposing parties, but also the legal process and the public's confidence in the legal system.

Pro se attorneys must be subject to the same ethical concerns as other attorneys in order to maintain high professional principles while promoting the integrity of their profession. The standard proposed by this Note recognizes the right of attorneys to self-representation and the independent rights enjoyed as parties to legal matters while embracing the ethical obligations lawyers have to uphold the integrity of the legal profession. Hence, pro se attorneys should be governed by Rule 4.2 and the ethical principles of objectivity, refraining from harassment, and propriety except to the extent courts shall determine when ex parte communications are in the interests of opposing parties, the legal process, and do not undermine society's confidence or respect for the legal system. Compliance with Rule 4.2 assures the proper administration of justice and upholds society's trust and confidence in the legal system.

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