ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009–2

ETHICAL DUTIES CONCERNING SELF-REPRESENTED PERSONS

TOPIC: Ethical duties concerning self-represented persons.

DIGEST: DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

CODE/RULE: DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3

QUESTION: What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION

I. Introduction

Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-represented litigants.[1] There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. *See* Hon. Judith S. Kaye, The State of the Judiciary 2007 at 18.[2] Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people, unable to afford legal representation, must nonetheless come to court to protect and assert their rights. *Cf.* Margery A. Gibbs, *More Americans serving as their own lawyers*, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. *See, e.g., Cabbad v. Melendez*, 81 A.D.2d 626, 626 (2d Dep't

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1 Persons proceeding in legal matters without an attorney are often interchangeably referred to as "pro se," "self-represented," or "unrepresented." This opinion uses the term "self-represented person/party" to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

2 Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that "most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity." Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System, *Self-Represented Litigants in the New York City Family Court and New York City Housing Court* at 1, *in Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys* (Dec. 2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer "*almost all or most of the time* in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases." *Id.*, *Services for the Self-Represented in the Town and Village Courts* at 3 (emphasis in original).

1981) (vacating consent judgment "'inadvertently, unadvisably or improvidently entered into'" by self-represented, non-English-speaking tenant (citation omitted)); *600 Hylan Assocs. v. Polshak*, 17 Misc.3d 134(A) (2d Dep't 2007) (table decision), *text available at* 2007 WL 4165282; *see also Schaffer Holding LLC v. Fleming*, 1 Misc.3d 131(A) (2d Dep't 2003) (table decision), *text available at* 2003 WL 23169883 (affirming order vacating stipulation).

Judicial response to the increase in self-represented litigants is ongoing and evolving. For example, state and federal courts in New York have opened offices to aid self-represented individuals appearing in their courtrooms.[3] Courses relating to self-represented litigants are now included in judicial training seminars.[4]

There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (*e.g.*, DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (*e.g.*, DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the "Code"), the newly-approved New York Rules of Professional

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3 Contact information for the Office of Self-Represented or Pro Se Office is available online for New York State courts (http://www.nycourts.gov/courthelp/nolawyer-text.htm#add) as well as federal district courts (http://www.nynd.uscourts.gov/prose.cfm; http://www1.nysd.uscourts.gov/courtrules_prose.php?prose=contact; http://www.nywd.uscourts.gov/mambo/index.php?option=com_content&task=section&id=8&Itemid=43; http://www.nyed.uscourts.gov/probono/Locations/locations.html) and federal appellate court (http://www.ca2.uscourts.gov/Docs/COAManual/everything%20manual.pdf).

4 *See, e.g.*, Office of Justice Initiatives website http://www.nycourts.gov/ip/justiceinitiatives/srl2.shtml#6 (discussing the "Dealing Effectively with Self-Represented Litigants" program); New York State Unified Court System, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* (Summer 2008) (working draft distributed in judicial training seminars); *see also* Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005) (discussion guide (pp. 59 ff.) containing "materials that can be used to plan and present a session on judicial ethics and self-represented litigants" (p. 59) including a self-test, hypotheticals, role plays, and small group exercises), *available at* http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Best Practice Institute, National Center for State Courts, *Judicial Management of Cases Involving Self-Represented Litigants*, *available at* http://www.ncsconline.org/Projects_Initiatives/BPI/ProSeCases.htm.

Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

II. Discussion

A. What Communications Are Permissible Under DR 7-104(A)(2)

The Code explicitly recognizes that lawyers' encounters with self-represented litigants are inevitable. Indeed, Ethical Consideration 7-18 recognizes that attorneys acting on behalf of a client "may have to deal directly with" self-represented persons in a wide variety of transactional and litigation contexts.

The primary guidance the Code offers for managing these interactions is found in DR 7-104(A)(2) which provides in pertinent part:

> During the course of representation of a client a lawyer shall not . . . . [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

See also EC 7-18 (extending this obligation to an unrepresented "person").[5]

Even when the interests of a self-represented person "conflict with the interests of the lawyer's client," ethics opinions have construed this Code provision to permit more than a simple statement that the self-represented person should obtain counsel. For example, the New York State Bar Association Committee on Professional Ethics concluded that an executor of a will could, but was not required to, advise an unrepresented surviving spouse of the need to obtain a lawyer to address a legal issue, and also could identify the relevant issue (the spouse's

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5 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." Although the term "legal advice" in Rule 4.3 suggests a narrower scope than the term "advice" in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.

potential right to take an election against the estate) to be addressed by the lawyer. *See* N.Y. State 477 (1977). Even though the executor might take a contrary position on that issue, the opinion concluded that "to remain silent in the face of the surviving spouse's expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead." The opinion further stated that it would be permissible for a lawyer to freely provide to a self-represented non-client information that is "purely a matter of fact and non-privileged," so long as it otherwise would be ethically permissible to do so (*e.g.*, no confidences or secrets would be revealed in violation of DR 4-101).

The New York County Lawyers' Association addressed a lawyer's ability to negotiate a settlement with an adverse party who had discharged her attorney. *See* N.Y. Cty 708 (1995). The opinion concluded that once an attorney had verified that the adverse party was no longer represented, she could communicate with the adverse party directly about the lawsuit and continue the negotiations -- but could not render any advice other than to secure counsel. The opinion cautioned, however, that under the circumstances presented, the attorney had an affirmative duty to advise the self-represented party to seek counsel while flagging a particular legal issue:

> At the outset of their dealings, . . . inquirer should advise [the unrepresented] plaintiff that there may be legal issues, such as the possible [discharged] attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the *inquirer's client* could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. *See* N.Y. State 728 (2000). The opinion reasoned that "the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel." *Id.* (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); *see also* ABCNY Formal Op. 2004-3 (government lawyer "may advise" an unrepresented agency constituent of the "non-controvertible" legal proposition that "under no circumstances may the constituent testify falsely"). Concluding that the right against self-incrimination was such "non-controvertible information," and recognizing that a government attorney has a duty to "seek justice" even in civil matters (EC 7-14), the opinion stated that a government attorney "might reasonably conclude" that the government's "interest in dealing fairly with the public" warrants advising the unrepresented person to retain a lawyer even if a private attorney would be "disinclined" to do so.

Finally, the New York State Bar Association Committee on Professional Ethics examined the duties of a government lawyer when the other party to pending negotiations, although represented, was unaccompanied by its lawyers at a meeting. *See* N.Y. State 768 (2003). The opinion also considered the related issue of what a lawyer may do when she does not know that the other party is represented by counsel. Addressing a situation analogous to the lawyer who negotiates with a self-represented party, the opinion concluded that it would be permissible for the lawyer to describe her client's own position in negotiations. It further found that the lawyer would not violate DR 7-104(A)(2) by providing certain indisputable information to the unrepresented party, such as the filing requirements of the lawyer's agency client. *See id.*

The teachings of these opinions are, essentially, three-fold. First, a lawyer may, but need not, advise a self-represented party to retain counsel and identify the legal issues that could be usefully addressed by counsel. Second, the lawyer may be obligated to render this advice when it would advance the interests of her own client to do so. Third, the lawyer may, but need not, provide certain incontrovertible factual or legal information to the self-represented party, such as her client's own position in negotiations, non-negotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination. We concur with each of these conclusions.

We also identify an additional option for matters pending before a court or other tribunal. In light of the efforts of a growing number of courts to provide support for self-represented litigants, we conclude that it is also appropriate for a lawyer to direct a self-represented adversary to any available court facilities designed to aid those litigants, such as an Office of the Self-Represented, or to a clerk or other court employee designated to orient the self-represented person through the litigation process.[7]

B. Duty To Clarify the Lawyer's Role

A lawyer engaging in any of these permissible communications, or choosing not to make them, should remain mindful of the need to avoid misleading the self-represented party. *See* DR 1-102(A)(4) (forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation"); DR 7-102(A)(5) (forbidding a lawyer from "[k]nowingly mak[ing] a false statement of law or fact" in representing a client); Restatement (Third) of the Law Governing Lawyers (hereafter, "Restatement") § 103(1) (2000) (in dealing with a constituent of the lawyer's organizational client who is not represented by counsel, a lawyer "may not mislead the

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7 Although we believe that interactions between lawyers and self-represented persons typically will be far different than the relationship between a corporation's lawyer and the corporation's unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we acknowledge that there may be situations where a lawyer should not advise a nonclient to seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where it is in the interest of the lawyer's client to do so, or the self-represented person has demonstrated confusion about the lawyer's role.

nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents"); *cf. Niesig v. Team I*, 76 N.Y.2d 363, 376 (1990) (stating, in the context of permissible interviews with self-represented employees of a lawyer's corporate client who could not bind the corporation, that "it is of course assumed that attorneys would make their identity and interest known to interviewees" and otherwise comport themselves ethically).

Refraining from misleading or deceptive conduct, however, may not be sufficient to satisfy the requirements of the Code in all dealings with self-represented persons. For some self-represented persons, further action may be necessary. In that regard, we conclude that a lawyer should be ready, when dealing with a self-represented person, to clarify when needed that the lawyer (a) does not and cannot represent the self-represented person; (b) represents another party in the matter who may have (or does have) interests adverse to the self-represented person; and (c) cannot give the self-represented person any advice, other than to secure counsel, or, as described above, to consult an available court facility designed to assist self-represented persons.

The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she *must* do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer's role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers and self-represented individuals when an organization's attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) ("[W]hen the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."); *see also* ABCNY Formal Op. 2004-3 ("When a lawyer . . . retained by an organization is dealing with the organization's . . . constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents") (citing DR 5-109(A). The nuances of client identity and the lawyer's role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer's role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement's "material prejudice" standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept

guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need to be re-litigated, agreements set aside, or attorneys disqualified. *Cf.* Restatement § 103 cmt. e ("Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .").

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. Conclusion

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel.[8] The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

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8 Nothing in this opinion alters a lawyer's duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client's position.