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

FORMAL OPINION 2011–1

CONTACTING FORMER CLIENTS REPRESENTED BY SUCCESSOR COUNSEL

TOPIC: Contact with former clients.

DIGEST: Absent consent of successor counsel, a lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of the successor counsel's representation.

RULE: 4.2

QUESTION: May a lawyer contact a former client to discuss matters concerning the prior representation without obtaining the prior consent of successor counsel?

OPINION

We address the question of whether a lawyer may contact, on her own behalf, a former client to discuss matters relating to the prior representation without the prior consent of successor counsel. This issue arises in a number of contexts including, for example, where a lawyer seeks to collect a fee or permission to return or destroy client files after she has been discharged by the client and replaced by new counsel. We conclude that a lawyer may not contact her former client regarding matters as to which the lawyer knows the client is represented by successor counsel.

Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules") governs this issue. That Rule provides as follows:

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

N.Y. Rules of Prof'l Conduct R. 4.2(a)(2010).

When a lawyer contemplates any contact with her former client, a threshold question presented by the rule is whether the former client is represented by new counsel in connection with the subject matter of the contemplated communication. If the client is not so represented, direct contact is not prohibited by the rule. If the client is so represented, the former client would be deemed under the rule to be a "party" whom the former lawyer knows is "represented by another lawyer in the matter." In that case, new counsel must give "prior consent" to direct communication. *Id*.

Rule 4.2(a) begins with phrase "[i]n representing a client," which appears to limit the scope of the rule. The weight of authority, however, is that a lawyer may not contact a represented person even when the lawyer is acting pro se and thus not "representing a client" at the time of contact. As explained by the court in *In re Discipline of Schaefer*, 25 P.3d 191, 199 (Nev. 2001), "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." *Accord In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *In re Conduct of Smith*, 861 P.2d 1013, 1016-17 (Or. 1993); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894, 898 (W. Va. 1990); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999); District of Columbia Op. 258 (1995); Hawaii Op. 44 (2003). *But see Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (lawyer, in his role as a tenant of an office building, may contact the landlord directly about the landlord's attempt to evict the lawyer, even though the landlord is represented by counsel in that proceeding).

Ethics committees in two states have reached the same conclusion specifically with respect to contacts with former clients represented by new counsel, opining that Rule 4.2 prohibits such contacts when the intended communication falls within the scope of the representation. We believe this to be the correct result and reach the same conclusion. *See* Illinois Op. 96-09 (1997) (discharged lawyer seeking fees from former client is restricted in doing so by Rule 4.2); *see also* Rhode Island Op. 2002-04 (2002) (when successor counsel writes to original lawyer asking for file and encloses signed request from client, original lawyer may not contact former client without successor's permission).

In each of the foregoing ethics opinions, successor counsel had been retained to represent the client in connection with the same matter handled by the prior lawyer. In the Illinois opinion, the new lawyer (B) asked the prior lawyer (A) to provide a breakdown of A's time spent on the files, together with a list of his expenses, and promised to protect those fees and expenses in the event of any settlement or judgment obtained on behalf of the client. Several days later, A, without authority from B, called the client and attempted to convince him, through lies, to fire B and re-hire A. Although the opinion concluded that the communication violated

Rule 4.2, it nevertheless declined to adopt a *per se* rule prohibiting a lawyer's contact with a former client, acknowledging that there may be valid reasons to contact a former client following discharge. But as to the communication at issue, the opinion did find that it had been initiated by the discharged lawyer with knowledge of B's representation and "appear[ed] motivated by a desire on his part to either protect his claim for fees and expenses and/or to convince the client to allow him to resume handling the files." The communication, therefore, violated Rule 4.2. In the Rhode Island opinion, successor counsel sent a letter to prior counsel requesting the client's files and stating that the client no longer wished to be contacted by his prior attorney. Successor counsel enclosed with the letter a "file transfer authorization" signed by the client, authorizing the prior attorney to release the file to successor counsel, discharging the prior attorney, and stating that successor counsel is "my attorney for all purposes." The opinion concluded that under those circumstances, Rule 4.2 prohibited the prior attorney from communicating directly with the client regarding the file transfer.

Rule 4.2, of course, does not flatly prohibit all contact with former clients and there appears to be no reason to adopt any such blanket prohibition. Indeed, we believe that such a *per se* rule would unduly restrict an attorney's ability to communicate with a former client regarding matters as to which the client is not represented by counsel. In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees.

In contrast, when a lawyer knows that the former client has secured new counsel, Rule 4.2 prohibits direct contact regarding any matter within the scope of the representation -- even where the lawyer is acting pro se -- unless the lawyer obtains the prior consent of successor counsel. To be sure, this conclusion may not be fully supported by the language of the first clause of Rule 4.2, which lawyers might justifiably interpret as permitting contact whenever the attorney initiating the communication is acting pro se and thus not "representing a client." Nevertheless, we believe that our construction, and that of most courts and ethics committees that have considered the question, comports with and furthers one of the salutary policy objectives of the rule, namely, to protect "a represented nonlawyer party from 'possible overreaching by other lawyers who are participating in the matter.'" *In re Disciplinary Proceeding Against Haley*, 126 P.3d at 1269 (citation omitted). But given the ambiguity of the rule and its potential for creating a trap for the unwary, we believe the Courts should consider amending the rule to clarify its intended scope and purpose.