**2.5: Ex Parte Communications**

*I got something to say that might cause you pain. If I catch you talking to that boy again, I'm gonna let you down, and leave you flat, because I told you before, oh, you can't do that.*[[1]](#footnote-0)

Model Rule 4.2 prohibits attorneys from engaging in “ex parte” communications.

Ex Parte Communications: communications with a represented person *without* the consent of that person’s attorney or the permission of the court.

In theory, the purpose of the prohibition on ex parte communications with represented persons is to help protect clients and ensure they receive the advice of counsel. As [Model Rule 4.2, Comment [1]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2/) explains:

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

The prohibition on ex parte communications applies to **all** represented persons involved in a matter. Accordingly, it prohibits ex parte communications with not only represented persons who are adverse parties, but also represented persons who are co-parties or non-parties. And it applies to *directed communications*.

In other words, an attorney cannot avoid the prohibition of ex parte communication by instructing or advising a non-attorney to contact a represented person. Furthermore, the prohibition on ex parte communications is not waivable by the client, and it applies even if the client initiates the communication, requiring the attorney to immediately end the communication. [Model Rule 4.2, Comment [2] & [3]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2/).

The prohibition on ex parte communications with represented persons may also apply to the employees of represented organizations. Most courts have held that attorneys cannot engage in ex parte communications with employees of a represented organization who:

* control the organization,
* acted on behalf of the organization in the matter,
* or make legal decisions for the organization.

In other words, upper management and people directly involved in the matter are off-limits, but other employees are not. In particular, former employees are generally fair game.

Notably, Model Rule 4.2 does incorporate a *mens rea* requirement. Attorneys cannot be disciplined for engaging in an ex parte communication with a represented person unless they **knew or should have known** that the person was represented in relation to the matter. [Model Rule 4.2, Comment [8]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2/).

And Model Rule 4.2 does not prohibit *all* ex parte communications. Nothing prevents an attorney from engaging in ex parte communications with a represented person about subjects **unrelated** to the matter in which they are represented. And nothing prevents an attorney who is not representing anyone in relation to a matter from engaging in ex parte communications with a represented party. In other words, attorneys may continue to pursue unrelated business, and clients may independently consult with outside counsel about a matter. [Model Rule 4.2, Comment [4]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2/).

In addition, Model Rule 4.2 *only applies to attorneys*. Nothing prevents represented persons from engaging in ex parte communications with each other. And if represented persons choose to communicate with each other, their attorneys may provide them with advice. “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” [Model Rule 4.2, Comment [4]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2/). Accordingly, attorneys can probably advise their clients how to engage in ex parte communications with represented parties, even though they can’t advise their clients to initiate an ex parte communication.

| [**Model Rule 4.2: Communication with Person Represented by Counsel**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/) |
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| In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. |

| **Restatement (Third) of the Law Governing Lawyers § 99: A Represented Nonclient—The General Anti-Contact Rule** |
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| 1. A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:    1. the communication is with a public officer or agency to the extent stated in § 101;    2. the lawyer is a party and represents no other client in the matter;    3. the communication is authorized by law;    4. the communication reasonably responds to an emergency; or    5. the other lawyer consents. 2. Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer’s client with a represented nonclient. |

| **Restatement (Third) of the Law Governing Lawyers § 100: Definition of a Represented Nonclient** |
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| Within the meaning of § 99, a represented nonclient includes:   1. a natural person represented by a lawyer; and: 2. a current employee or other agent of an organization represented by a lawyer:    1. if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;    2. if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or    3. if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter. |

| **Restatement (Third) of the Law Governing Lawyers § 101: A Represented Governmental Agency or Officer** |
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| 1. Unless otherwise provided by law (see § 99(1)(c)) and except as provided in Subsection (2), the prohibition stated in § 99 against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity. 2. In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy. |

| [***In re Disciplinary Proceeding Against Haley*, 126 P. 3d 1262 (Wash. 2006)**](https://scholar.google.com/scholar_case?case=11508663158751869859) |
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| **Summary:** Attorney Haley is appealing the recommendation of a Disciplinary Board proceeding that Haley be subject to a 6 month suspension for violating Rule 4.2(a). Haley filed a lawsuit against a CEO, Carl Highland, of his former employer,Coresoft., Haley proceeded pro se. Highland was represented by various attorneys. Haley sent a letter to Highland proposing a settlement. Highland’s lawyer said the letter was a violation of Rule 4.2 and told Haley to not talk to Highland directly. Haley called Highland, appearing to tell him the legal status of his case and once again proposing settlement. This was an issue of first impression for the court, and the authorities were split. Haley argued that pro se lawyers should not be included in the scope of the rule because the lawyer has no client. The court held that a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter and applied the rule prospectively. |

Attorney Jeffrey T. Haley appeals the recommendation of the Disciplinary Board of the Washington State Bar Association that Haley was subject to a six-month suspension for knowingly violating RPC 4.2(a), which provides that, “in representing a client, a lawyer shall not communicate with a party represented by another lawyer.”

Although we hold that, under RPC 4.2(a), a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter, we apply our interpretation of RPC 4.2(a) prospectively only and dismiss the violation.

FACTS

In 1994, Haley filed a lawsuit against Carl Highland, the former chief executive officer of a defunct closely held corporation, Coresoft, of which Haley was formerly a shareholder and board member. Initially, Haley acted pro se in the matter but hired counsel when the case went to trial in November 1995. After the trial ended, Haley’s counsel filed notice of withdrawal and Haley reverted to pro se status as to appeal and collection issues. Highland was represented by various attorneys at all times during this matter, and Haley knew that Highland was consistently represented by counsel.

The hearing officer and Board concluded that Haley's improper contact with a represented party arose out of two incidents. First, while Haley was acting pro se after the trial, he sent a letter to Highland and his wife proposing settlement. The letter was dated September 9, 1996, and stated in full as follows:

I am about to spend approximately $25,000 on costs and attorneys fees for the appeal. If the appeal is successful, the personal earnings of both Ronda Hull and Carl Highland will be subject to garnishment to satisfy my judgment and the judgment now held by Carl Highland will be overruled. Also, the amount I am about the [sic] spend on costs and attorneys fees will be added to the judgment.

This is the last opportunity to settle the case before I spend the money on the appeal. This settlement offer will not be open after this week and may be withdrawn at any time if it is not promptly accepted. I am offering that all claims and judgments between the parties be releases [sic] with no payments. Please respond directly to me.

Highland forwarded the letter to his attorney who, in turn, suggested to Haley that the letter constituted a violation of RPC 4.2(a) and warned him not to have any further contact with Highland. Second, on January 31, 1997, Haley again contacted Highland, this time by telephone. Haley left the following voice message on Highland’s phone:

Carl, this is Jeff Haley. I hope your attorneys have told you Jim Bates decided that your judgment against me is collectable only from my separate assets and I have none; they're all community assets. And, therefore, your judgment is uncollectable [sic]. And the chance for appeal of that determination by Jim Bates has run so you can't appeal it so that if the appeal proceeds my position can only improve and yours can only get worse and if you have nothing collectable there’s no chance of ever getting anything collectable. It seems to me that we ought to settle this case and if we do so Monday there’ll be an opportunity on Monday to do so if you’re interested. Give me a call."

In his "Amended Findings of Fact and Conclusions of Law," the hearing officer stated that Haley’s letter and phone message were “clearly prohibited” by RPC 4.2(a), but he acknowledged that there was some authority supporting Haley's position that attorneys acting pro se are not subject to the prohibition. Ultimately, in his “Additional Findings of Fact, Application of Standards, and Recommendation,” the hearing officer determined that, “because of the specific language of RPC 4.2 (i.e., ‘In representing a client’) and because of the apparent absence of authority within the state of Washington on this specific issue, Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited.” Consequently, the hearing officer concluded that the violation was “negligent” and that the presumptive sanction was thus a reprimand.

Deleting the hearing officer’s conclusion that Haley's violation was negligent, the Board substituted its contrary determination that “Haley's mental state was knowledge” and that the presumptive sanction was therefore a suspension. In doing so, the Board took note that Haley knew Highland was represented by counsel at all times and stated that a “reasonable reading of RPC 4.2 prohibits a lawyer, while representing himself or herself, from contacting a represented party.” The Board also faulted Haley for not “taking time to determine whether his conduct was an ethical violation.”

The hearing officer recommended that Haley be reprimanded for the violation. The Board recommended a six-month suspension.

Does RPC 4.2(a) prohibit a lawyer who is acting pro se from contacting a party who is represented by counsel? If so, should the rule be applied in the present case?

ANALYSIS

*Applicability of RPC 4.2(a) to Lawyer Acting Pro Se.* RPC 4.2(a) reads in full as follows:

In representing a client, a lawyer shall not 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 consent of the other lawyer or is authorized by law to do so.

The rule is virtually identical to model rule 4.2. While we have not formally adopted the commentary to the ABA Annotated Model Rules, we have noted that it “may be ‘instructive in exploring the underlying policy of the rules.’” As the comment to model rule 4.2 explains, the rule aims to protect those represented by counsel “against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.” In *Carmick*, we acknowledged that “the rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel.”

At issue in the present case is whether RPC 4.2(a) applies to lawyers acting pro se — or, more precisely, whether a lawyer who is representing himself or herself is, in the words of RPC 4.2(a), “representing a client.” This court has not previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question. Other jurisdictions that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se.

Haley asks this court to take the contrary view and hold that the plain meaning of the word “client” in RPC 4.2(a) precludes application of the rule to a lawyer acting pro se. The word “client” is variously defined as “a person or entity that employs a professional for advice or help in that professional’s line of work,” and “a person who engages the professional advice or services of another.” Thus, for the rule to apply to lawyers acting pro se, such lawyers would, in effect, be employing or engaging themselves for advice, help, or services. This, as Haley contends, suggests that lawyers who are acting pro se are excluded from the scope of the rule because such lawyers have no client.

In the alternative, Haley maintains that, even if RPC 4.2(a) were construed to restrict pro se lawyers from contacting represented parties, we should conclude that the rule as applied to him, a lawyer proceeding pro se, was unconstitutionally vague, violating his constitutional due process rights. Such a resolution finds support in *Schaefer*. There, the Nevada State Supreme Court relied on the principle that “a statute or rule is impermissibly vague if it ‘either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” The *Schaefer* court based its determination that Nevada’s Supreme Court Rule 182, a rule identical to RPC 4.2(a), was unconstitutionally vague on “the absence of clear guidance” from the Nevada State Supreme Court and on “the existence of conflicting authority from other jurisdictions.”

Both factors relied on in *Schaefer* are present here. First, as noted above, no prior opinion of this court has addressed the application of RPC 4.2(a) to lawyers proceeding pro se. Second, in late 1996 and early 1997 when Haley contacted Highland, authority permitting such contacts counterbalanced the prohibitions then existing from four jurisdictions. The comment to rule 2-100 of the California RPCs, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

The rule does not prohibit a lawyer who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Likewise, a comment to the restatement specifically provides that “a lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals.”

Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer’s communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

(A) During the course of the lawyer's representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate with a person the lawyer knows to be represented by a lawyer. This prohibition includes a lawyer representing the lawyer's own interests.

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington’s rule was narrower in scope than Oregon’s and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that “parties to a matter may communicate directly with each other.” Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee*, appears to call into question the policy concerns supporting the application of RPC 4.2(a) to lawyers acting pro se. In *Pinsky*, the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that “contact between litigants is specifically authorized by the comments under rule 4.2” and concluded that Pinsky was not “representing a client” as stated in the rule. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a) — the protection of a represented nonlawyer party from “possible overreaching by other lawyers who are participating in the matter.” Because the *Pinsky* decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching than would contacts from a represented lawyer-party, *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

In sum, consistent with the resolution of the same issue in *Schaefer*, we hold that a lawyer acting pro se is “representing a client” for purposes of RPC 4.2(a), but given the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries, we find the rule impermissibly vague as to its applicability to pro se attorneys and thus apply our interpretation of the rule prospectively only. We therefore dismiss the violation alleged in count 2.

CONCLUSION

We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel. However, because we conclude that RPC 4.2(a) was impermissibly vague as applied to Haley, we apply our interpretation of RPC 4.2(a) prospectively only and thus dismiss.

C.JOHNSON, BRIDGE, CHAMBERS, and J.M. JOHNSON, JJ, concur.

MADSEN, J. (concurring).

I agree with part one of Justice Sanders’ concurrence. This court currently has a new set of RPCs pending before it. Because I agree with the majority that the better policy is to include self-represented lawyers within the prohibition of RPC 4.2(a), I would revise that rule in conjunction with the review of the RPCs and avoid the issue of prospectivity.

SANDERS, J. (concurring).

The majority holds that self-represented lawyers are “representing a client” under RPC 4.2(a) and therefore may not contact a represented party. But it refrains from sanctioning Haley, implicitly holding that the scope of RPC 4.2(a) is ambiguous. I concur only in the result, because the majority incorrectly construes RPC 4.2(a). The plain language of RPC 4.2(a) exempts self-represented lawyers. And the rule of lenity requires strict and narrow construction of an ambiguous penal statute. We must apply RPC 4.2(a) prospectively just as we apply it today.

I. THE PLAIN LANGUAGE OF RPC 4.2(A) PERMITS SELF-REPRESENTED LAWYERS TO CONTACT REPRESENTED PARTIES

Court rules like the Code of Professional Responsibility “are subject to the same principles of construction as are statutes.” Thus, when interpreting a rule we give “the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it.” If the plain language of the rule is unambiguous, additional interpretation is unnecessary.

The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers. “In representing a client, a lawyer shall not 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 consent of the other lawyer or is authorized by law to do so.” A “client” is “a person who consults or engages the services of a legal advisor,” or a “person or entity that employs a professional for advice or help in that professional's line of work.” In other words, a “client” is a third party who engages a lawyer. Because self-represented lawyers have no client, under RPC 4.2(a) they may contact a represented party.

The majority concedes that RPC 4.2(a) applies only when a lawyer is “representing a client” but nonetheless construes it to cover self-represented lawyers. Apparently, the majority concludes that self-represented lawyers are “employing or engaging themselves for advice, help, or services.”

This ingenious bit of legal fiction illustrates the wisdom of avoiding interpretations “conceivable in the metaphysical sense” when the plain language of a statute “is both necessary and sufficient.” Assuming that a self-represented lawyer represents a “client” certainly produces the majority’s preferred outcome. Unfortunately, it does so only at the expense of coherence. Lawyers cannot retain themselves any more than pro se litigants can claim legal malpractice or ineffective assistance of counsel. Undoubtedly, wise lawyers follow their own counsel. But it is a neat trick indeed to advise oneself.

The majority’s claim to follow an emerging majority rule is unavailing. Indeed, it cites decisions from six states concluding that self-represented lawyers are their own clients. But none offers any more convincing a rationale for this curious conclusion than the majority. Conclusory statements cannot substitute for legal reasoning, and another court’s error cannot justify our own.

Likewise, the majority’s reliance on the “purpose” of RPC 4.2(a) is misplaced. As the author of the court rules, we are “in a position to reveal the actual meaning which was sought to be conveyed.” But in the interest of certainty and consistency, we approach them “as though they had been drafted by the Legislature.” Whatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes. We may not expand the scope of a rule by fiat. If we conclude that self-represented lawyers should not contact represented parties, we should simply rewrite the rule to clearly prohibit that conduct. Other states have already done so. Lawyers should not have to read slip opinions to divine their professional obligations.

II. THE RULE OF LENITY REQUIRES A CONSTRUCTION OF RPC 4.2(A) EXEMPTING SELF-REPRESENTED LAWYERS

Even assuming that the plain language of RPC 4.2(a) is somehow ambiguous, the rule of lenity requires a strict and narrow construction exempting self-represented lawyers. The rule of lenity is a venerable canon of statutory interpretation, requiring courts “to interpret ambiguous criminal statutes in the defendant's favor.” While the Rules of Professional Conduct are only “quasi-criminal,” the rule of lenity applies to both criminal and quasi-criminal statutes. The deciding factor is the nature of the sanction imposed.

As a general rule, courts apply the rule of lenity to any statute imposing penal sanctions. "We are mindful of the maxim that penal statutes should be strictly construed." A statute is penal if it “can be punished by imprisonment and/or a fine” and remedial if it “provides for the remission of penalties and affords a remedy for the enforcement of rights and the redress of injuries.”

The Rules of Professional Conduct are penal because they concern punishing an offender, not compensating a victim. Professional discipline “is punitive, unavoidably so, despite the fact that it is not designed for that purpose.” While the “purpose of disciplining an attorney is not primarily to punish the wrongdoer,” punishment is an important purpose — and a necessary consequence — of professional discipline.

Courts have long recognized that disbarment is “penal in its nature” and subject to the rule of lenity. The same holds for all other sanctions. “Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged.”

In his dissent, Chief Justice Alexander suggests that the Rules of Professional Conduct can tolerate a degree of vagueness. But RPC 4.2(a) is not vague. It is ambiguous. And the Rules of Professional Conduct certainly cannot tolerate ambiguity.

A statute is ambiguous if it “refers to P, P can alternatively encompass either a or b, and it is beyond dispute that the defendant did a” and vague if it “refers to X, but we cannot tell whether the disputed event is an X.” No one disputes what Haley did: While representing himself, he contacted a represented party. The only question is whether the term “representing a client” encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term “representing a client” is “susceptible to more than one reasonable meaning,” it is ambiguous.

Courts routinely apply the rule of lenity to ambiguous statutes. And the rule of lenity is peculiarly appropriate to the Rules of Professional Conduct. We have recognized that “in a disciplinary proceeding, all doubts should be resolved in favor of the attorney.” Because lawyers “are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court,” courts “should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.” Application of the rule of lenity reflects that caution. It demands that we adopt the stricter, narrower construction, excluding self-represented lawyers.

III. CONCLUSION

The majority objects to the plain language of RPC 4.2(a) only because it believes that permitting self-represented lawyers to contact represented parties would violate the “purpose” of the rule. But the putative “spirit and intent” of a rule can trump only a “strained and unlikely” interpretation. And the plain language of RPC 4.2(a) is neither strained nor unlikely. It prohibits a lawyer representing a client — but not a self-represented lawyer — from contacting a represented party. As the majority concedes, several commentators and courts have found the plain language of essentially identical rules entirely unambiguous. We must not manufacture ambiguity and rely on legal fictions to arrive at a preferred result. Especially when we may simply write that result into law.

I therefore concur in result.

ALEXANDER, C.J. (dissenting).

I agree with the majority that RPC 4.2(a) prohibits lawyers who are representing themselves from communicating directly with opposing, represented parties unless they first obtain the consent of the parties' counsel. I disagree, however, with the majority’s decision to limit application of this important rule to future violators. I know of no authority that supports imposition of a rule of professional conduct prospectively only. I believe, therefore, that this court should suspend Jeffrey Haley from the practice of law for his violation of RPC 4.2(a). The violation is especially egregious in light of Haley’s claim that he “studied the rule” before directly contacting his opposing party, and in view of the fact that he contacted the party a second time after the party's lawyer warned him that doing so would violate RPC 4.2(a). Because the majority concludes that Haley should not be subjected to discipline for a violation of RPC 4.2(a), I dissent.

The majority correctly observes that among states considering the question with which we are here presented, the prevailing trend has been to apply RPC 4.2(a) to attorneys acting pro se, as was Haley, and not just to attorneys representing someone other than themselves. The majority acknowledges, additionally, that in late 1996 and early 1997, when Haley twice attempted to negotiate a settlement without going through the opposing party's lawyer, at least four jurisdictions already had concluded that RPC 4.2(a) prohibited such contacts. Yet none of the four jurisdictions mentioned by the majority applied the rule to pro se attorneys on a prospective basis only, as the majority does here. Rather, all four jurisdictions applied the rule to the facts before them, as this court should do. These four opinions, all cited by the majority, are sound and make it clear that at the time Haley engaged in the prohibited conduct, the weight of authority supported the disciplining of violators and did not even hint at the prospective-only application embraced by the majority in this case. In shielding Haley from application of RPC 4.2(a), the majority borrows from the reasoning of the Nevada Supreme Court in *In re Discipline of Schaefer*. There, the Nevada court declined to punish an attorney's violation of the Nevada equivalent of RPC 4.2(a) because of: (a) the “absence of clear guidance” from the court, and (b) “conflicting authority from other jurisdictions” as to whether the rule applied to pro se attorneys. In effect, the majority establishes a new test: if there is any doubt about how a rule will be construed, a violator will not be punished. That is a dangerous message to send.

Furthermore, whereas the *Schaefer* court relied on due process principles articulated by the United States Supreme Court in *Connally* in applying the Nevada rule prospectively, it is worth noting that this court has never drawn from *Connally* the proposition that discipline is inappropriate just because a rule is being interpreted for the first time. In fact, in *Haley v. Medical Disciplinary Board*, the only discipline case in which this court cited *Connally*, we affirmed sanctions against a physician for violating a statute prohibiting “moral turpitude” although we recognized “uncertainties associated with” the statutory language in question. Thus, this court has previously declined to interpret *Connally* in the way the Nevada court did in *Schaefer* and the majority does here — as if professional license holders have a due process right to avoid discipline simply because a court is newly construing the rule in question. Such an interpretation will have far-reaching impact, as many discipline cases that come before this court raise an issue of construction. In declining to sanction Haley for violating RPC 4.2(a), despite the fact that Haley had “studied” the rule and should have known that the prevailing construction prohibited his conduct, the majority suggests that questionable conduct will be tolerated as long as there is no prior Washington court decision exactly on point.

We must remember that our purpose in disciplining attorneys is to “protect the public and to preserve confidence in the legal system.” In *Curran*, an attorney argued that he should not be punished for violating RLD 1.1(a) because, in forbidding actions that reflect “disregard for the rule of law,” the rule was unconstitutionally vague. This court said, “We choose to give these words a narrowing construction. This law is not so vague as to be unconstitutional, given this limiting construction.” We noted that “a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack.” This court suspended the attorney, Curran, saying, “Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts.” Just as we disciplined Curran there, despite uncertainty about the rule in question, so should Haley be disciplined for violating RPC 4.2(a) in order to “protect the public and to preserve confidence in the legal system.”

*Curran* also weighs against the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity — a criminal law doctrine. We said in that case, “The purposes of bar discipline do not precisely duplicate the purposes of the criminal law.” More notably, we have said numerous times that “punishment is not a proper basis for discipline.” In *In re Disbarment of Beakley*, we said:

Neither disbarment nor suspension is ordered for the purpose of punishment, but wholly for the protection of the public. When a matter such as this comes before the court, the question presented is not: What punishment should be inflicted on this man? The question presented to each of its judges is simply this: Can I, in view of what has been clearly shown as to this man's conduct, conscientiously participate in continuing to hold him out to the public as worthy of that confidence which a client is compelled to repose in his attorney?

Thus, this court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which we have applied the rule of lenity to resolve ambiguity in the attorney's favor.

In sum, because the purpose of attorney discipline is to protect the public, it is our duty to enforce RPC 4.2(a) in this case. The majority provides no authority for applying RPC 4.2(a) to pro se attorneys prospectively only. I would apply the rule to Haley and suspend him for six months.

| **CHECK YOUR KNOWLEDGE:** |
| --- |
| 1. What is the purpose of Model Rule 4.2 and its prohibition on attorneys engaging in ex parte communications with represented persons? Is it intended to protect clients or their attorneys? |
| 1. Why don’t the model rules prohibit clients from engaging in ex parte communications? Should ex parte communications between represented persons be encouraged, discouraged, or neither? |
| 1. Haley retained counsel when the action at issue went to trial. If he had engaged in ex parte communications with Highland while represented by an attorney, would it have violated Model Rule 4.2? Should attorneys who are parties to an action and represented by counsel be permitted to engage in ex parte communications with represented persons? What if both parties are attorneys represented by counsel? |
| 1. Do you agree with Justice Sanders’s concurrence that the rule exempts lawyers who proceed pro se? |
| 1. Do you agree with the dissent that Haley should have been sanctioned because he studied the rule prior to contacting Highland? (Remember the *mens rea* requirement under Model Rule 4.2.) |

| [***Niesig v. Team*, 76 N.Y.2d 363 (N.Y. 1990)**](https://scholar.google.com/scholar_case?case=17261565756900857956) |
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| **Summary:** Plaintiff was injured when he fell from a scaffolding at a building construction site, and is now suing his employer DeTrae. Plaintiff moved for his lawyer to be able to conduct ex parte interviews with employees of DeTrae that were present at the time of the accident. Plaintiff argued the employees were not managing or controlling employees and could therefore be interviewed. DeTrae argued for a “blanket” rule applicable to all employees. The court reversed the lower court and held that an employee of a corporation is a “party” for the purpose of ex parte communications only if the employee’s actions bind the corporation in the matter or the employee implements the advice of counsel. |

Plaintiff in this personal injury litigation, wishing to have his counsel privately interview a corporate defendant’s employees who witnessed the accident, puts before us a question that has generated wide interest: are the employees of a corporate party also considered “parties” under Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility, which prohibits a lawyer from communicating directly with a “party” known to have counsel in the matter? The trial court and the Appellate Division both answered that an employee of a counseled corporate party in litigation is by definition also a “party” within the rule, and prohibited the interviews. For reasons of policy, we disagree.

As alleged in the complaint, plaintiff was injured when he fell from scaffolding at a building construction site. At the time of the accident he was employed by DeTrae Enterprises, Inc.; defendant J.M. Frederick was the general contractor, and defendant Team I the property owner. Plaintiff thereafter commenced a damages action against defendants, asserting two causes of action, and defendants brought a third-party action against DeTrae.

Plaintiff moved for permission to have his counsel conduct ex parte interviews of all DeTrae employees who were on the site at the time of the accident, arguing that these witnesses to the event were neither managerial nor controlling employees and could not therefore be considered “personal synonyms for DeTrae.” DeTrae opposed the application, asserting that the disciplinary rule barred unapproved contact by plaintiff’s lawyer with any of its employees. Supreme Court denied plaintiff's request, and the Appellate Division modified by limiting the ban to DeTrae’s current employees.

The Appellate Division concluded, for theoretical as well as practical reasons, that current employees of a corporate defendant in litigation “are presumptively within the scope of the representation afforded by the attorneys who appeared in the litigation on behalf of that corporation.” The court held that DeTrae’s attorneys have an attorney-client relationship with every DeTrae employee connected with the subject of the litigation, and that the prohibition is necessitated by the practical difficulties of distinguishing between a corporation’s control group and its other employees. The court further noted that the information sought from employee witnesses could instead be obtained through their depositions.

In the main we disagree with the Appellate Division’s conclusions. However, because we agree with the holding that DR 7-104(A)(1) applies only to current employees, not to former employees, we modify rather than reverse its order, and grant plaintiff's motion to allow the interviews.

We begin our analysis by noting that what is at issue is a disciplinary rule, not a statute. In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, we are of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession’s document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law.

That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake. “When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned.”

DR 7-104(A)(1), which can be traced to the American Bar Association Canons of 1908, fundamentally embodies principles of fairness. “The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party’s attorney theoretically neutralizes the contact.” By preventing lawyers from deliberately dodging adversary counsel to reach — and exploit — the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.

There is little problem applying DR 7-104(A)(1) to individuals in civil cases. In that context, the meaning of “party” is ordinarily plain enough: it refers to the individuals, not to their agents and employees. The question, however, becomes more difficult when the parties are corporations — as evidenced by a wealth of commentary, and controversy, on the issue.

The difficulty is not in whether DR 7-104(A)(1) applies to corporations. It unquestionably covers corporate parties, who are as much served by the rule’s fundamental principles of fairness as individual parties. But the rule does not define “party,” and its reach in this context is unclear. In litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule. The issue therefore distills to which corporate employees should be deemed parties for purposes of DR 7-104(A)(1), and that choice is one of policy. The broader the definition of “party” in the interests of fairness to the corporation, the greater the cost in terms of foreclosing vital informal access to facts.

The many courts, bar associations and commentators that have balanced the competing considerations have evolved various tests, each claiming some adherents, each with some imperfection. At one extreme is the blanket rule adopted by the Appellate Division and urged by defendants, and at the other is the “control group” test — both of which we reject. The first is too broad and the second too narrow.

Defendants’ principal argument for the blanket rule — correlating the corporate “party” and all of its employees — rests on *Upjohn v United States*. As the Supreme Court recognized, a corporation’s attorney-client privilege includes communications with low- and mid-level employees; defendants argue that the existence of an attorney-client privilege also signifies an attorney-client relationship for purposes of DR 7-104(A)(1).

*Upjohn*, however, addresses an entirely different subject, with policy objectives that have little relation to the question whether a corporate employee should be considered a “party” for purposes of the disciplinary rule. First, the privilege applies only to confidential communications with counsel, it does not immunize the underlying factual information — which is in issue here — from disclosure to an adversary. Second, the attorney-client privilege serves the societal objective of encouraging open communication between client and counsel, a benefit not present in denying informal access to factual information. Thus, a corporate employee who may be a “client” for purposes of the attorney-client privilege is not necessarily a “party” for purposes of DR 7-104(A)(1).

The single indisputable advantage of a blanket preclusion — as with every absolute rule — is that it is clear. No lawyer need ever risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which not. The problem, however, is that a ban of this nature exacts a high price in terms of other values, and is unnecessary to achieve the objectives of DR 7-104(A)(1).

Most significantly, the Appellate Division’s blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. “A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness’ knowledge, memory and opinion — frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product.” Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.

Nor, in our view, is it necessary to shield all employees from informal interviews in order to safeguard the corporation’s interest. Informal encounters between a lawyer and an employee-witness are not — as a blanket ban assumes — invariably calculated to elicit unwitting admissions; they serve long-recognized values in the litigation process. Moreover, the corporate party has significant protection at hand. It has possession of its own information and unique access to its documents and employees; the corporation’s lawyer thus has the earliest and best opportunity to gather the facts, to elicit information from employees, and to counsel and prepare them so that they will not make the feared improvident disclosures that engendered the rule.

We fully recognize that, as the Appellate Division observed, every rule short of the absolute poses practical difficulties as to where to draw the line, and leaves some uncertainty as to which employees fall on either side of it. Nonetheless, we conclude that the values served by permitting access to relevant information require that an effort be made to strike a balance, and that uncertainty can be minimized if not eliminated by a clear test that will become even clearer in practice.

We are not persuaded, however, that the “control group” test — defining “party” to include only the most senior management exercising substantial control over the corporation — achieves that goal. Unquestionably, that narrow (though still uncertain) definition of corporate “party” better serves the policy of promoting open access to relevant information. But that test gives insufficient regard to the principles motivating DR 7-104(A)(1), and wholly overlooks the fact that corporate employees other than senior management also can bind the corporation. The “control group” test all but “nullifies the benefits of the disciplinary rule to corporations.” Given the practical and theoretical problems posed by the “control group” test, it is hardly surprising that few courts or bar associations have ever embraced it.

By the same token, we find unsatisfactory several of the proposed intermediate tests, because they give too little guidance, or otherwise seem unworkable. In this category are the case-by-case balancing test, and a test that defines “party” to mean corporate employees only when they are interviewed about matters within the scope of their employment.

The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines “party” to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation’s “alter egos”) or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.

Unlike a blanket ban or a “control group” test, this solution is specifically targeted at the problem addressed by DR 7-104(A)(1). The potential unfair advantage of extracting concessions and admissions from those who will bind the corporation is negated when employees with “speaking authority” for the corporation, and employees who are so closely identified with the interests of the corporate party as to be indistinguishable from it, are deemed “parties” for purposes of DR 7-104(A)(1). Concern for the protection of the attorney-client privilege prompts us also to include in the definition of “party” the corporate employees responsible for actually effectuating the advice of counsel in the matter.

In practical application, the test we adopt thus would prohibit direct communication by adversary counsel “with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation.” This test would permit direct access to all other employees, and specifically — as in the present case — it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued.

Apart from striking the correct balance, this test should also become relatively clear in application. It is rooted in developed concepts of the law of evidence and the law of agency, thereby minimizing the uncertainty facing lawyers about to embark on employee interviews. A similar test, moreover, is the one overwhelmingly adopted by courts and bar associations throughout the country, whose long practical experience persuades us that — in day-to-day operation — it is workable.

Finally, we note the particular contribution made by the various amici curiae in this case; by highlighting the diverse contexts in which the question may arise, their submissions have enlarged our comprehension of the broad potential impact of the issue presented. In so doing, however, they have also alerted us to the wisdom of flagging what is in any event implicit in our decisions — that they are limited by the facts before us and the questions put to us. Today’s decision resolves the present controversy by allowing ex parte interviews with nonmanagerial witnesses employed by a corporate defendant; even in that limited context, we recognize that there are undoubtedly questions not raised by the parties that will yet have to be answered. Defendants’ assertions that ex parte interviews should not be permitted because of the dangers of overreaching, moreover, impel us to add the cautionary note that, while we have not been called upon to consider questions relating to the actual conduct of such interviews, it is of course assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically.

| **CHECK YOUR KNOWLEDGE:** |
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| 1. Why did the court find that the rule did not apply to former employees of a company? |
| 1. Why did the court reject the “blanket” test? |
| 1. Do you think the rule the court adopted clarified when an attorney may interview employees of a company without a deposition notice? |

**Further Reading:**

* [John Leubsdorf, *Communicating with Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. Pa. L. Rev. 683 (1979)](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4843&context=penn_law_review)

1. The Beatles, *You Can’t Do That*, A Hard Day’s Night (1964). [↑](#footnote-ref-0)