Chapter 8

Interactions with Non-Clients

1. Truthfulness & Fairness

Model Rules of Professional Conduct

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.4: Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

2. Represented Persons

Model Rules of Professional Conduct,

Rule 4.2: Communication with Person Represented by Counsel

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.

N.C. State Bar v. Weckworth, No. COA18-866 (N.C, Ct. App. June 4, 2019)

HAMPSON, Judge.

Factual and Procedural Background

Robert N. Weckworth, Jr. (Defendant) appeals from an Order of Discipline entered by a Disciplinary Hearing Panel of the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar (State Bar), censuring him for violations of the North Carolina Rules of Professional Conduct (RPC). Defendant also noticed appeal from several interlocutory rulings by the DHC, which are also before us on appeal. The Record, including the evidence presented before the DHC over a two-day hearing on 7 April and 20 June 2017, reflects the following:

In December 2013, Defendant, an attorney licensed by the State Bar, was retained by the Connor [1] family to represent them in child custody litigation involving a minor child, Sally,[2] who at the time was in the custody of the Guilford County Department of Social Services (DSS) pursuant to a Petition and non-secure custody order in a Guilford County juvenile proceeding (the Juvenile Case). DSS's involvement with Sally's biological parents began in September 2012, due to alleged domestic violence and substance abuse issues.

1 (n.1 in opinion) Pseudonyms are used to protect the privacy of non-parties who were parties to the underlying legal proceedings and the minor child.

2 (n.2 in opinion) A pseudonym.

In October 2012, DSS received a report from law enforcement that Sally's biological mother, Louise[3], had been the victim of physical domestic abuse by Sally's biological father. Louise was subsequently accepted into a treatment program at Mary's House, a residential facility for single mothers recovering from substance abuse and their children. It was here Louise first met the Connors, who were volunteering at the facility. Louise became friendly with the Connors and introduced them to Sally.

3 (n.3 in opinion) Also a pseudonym.

On 5 February 2013, DSS received another report alleging Louise had left Mary's House and moved in with Sally's biological father. As a result, DSS held a team meeting with the biological parents, who thereafter entered into service agreements that required the parents to, *inter alia*, complete a substance abuse assessment and follow any recommendations. In addition, the biological parents agreed to voluntarily place Sally with the Connors. Louise testified: "At that time I was under the impression that they merely wanted to help, and I looked at them as a back-up plan if I was unable to be reunified with my daughter." Louise further testified she wanted to avoid Sally being placed in the foster-care system.

By September 2013, both biological parents were continuing to fail in their respective treatment plans, and on 26 September 2013, DSS filed its Petition in the Juvenile Case. The same day, Danielle Caldwell (Caldwell) was appointed by the court to represent Louise. Placement of Sally remained with the Connors.

However, by November 2013, concerns were raised, including by Caldwell, that the Connors were acting in a manner contrary to DSS's efforts to reunite Sally with Louise, including by calling Sally by the name "Emma" and by interfering with the parents' visitation and DSS's own efforts to provide services. On 21 November 2013, following another team meeting—which counsel for the parties in the Juvenile Case attended—where these concerns were discussed, Sally was removed from her placement in the Connors' home. The removal of Sally from the Connors' home was done over the express wishes of Louise, who orally told Caldwell she was fired at this meeting. Nevertheless, Caldwell continued to serve as court-appointed counsel for Louise, no request was made to the trial court to discharge Caldwell, and no order allowing Caldwell to withdraw was entered at the time.

On or around 20 December 2013, the Connors posted a request for legal services to a legal-referral website, providing a synopsis of their situation and seeking someone to assist in returning Sally to them. Defendant responded to the request, and thereafter Defendant and Mr. Connor spoke on the phone about the case.

A few days later, on 23 December 2013, the Connors invited Louise to dinner. The same evening, Defendant received a voicemail from Mr. Connor asking to meet and discuss retaining Defendant's services. Defendant returned the call and agreed to drop by the Connors' residence that evening. When Defendant arrived, the Connors and Louise were all there. Louise began by telling Defendant she

wanted Sally returned to the Connors and expressing her displeasure with both DSS and Caldwell. Defendant testified it was "clear that *Louise* and the *Connors* were on the same page." At the hearing before the DHC, Defendant presented evidence it was represented to him at this meeting that Louise was no longer represented by Caldwell and wanted to hire him. Defendant testified he demurred, noting the conflict of interest in representing both parties.[4] After Louise spoke to Defendant, Defendant and Mr. Connor retreated to the nursery the Connors had set up for Sally in order to discuss the matter further. The Connors retained Defendant on 26 December 2013.

4 (n.4 in opinion) Louise testified before the DHC that at this meeting she asked Defendant if he had contacted Caldwell and Defendant responded he had left her voicemails. Defendant, however, denied leaving Caldwell voicemails prior to this meeting on the 23rd. Caldwell testified Defendant had left her a voicemail sometime between 20 December and 23 December 2013, which she did not return.

On 27 December 2013, Defendant contacted Connie Bowman (Bowman), a foster-care social worker with DSS assigned to the Juvenile Case, to inquire about DSS's position as to Sally's placement. Bowman informed Defendant DSS was represented by the Guilford County Attorney's Office and that Robert W. Brown, III (Brown) was the attorney assigned to the Juvenile Case.

Defendant further testified he later learned from the Connors that Louise may be willing to sign a written statement in support of their efforts to regain custody over Sally. Defendant encouraged the Connors to obtain such a statement—saying, "That would be great. It shows everybody is on the same page." The Connors procured an affidavit dated 2 January 2014 from Louise, which expressed her support for the Connors' position, including: (A) stating she agreed with the Connors' position regarding visitation, which would negatively impact her visitation with Sally; (B) having no objection to the Connors calling her child "Emma"; (C) acknowledging "mistakes" and "choices" that adversely impacted her ability to care for Sally; (D) expressing it was in Sally's best interest to be in the Connors' custody; and (E) indicating her wishes for Sally to be adopted by the Connors if she was not reunified with Louise. Although Louise testified the affidavit was the Connors' idea, Ms. Connor testified it was a "mutual decision."

Defendant filed a motion to intervene in the Juvenile Case on behalf of the Connors on 3 January 2014. The same day, Defendant filed a civil complaint on behalf of the Connors against Louise, Sally's biological father, and DSS (the Civil Case), seeking custody of Sally. He attached Louise's affidavit to this complaint. Caldwell was never contacted about the affidavit, and Defendant did not obtain Caldwell's consent prior to utilizing it.

On 6 January 2014, Defendant approached Guilford County District Court Judge Michelle Fletcher (Judge Fletcher), asking for an immediate hearing on emergency child custody and placement of Sally. Judge Fletcher was the judge assigned to the Juvenile Case but on this day was sitting in traffic court. Defendant did not notify DSS's counsel before doing so, and at the time of Defendant's request, neither DSS nor Caldwell had been served with the complaint in the Civil Case.

Judge Fletcher contacted Brown, who immediately drove to Greensboro to attend a hearing that same afternoon on Defendant's request. Brown testified he received a call from Judge Fletcher, stating Defendant was in her office requesting emergency custody. Caldwell testified she received a call from Brown, stating Defendant was trying to get *ex parte* emergency custody of Sally on behalf of the Connors; however, she did not attend this hearing.

The hearing was conducted, Defendant did not present any witnesses, and Judge Fletcher entered an order finding the Connors failed to allege or show grounds sufficient to support an award of emergency temporary custody. Judge Fletcher's order denying Defendant's motion specifically found: "At some time on January 6, 2014, *Defendant* approached the undersigned district court judge to request that she immediately consider granting the *Connors* temporary custody of *Sally*."

Based on these allegations, in its 27 June 2016 Complaint, the State Bar asserted Defendant's conduct constituted grounds for discipline under N.C. Gen. Stat. § 84-28(b)(2) through four separate violations of the RPC: (1) by discussing custody of Sally with Louise at the Connors' home and by obtaining and filing Louise's affidavit without Caldwell's consent, Defendant communicated with a represented client in violation of RPC 4.2(a); (2) by attempting to discuss custody of Sally with Bowman without Brown's consent, Defendant communicated with a represented client in violation of RPC 4.2(a); (3) by approaching Judge Fletcher *ex parte* and orally seeking a grant of temporary custody without first notifying Brown, Defendant engaged in an *ex parte* communication with a judge without adequate notice to an opposing party in violation of RPC 3.5(a)(3); and (4) by alleging the Connors were entitled to temporary custody and failing to present any evidence in support of his request, Defendant brought and asserted a frivolous claim in violation of RPC 3.1.

On 30 March 2017, Defendant filed a Motion to Compel, seeking to compel the State Bar to respond to certain Interrogatories and Requests for Production of Documents, and a Request for Prehearing Conference. On 7 April 2017, the DHC entered an Order Denying Defendant's Motion to Compel and Request for Prehearing Conference. The DHC found the State Bar contacted Defendant on multiple occasions prior to the filing of Defendant's Motion to discuss Discovery and schedule a Prehearing Conference. Specifically, the DHC found the parties ultimately met for a Prehearing Conference on 30 March 2017, at which time Defendant hand-delivered his Motion to Compel. The DHC concluded Defendant had "failed to confer in good faith" to secure Discovery and had "failed to timely pursue" the subject of his Motion to Compel. The DHC therefore denied Defendant's Motion to Compel and Request for Prehearing Conference.

On 4 April 2017, Defendant issued a subpoena to the Clerk of Superior Court for Guilford County, commanding the Clerk to appear before the DHC on 7 April 2017 and produce audio recordings of the Juvenile Case proceedings before Judge Fletcher. In response, the Clerk filed a Motion to Quash Subpoena. The same day, Defendant also issued a subpoena to Judge Fletcher, commanding the Judge to appear and testify before the DHC on 7 April 2017 concerning the proceedings before her, and in response, Judge Fletcher filed a Motion to Quash Subpoena. On 7 April 2017, the DHC entered two Orders on these Motions, quashing both subpoenas on the grounds that the two-day time window failed to allow reasonable time for compliance and constituted an undue burden. Additionally, the DHC noted Judge Fletcher enjoyed judicial immunity, including a testimonial privilege.

On 6 October 2017, the DHC entered its Order of Discipline. In its Order, the DHC concluded Defendant had violated the RPC in two ways: (1) by failing to obtain Caldwell's consent prior to the use and filing of Louise's affidavit, in violation of RPC 4.2(a); and (2) by failing to notify opposing counsel prior to his *ex parte* communications with Judge Fletcher, in violation of RPC 3.5(a)(3). The DHC determined the evidence was insufficient to show Defendant's contact with Bowman violated RPC 4.2(a) or that Defendant's claim before Judge Fletcher violated RPC 3.1.

The DHC entered additional findings regarding discipline, noting Defendant's prior disciplinary offenses in North Carolina, Defendant's substantial experience in the practice of law, Defendant's refusal to acknowledge wrongdoing, and Louise's vulnerability resulting from her history of substance abuse and ongoing recovery treatment. Based on these findings, the DHC concluded Defendant's conduct, while not serious enough to warrant a suspension of his license, warranted Censure "because entry of an order imposing less severe discipline would fail to acknowledge the seriousness of the conduct and would send the wrong message to attorneys and the public about the conduct expected of members of the Bar of this State." The DHC censured Defendant and taxed him with fees and costs. Defendant timely filed Notice of Appeal.

Analysis

I. Violations of the Rules of Professional Conduct

In his first argument, Defendant contends the DHC's decision "was unsupported and contrary to the evidence, contrary to existing law, did not have a rational basis in the evidence, and was completely arbitrary and unsupported by reason." We disagree.

A. Rule 4.2

The DHC, in its Order of Discipline, found Louise was represented by Caldwell in the Juvenile Case, Defendant knew Caldwell represented Louise, and Defendant nonetheless discussed Sally's custody with Louise without obtaining Caldwell's consent. The DHC also found the Connors, at Defendant's direction, secured Louise's affidavit, again without Caldwell's consent. The DHC concluded, "*b*y failing to obtain Caldwell's consent prior to the use and filing of *Louise's* affidavit with the *Connors'* complaint in *theCivilCase*, Defendant violated Rule 4.2(a)."

Rule 4.2 of the RPC states:

> During the representation of 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. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

Defendant contends "*t*he overwhelming, uncontroverted evidence in this matter is that Caldwell did not at any time ever represent *Louise* in the civil case." Defendant concedes Caldwell represented Louise in the Juvenile Case but contends because her representation was limited to the Juvenile Case, he had no obligation to seek Caldwell's consent to use Louise's affidavit in the Civil Case. Defendant also asserts there could be no violation of RPC 4.2 because he did not directly procure the affidavit.

However, Defendant ignores the DHC's finding that he did communicate directly with Louise regarding custody of Sally. This communication began the series of events culminating in Defendant encouraging the Connors to obtain a statement helpful to their case from Louise and, further, his use of Louise's affidavit in the Civil Case without Caldwell's consent in an effort to obtain custody of Sally for his clients.

Moreover, Defendant's interpretation of RPC 4.2 is too narrow. Comment 8 to the Rule makes clear the Rule "applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates." N.C. St. B. Rev. R. Prof'l Conduct r. 4.2 cmt. 8.

Here, the matter under discussion was custody of Sally. Louise was represented by Caldwell in the Juvenile Case, which concerned custody of Sally. Defendant filed the Civil Case on behalf of the Connors, seeking custody of Sally and naming Louise and DSS as adverse parties, as an alternative to the Juvenile Case. Defendant was clearly aware the Juvenile Case and Civil Case overlapped on the issue of custody of Sally. Indeed, Defendant specifically approached Judge Fletcher on his emergency custody motion precisely because Judge Fletcher was presiding over

the Juvenile Case. Applying the whole-record test, the DHC's findings were supported by substantial evidence rising to the level of clear, cogent, and convincing, and its findings support the conclusion Defendant violated RPC 4.2 by communicating with Louise regarding custody of Sally while knowing Louise was represented by Caldwell.

3. Unrepresented Persons

Model Rules of Professional Conduct

Rule 4.3: Dealing with Unrepresented Person

In dealing 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 a person are or have a reasonable possibility of being in conflict with the interests of the client.

In re Disciplinary Proceeding Against Haley, 126 P.3d 1262 (Wash. 2006)

Owens, J.

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 with-

in 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.

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.

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 Neva-

da 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.

Niesig v. Team I, 76 N.Y.2d 363 (N.Y. 1990)

Kaye, J.

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 centering on Labor Law § 240, 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." Citing *Upjohn Co. v United States*, 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 [...].

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 latter approach is based on rule 801(d)(2)(D) of the Federal Rules of Evidence, a hearsay exception for statements concerning matters within the scope of employment, which is different from the New York State rule.

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.

Accordingly, the order of the Appellate Division should be modified, without costs, by reversing so much of the Appellate Division order as denied plaintiff's motion to permit ex parte interviews of current DeTrae employees and, as so modified, the Appellate Division order should be affirmed and the certified question answered in the negative.