

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION 25: IN RE AMERICAN BAR ASSOCIATION FORMAL OPINION 502 REGARDING COMMUNICATION WITH A REPRESENTED PERSON BY A *PRO SE* LAWYER

#

On September 28, 2022, the American Bar Association issued its formal opinion 502.¹ This new ABA Opinion 502 significantly expands the scope of ABA Model Rule 4.2 by asserting that the *pro se* lawyer does represent “a client”. This opinion is unusual in that it contains a dissent since this expansion of ABA Model Rule 4.2 was made without regard to the important operative language of “In representing a client...” The instant Opinion adopts the position of the dissent in ABA Opinion 502 in order to eliminate any ambiguity in the meaning of Minnesota Rule of Professional Conduct 4.2 (MRPC 4.2)

MRPC 4.2 is a long-established “no-contact” rule of ethics that strictly prohibits Minnesota lawyers from contacting represented clients on any extant legal issue in which those clients have retained legal representation.

More specifically, MRPC 4.2 provides that “*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 consent of the other lawyer or is authorized to do so by law or court order.*”

¹ The full ABA Opinion 502 is found at: <https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-formal-opinion-502>

MRPC 4.2 has long served the overriding, critical interests of eliminating improper overreach with less sophisticated clients, interfering in other lawyers' relationships with their clients, and from eliciting uncounseled disclosure of protected information.

ABA Opinion 502 provides that *pro se* lawyers are now also subject to the Rule 4.2, notwithstanding the fact that the *pro se* attorney is not representing an actual third-party client as directly contemplated by Model Rule 4.2. In expanding the reach of 4.2 to *pro se* attorneys ABA Opinion 502 recites the same policy rationale underlying the original ABA Model Rule 4.2: eliminating overreach, interfering with another attorney's relationship with his or her client, and eliciting uncounseled disclosures.

The dissent in ABA Opinion in no way disputes these important, common-sense policy prerogatives that promulgate the proper functioning of Minnesota's legal system. Indeed, as a general matter, the Minnesota Rules of Professional Conduct have traditionally hewed closed to the carefully developed ABA Model Rules. However, in this instance, the LPRB believes the dissent in ABA Opinion 502 is persuasive.

The LPRB agrees with the dissent because both ABA Model Rule 4.2 and MRPC 4.2 are premised on the antecedent language of "*In representing a client,...*" As the dissent succinctly asserts, the *pro se* attorney is simply not representing a client as the term "client" is typically understood.

As a practical matter and under common understanding, a "client" is typically known as "a person who employs or retains an attorney, or counsellor, to appear for him [her] in courts, advise, assist, and defend him in legal proceedings, as to act for him in

any legal proceedings, and to act for him in any legal business. It should include one who disclosed confidential matters to attorney while seeking professional aid, whether the attorney was hired or not.”²

There is no question ABA Opinion 502 addresses important policy reasons why ABA Model Rule 4.2, and by extension, MRPC 4.2 should be expanded to *pro se* attorneys. However, before that should happen, the prefatory language of 4.2 must be changed or amended as appropriate before an unsuspecting Minnesota attorney is unfairly snared under ABA Opinion 502. Minnesota attorneys deserve – and the Minnesota Supreme Court is required, to provide clear notice in the exact language of MRPC 4.2 itself.

It is the opinion of the LPRB that the *pro se* attorney should not face discipline under MRPC 4.2 unless and until the language of “In representing a client” is appropriately changed or modified under the supervision of the Minnesota Supreme Court following appropriate input from all stakeholders.

#

² *Black’s Law Dictionary*, 5th Ed. (West Publishing, 1979). The MRPC does not otherwise define “client.”