IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-DI-474

In the Matter of
Michael C. Steele,
Respondent.

Decided: March 4, 2022

Attorney Discipline Action

Hearing Officer James A. Joven

Per Curiam Opinion

Chief Justice Rush and Justices David, Massa, and Goff concur.
Justice Slaughter dissents with separate opinion.

Per curiam.

The old adage, "a lawyer who represents himself has a fool for a client," often is invoked to illustrate the perils of self-representation. Less frequently have we had occasion to explore the extent to which a self-represented lawyer functions as both a lawyer and a client.

Representing himself in a legal dispute, Respondent communicated directly with the opposing party about the subject of the representation, despite opposing counsel's explicit instructions not to do so. We agree with the hearing officer that Respondent's conduct violated Indiana Professional Conduct Rule 4.2; and for this misconduct, we conclude Respondent should be publicly reprimanded.

Procedural Background and Facts

This matter is before the Court on the report of the hearing officer we appointed to hear evidence on the Indiana Supreme Court Disciplinary Commission's disciplinary complaint filed against Respondent. Respondent's 2005 admission to this State's bar subjects him to this Court's disciplinary jurisdiction. *See* IND. CONST. art. 7, § 4.

Sometime around 2018, a dispute arose between Respondent and a long-time friend ("Smith"), a Nevada resident, regarding an oral promise Smith allegedly had made to pay Respondent's costs toward an educational program. After Respondent emailed a demand letter to Smith and Smith's counsel ("Kealey") in July 2019, Kealey replied with a directive that Respondent "[d]irect your communications to me and cease all communications with" Smith. Respondent and Kealey then had a series of communications over the next two weeks regarding Respondent's demand and his threatened lawsuit. These communications were not fruitful, and Respondent filed a lawsuit against Smith in Marion Superior Court.

One week after that, Respondent sent a profanity-laced email to Smith threatening to visit Smith in person and demanding that Smith bypass Kealey and discuss the matter with Respondent directly:

> This is me writing you. I'm tired of talking to that douchebag lawyer. Your birthday is in a few hours. I'm out west and gonna drive to Vegas. If you don't want to speak to me you'll have to tell your security people to turn me away.
>
> . . .
>
> We aren't going to hang out again. I get that. But this is 30+ years of our life. Let me tell you about the fucking hell I have been thru the past year over a despicable lying whore and one of the guys that was banging her. I have every intention of seeing them both face the multiple felony charges they deserve, and I won't rest a moment in my life until he does at least.
>
> You have a choice. Send this to your dork of a lawyer who will try to make more stupid arguments, or have a bit of respect for 30 years of friendship and 7 years I have to your company and its wild success.
>
> . . .
>
> Get the fucking lawyer out of this and talk to me like I'm the guy who's had your back for 32 years (and still counting).

Respondent did not have Kealey's consent to communicate directly with Smith. Respondent dismissed the lawsuit in February 2020 without ever having served Smith.

The Commission filed a disciplinary complaint against Respondent in July 2020 alleging Respondent violated Indiana Professional Conduct Rule 4.2, which provides:

> 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 by law or a court order.

Following an evidentiary hearing, the hearing officer issued his final report in September 2021, concluding Respondent violated Rule 4.2 as

charged and making no recommendation on sanction. The matter has been fully briefed and is now ripe for our consideration.

Discussion and Discipline

The Commission carries the burden of proof to demonstrate attorney misconduct by clear and convincing evidence. *See* Ind. Admission and Discipline Rule 23(14)(g)(1). While our review process in disciplinary cases involves a de novo examination of all matters presented to the Court, the hearing officer's findings receive emphasis due to the unique opportunity for direct observation of witnesses. *See Matter of Wray*, 91 N.E.3d 578, 582 (Ind. 2018).

Most of the elements of a Rule 4.2 violation are plainly met here. Respondent knew Kealey was representing Smith with respect to Respondent's demand and his subsequent lawsuit. Respondent did not have Kealey's consent to talk with Smith about this subject, and he was not authorized by a court order to do so. And we can readily dispense with Respondent's contention that he was not communicating in the email "about the subject of the representation" but rather "spoke only of matters involving friendship." (Pet. for Rev. at 3). This contention is belied by the language of the email itself, which thrice explicitly requested that Smith bypass Kealey, and by the context in which it was sent, after two weeks of unsuccessful discussions with Kealey and the filing of a lawsuit.

Respondent nonetheless argues he was entitled to send the email to Smith, for two related reasons. First, in reference to Rule 4.2's prefatory clause, he asserts he was not "representing a client" but rather was representing himself; and second, he points to language in the commentary to Rule 4.2 recognizing that parties generally may communicate with one another. For reasons explained below, we find these arguments unavailing.

Many of our disciplinary precedents have found professional misconduct in connection with an attorney's pro se litigation. *See, e.g.*, *Matter of Straw*, 68 N.E.3d 1070 (Ind. 2017) (pursuit of frivolous action); *Matter of Yudkin*, 61 N.E.3d 1169 (Ind. 2016) (same); *Matter of Relphorde*, 644

N.E.2d 874 (Ind. 1994) (pattern of misconduct in civil case in which attorney was a defendant proceeding pro se).[1] We also have found professional misconduct arising from an attorney's actions as a represented party in a matter. *See, e.g.*, *Matter of Powell*, 76 N.E.3d 130 (Ind. 2017) (falsifying evidence that caused counsel to make a false statement to a court); *Matter of Usher*, 987 N.E.2d 1080 (Ind. 2013) (multiple violations); *Matter of Gaydos*, 738 N.E.2d 276 (Ind. 2000) (dishonesty in ghostwritten appellate filings). These cases, and many others, reflect that an attorney's ethical responsibilities are not limited to the representation of others.

Notably, several of these cases have involved professional conduct rules with language similar to Rule 4.2's prefatory clause. For example, in *Matter of Dempsey*, 986 N.E.2d 816 (Ind. 2013), and *Matter of Richardson*, 792 N.E.2d 871 (Ind. 2003), we found violations of Rule 4.4(a)—which provides that "in representing a client" an attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person—for conduct committed by the respondent attorneys as pro se litigants. Similarly, in *Matter of Thomas*, 30 N.E.3d 704 (Ind. 2015), we found a violation of Rule 3.3(a)(1) for dishonesty in bankruptcy filings by a pro se attorney, even though the commentary to that rule indicates it governs the conduct of an attorney "who is representing a client[.]"[2] These results make eminent sense from a policy view; after all, the harms wrought by an attorney's dishonesty toward courts or third parties, or his undue burdening of an opposing party, are the same whether the attorney is representing himself, representing someone else, or being represented by someone else. These cases also implicitly recognize that self-representation is still representation, and an

[1] Indeed, Respondent himself was recently disciplined in another case for an unethical email sent in connection with separate pro se litigation in which he was engaged. *Matter of Steele*, 171 N.E.3d 998 (Ind. 2021).

[2] We similarly found a Rule 3.3(a)(1) violation in *Usher* for dishonesty in sworn discovery provided by a represented attorney and expressly rejected the respondent's argument that actions taken as a litigant were beyond the reach of the Rules of Professional Conduct. 987 N.E.2d at 1087.

attorney who proceeds pro se in a matter functionally occupies the roles of both attorney and client.

We do not think a different result obtains, or should obtain, under Rule 4.2. The overarching purposes of the rule are "to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship[.]" *Matter of Baker*, 758 N.E.2d 56, 58 (Ind. 2001). More specifically, we have explained that an attorney's attempt to bypass opposing counsel in order to pressure an opposing party to settle on less favorable terms "undermines the representative adversarial system." *Matter of Syfert*, 550 N.E.2d 1306, 1307 (Ind. 1990). This is precisely what Respondent did here; and it makes little difference (nor should it) that he did so while representing himself and not someone else.

The commentary to Rule 4.2 reinforces this conclusion, notwithstanding Respondent's reliance on one isolated clause within that commentary. In describing the purposes underlying the rule, Comment 1 refers to "lawyers who are participating in the matter," and not merely lawyers representing others. Comments 2 and 3 emphasize the broad application of the rule in different respects. As Respondent notes, Comment 4 includes a clause recognizing that there are situations where "[p]arties to a matter may communicate directly with each other." But Respondent's reliance on this clause ignores the remainder of the same sentence and the preceding one, delineating what a party's counsel may or may not do in connection with the parties' own direct communication, when the parties are entitled to make that communication. *Accord Matter of Anonymous*, 819 N.E.2d 376, 379 n.1 (Ind. 2004) (explaining that Comment 4's recognition that parties may directly communicate with one another "is not intended to insulate from scrutiny situations where a party communicates with another at the insistence of or in the presence of the party's counsel and while the adverse party's counsel is absent and unaware of the contact"). Put simply, neither the clause Respondent cites out of context nor anything else in Comment 4 provides cover for an attorney to engage in conduct that violates the rule simply because the attorney is a party representing himself.

Our holding today accords with those of other jurisdictions addressing application of substantially similar versions of Rule 4.2 to self-represented attorneys. *See Matter of Hodge*, 407 P.3d 613, 654-55 (Kan. 2017); *Medina Cty. Bar Ass'n v. Cameron*, 958 N.E.2d 138, 140-41 & n.1 (Ohio 2011); *In re Disciplinary Proceedings Against Haley*, 126 P.3d 1262, 1267 (Wash. 2006); *In re Discipline of Schaefer*, 25 P.3d 191, 199-200 (Nev. 2001), *opinion modified on denial of reh'g*, 31 P.3d 365 (Nev. 2001); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. Houston 14th Dist. 1999); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994), *reh'g denied*; *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987).[3]

In sum, we agree with the hearing officer and conclude that Respondent violated Rule 4.2 as charged. Turning to the question of sanction, we have consistently imposed a reprimand in prior cases involving standalone violations of Rule 4.2. *See Matter of Martin*, 166 N.E.3d 345, 347 (Ind. 2021); *Matter of Litz*, 894 N.E.2d 983, 984 (Ind. 2008); *Matter of Uttermohlen*, 768 N.E.2d 449, 451 (Ind. 2002); *Baker*, 758 N.E.2d at 58; *Syfert*, 550 N.E.2d at 1307. We conclude a reprimand is sufficient discipline in this case as well.[4]

[3] Although *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990), has been cited as contrary authority, we are not convinced it is. The attorney who made the communication at issue in *Pinsky* was not representing himself in the matter but rather was being represented by separate counsel. The application of Rule 4.2 to an attorney who occupies *solely* the role of a party presents a different issue, and one we need not address today.

[4] We hasten to add, though, that Respondent continues to be his own worst enemy when it comes to his electronic communications. He has been disciplined twice now for inappropriate emails; and during our consideration of this case he has sent numerous extrajudicial emails about his disciplinary matters to the membership and staff of this Court, prompting the Commission to file an "Objection to Respondent's Email Communications and Verified Request for Order Prohibiting Further Submissions." We decline at this time to issue an order of prohibition enforceable through contempt, this matter essentially having come to its substantive end with this opinion. But our declination should not be viewed by Respondent as license to engage in inappropriate communications.

Conclusion

The Court concludes that Respondent violated Indiana Professional Conduct Rule 4.2. For Respondent's professional misconduct, the Court imposes a public reprimand. The costs of this proceeding are assessed against Respondent, and the hearing officer appointed in this case is discharged with the Court's appreciation.

Rush, C.J., and David, Massa, and Goff, JJ., concur.
Slaughter, J., dissents with separate opinion.

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Slaughter, J., dissenting.

I respectfully dissent because Professional Conduct Rule 4.2 does not clearly apply to pro se lawyers. Rule 4.2, by its terms, applies only to lawyers who are "representing a client". It says:

> 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 by law or a court order.

Ind. Professional Conduct Rule 4.2.

Under the Court's interpretation of this rule, "client" and "lawyer" may be one and the same person. But to treat them as the same person would twist our understanding of the client-lawyer relationship under our rules of professional conduct and stretch the word "client" beyond its plain meaning. It might also lead to counterintuitive outcomes. For example, Rule 1.15 might be read to require a pro se lawyer to establish a separate IOLTA account for himself as a "client". See Prof. Cond. R. 1.15. Or if the lawyer is representing himself *gratis*, Rule 6.1 might allow him to count his pro se hours as pro bono hours and to report them accordingly. See *id.* R. 6.1. If the pro se lawyer is wearing two hats—as both client and lawyer—it would be anyone's guess if (or when) the rules governing the client-lawyer relationship would apply. The Rules treat client and lawyer as separate persons who may enter a representation relationship, see, e.g., *id.* R. 1, and we should interpret Rule 4.2 consistent with the Rules' framework.

The commentary to Rule 4.2 makes its application here even less clear. Looking at Comment 1, a pro se lawyer may conclude that as a lawyer "participating in the matter", the rule applies. *Id.* R. 4.2 cmt. 1. But the same lawyer may also look to Comment 4 and conclude the rule does not apply because "[p]arties to a matter may communicate directly with each other". *Id.* R. 4.2 cmt. 4. Thus, a pro se lawyer confused about Rule 4.2's application would find no useful guidance in the commentary.

On policy grounds, I understand the Court's desire to protect non-lawyers represented by counsel from pro se lawyers who may try to take advantage of the non-lawyer's lack of legal education, experience, or sophistication. But while this is a desirable policy goal, this issue is one of first impression in Indiana, and Rule 4.2 does not clearly apply to pro se lawyers.

If we wish to achieve this policy goal, we should rewrite the rule so it actually says what the Court believes it should say: "No lawyer representing a client **or proceeding on the lawyer's own behalf** in a matter shall communicate about the subject of the matter with a person the lawyer knows to be represented by another lawyer in the matter, unless . . . . " The Restatement editors rewrote Rule 4.2 for a reason, see Restatement (Third) of the Law Governing Lawyers § 99(1)(b)—because the prior rule did not clearly apply to pro se lawyers.

* * *

As the Court notes at the outset, Lincoln cautioned that lawyers who represent themselves have fools for clients. This timeless advice may still be worth heeding. But lawyers who ignore it should not be subject to sanction for violating professional rules that do not clearly apply to their pro se activities. Because the Court holds otherwise, I respectfully dissent.