Ethical Guidelines for Lawyers Opposing Pro Se and Minimally Represented Borrowers in Troubled-Loan Scenarios

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A Practice Note addressing the ethical issues lender's counsel may encounter when dealing with pro se or minimally represented borrowers in a troubled loan scenario. This Note details the requirements under the American Bar Association's Model Rules of Professional Conduct that attorneys must adhere to while balancing the requirements of vigorous client representation against the ethical obligations to pro se or minimally represented opponents.

When an individual borrower is in financial straits and must negotiate with a lender in a troubled loan scenario, the borrower may choose to have minimally involved counsel or not even engage counsel at all, with the goal of saving as much money as possible. In either situation there are hidden pitfalls for lender's counsel, who must balance the requirement of vigorous representation on behalf of their lender client against the ethical obligations to pro se or minimally represented opponents. Attorneys in this scenario are cautioned against viewing pro se or minimally represented opponents as an opportunity for the lender to aggressively negotiate and get everything it wants as part of the loan workout.

An attorney should never underestimate a pro se opponent because:

- Many pro se parties, rather than being uneducated or foolish, can quickly learn sophisticated legal positions with just a few quick internet searches.
- Pro se parties may have family members or friends who are attorneys helping them in the background.
- Although pro se parties are bound by the same legal rules and requirements as an attorney, judges frequently make allowances and relax the rules for pro se parties, allowing them to gain some advantage in court.
- Pro se parties can file ethical complaints against the lender's attorney for improper conduct and violation of professional and ethical requirements. Pro se parties have been known to stall foreclosure of their homes for years, racking up thousands of dollars in legal fees and costs for the lenders.

Most state bars have adopted the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules) to guide attorneys through their professional and ethical responsibilities. Model Rules 4.4-1 through 4.4-4 in particular pertain to attorneys that deal with pro se parties or parties with minimally involved counsel.

This Note details the guidelines and requirements for attorneys under the ABA Model Rules for when lender's attorneys encounter pro se or minimally represented borrower opponents.

For more information on the ethical requirements when representing a corporation, see Practice Note, Ethical Issues for In-House Counsel (2-611-6885).

REQUIREMENTS OF ETHICAL CONDUCT FOR LENDERS' COUNSEL

Individual borrowers often use consumer loans to fund their everyday lives. Consumer loans include:

- Mortgages for home purchases.
- Auto loans for vehicle purchases.
- Student loans to finance education.
- Home equity loans, frequently used to fund home improvements.

Small business owners also often enter into the consumer lending space, seeking funding to run their small businesses from:

- Personal business loans.
- Lines of credit.
- Credit cards.

Individuals and small business owners whose consumer loans fall into arrears and enter into default may face:

- Home foreclosure.
- Vehicle repossession.
- Cripplingly high annual percentage rates.
- Damage to personal credit.

When a troubled loan scenario arises, individuals and small business owners may seek to represent themselves against their lenders because they cannot afford formal legal representation. Lawyers practicing on behalf of lenders in consumer financial services and small business lending, therefore, are uniquely positioned to encounter pro se and minimally represented opponents with regularity.

Lender's counsel must take special care to adhere to the ABA Model Rules or the ethical rules specifically followed by the individual jurisdictions in which they practice. All states and US jurisdictions have adopted some version of the ABA Model Rules, but there are variations from state-to-state and counsel should consult the model rules for their individual state when interacting with pro se or minimally involved counsel. To date, Puerto Rico is the only U.S. jurisdiction that has not adopted the ABA Model Rules.

At minimum, the ABA Model Rules require counsel:

- Not to communicate with individuals represented by counsel (ABA Model Rule 4.2 and see The No Contact Rule: ABA Model Rule 4.2).
- To avoid misrepresentations when dealing with pro se parties (ABA Model Rule 4.3 and see Dealing with Pro Se Parties: ABA Model Rule 4.3).
- To be truthful in their statements (ABA Model Rule 4.1 and see Obligations for Truthfulness: ABA Model Rule 4.1).
- To respect the rights of third parties (ABA Model Rule 4.4 and see Obligations to Respect the Rights of Third Parties: ABA Model Rule 4.4).

It is crucial for lenders' counsel to understand the limitations imposed by the ABA Model Rules and implement best practices to ensure appropriate and ethical conduct with unrepresented or minimally represented parties.

The limits of ethical conduct do not end with the ABA Model Rules. Ethical guidelines for a lender's attorney's conduct can also be found in:

- Jurisdictional adoptions of the ABA Model Rules.
- State consumer protection laws, such as California's Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 to 1784).

THE NO CONTACT RULE: ABA MODEL RULE 4.2

Under ABA Model Rule 4.2, an attorney cannot communicate with a party that is represented, unless the lawyer:

- Is authorized by law to contact the represented party. An example of contact authorized by law is a state law allowing for service of specific items, for instance, an offer of judgment on an opposing party (see Communications with Represented Persons, ABA Formal Op. 95-396 (July 28, 1995)).
- Has the consent of the represented party's attorney to make direct contact.

Frequently referred to as the no contact rule, ABA Model Rule 4.2 is intended to protect an individual represented by counsel from disclosure of information that is:

- Protected by the attorney-client privilege.
- Not advised by counsel.
- Detrimental to the party's case.

(ABA Model Rule 4.2 cmt 1 and *United States v. Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005).)

The prohibition against contacting a represented party only arises if the lawyer has knowledge that the individual is represented by counsel (ABA Model Rule 4.2 cmt. 8). Therefore, the first inquiry for attorneys representing lenders in a loan workout is whether or not the borrower is represented.

CONTACT WITH A BORROWER REPRESENTED BY COUNSEL

If a borrower is represented by counsel, lender's counsel should:

- Confirm the representation in writing with the borrower's attorney.
- Immediately cease communications with the borrower and communicate directly with the borrower's attorney.

How the lender's attorney should proceed depends on what happens next. For example, if:

- The borrower continues to communicate directly with the lender's attorney, as is often the case where counsel is minimally involved, the lender's attorney should respond only to the borrower's attorney.
- The borrower's attorney permits the lender's attorney to communicate directly with the borrower, the lender's attorney:
  - can accept that as consent for direct contact;
  - should adhere to any directions that accompany the consent for direct contact, for example, a request that the borrower's attorney be copied on all communications; and
  - should send a clear, written communication to the borrower's attorney confirming the consent and any conditions thereto.
- The borrower tells the lender's attorney it has terminated the relationship with its attorney, the lender's attorney should contact the borrower's former attorney to confirm the termination before engaging directly with the borrower.

Sometimes, client-to-client communication is preferable to, and more effective than, attorney-to-attorney communication. In that situation, the lender's attorney:

- Should advise the lender on how to proceed in direct communication with the borrower.
- Cannot script the communication with the borrower with the intent of skirting the no contact rule.

(ABA Model Rule 4.2 cmt. 4.)

The application of the no contact rule can be extensive and complicate many situations. For example, the lender's attorney could risk a violation of ABA Model Rule 4.2 if:

- The borrower sends the lender's attorney an email, without copying its own attorney, and the lender's attorney replies.
- The borrower's attorney sends an email to the lender's attorney with a copy to its client and the lender's attorney replies to all. Some opinions suggest that the lender's attorney must first ask the borrower's attorney consent before replying all (see Copying Represented Persons on Electronic Communications, N.C. Ethics Op. 2012-7 (Oct. 25, 2013)).
- The lender's attorney sends a social media friend request to a borrower with the intent of viewing the borrower's private information. Most jurisdictions prohibit attorneys from connecting

with a represented party on social media (see Accessing Information About Third Parties Through a Social Networking Website, Or. State Bar Formal Op. 2013-189, (2016)).

For more information on ethical considerations when contacting third parties using social media, see Practice Note, Social Media Ethics for Attorneys (W-013-1896).

CONTACTING INDIVIDUALS WITHIN A CORPORATION

Institutional lenders may also encounter no contact situations involving corporate clients. These can be particularly challenging to navigate because they raise the question of whether a lawyer can directly contact a person who works for a corporation that has in-house or outside retained general counsel. The answer depends on the person and circumstances at the organization with whom the attorney is seeking to make contact.

A corporation or other organization cannot prevent an attorney from contacting all employees (see Communications with Represented Persons, ABA Formal Op. 95-396 (July 28, 1995)). In a troubled loan scenario, the lender's lawyer cannot make contact with the following individuals within a represented borrower corporation:

- A director.
- An officer.
- A supervisor.
- An employee who regularly consults with the corporation's counsel about the issue at hand.
- An employee who could either:
  - obligate the corporation regarding the loan workout; or
  - perform an act or omission in connection with the loan workout that could attribute civil or criminal liability to the company.

(ABA Model Rule 4.2 cmt. 7.)

Consent of corporate counsel is not required for an outside lawyer to make contact with the following individuals within a represented corporation:

- A former employee (ABA Model Rule 4.2 cmt. 7 and see Contact with Former Employee of Adverse Corporate Party, ABA Formal Op. 91–359 (Mar. 22, 1991)).
- If an individual is represented by independent counsel only consent of the independent counsel is needed for the outside lawyer to contact the individual and not consent of counsel to the corporation (ABA Model Rule 4.2 cmt. 7).
- Fact witnesses employed by a company represented by separate counsel, when those employees are not in the group otherwise identified as prohibited to contact (see *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 764 N.E.2d 825, 835 (2002)).

LIMITS OF THE NO CONTACT RULE

The no contact rule is not applicable in every scenario where a lender's attorney attempts to contact an individual who is represented by counsel regarding a troubled loan. For example, the no contact rule:

- Does not prevent a lawyer acting in a capacity other than as a lawyer for a lender from contacting a represented borrower party (see *In re Rock Rubber & Supply of Conn., Inc.*, 345 B.R. 37 (Bankr. D. Conn. 2006) (Chapter 7 trustee could contact a represented bank regarding turnover of estate funds)). However, a split of authority has arisen over whether the no contact rule applies if an attorney is representing themselves in the matter, with most courts holding that the no contact rule is applicable (see *Medina Cty. Bar Ass'n v. Cameron*, 958 N.E.2d 138 (Ohio 2011) (collecting cases)).
- Will not apply to a lender's lawyer contacting a represented party if the lawyer is not representing any parties in the troubled loan matter (ABA Model Rule 4.2 cmt. 4 where the rule "does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").
- Does not prevent a lawyer who is not involved in the troubled loan workout from speaking to a represented borrower where the borrower is seeking a second opinion or exploring the possibility of engaging new counsel. Indeed, the Eighth Circuit has held that the no contact rule "does not prohibit an attorney who is contacted by a party to litigation from communicating with the party about the case without first obtaining permission from the party's existing counsel when the attorney is not involved in the matter" (*Gonzalez-Lopez*, 403 F.3d at 566).

NO WAIVER

A represented party cannot waive the applicability of the no contact rule by authorizing opposing counsel to be in direct communication themselves. The rule itself provides that it "applies even though the represented person initiates or consents to the communication" (ABA Model Rule 4.2 cmt. 3).

DEALING WITH PRO SE PARTIES: ABA MODEL RULE 4.3

Once the determination has been made that an opposing party is unrepresented, the ABA Model Rules set out a different set of guidelines to ensure ethical conduct by lawyers when dealing with a pro se party.

If a lawyer is not acting on behalf of a client, ABA Model Rule 4.3 does not apply. Such a scenario may occur if:

- An individual is a lawyer but is solely acting in a business capacity (such as a vice president of a bank or other lending institution).
- A lawyer is acting on its own behalf.

A PARTY'S LAWYER IS NOT DISINTERESTED

A lawyer representing a lender cannot tell (or imply to) a pro se borrower opponent that the lawyer is disinterested (ABA Model Rule 4.3). If the lender's lawyer meets with its lender client and an unrepresented borrower, and fails to clarify that the lawyer only represents the lender, the lawyer would be in violation of ABA Model Rule 4.3.

Various ethics opinions hold that if a lawyer seeks to obtain access to non-public portions of an unrepresented person's social media, it must be done in a non-deceptive manner. For example, the attorney would have to disclose its identity and could not seek to contact a pro se opponent on social media through a false identity (see Ethical Obligations for Attorneys Using Social Media, Pa. Formal Ethics Op. 2014-300 (2014)).

A lawyer is ethically required to clarify its role in the case and to make an effort to correct any misunderstanding of the lawyer's role to a pro se opponent (ABA Model Rule 4.3). If a lawyer knowingly fosters a misunderstanding of the situation to the unrepresented party, it is in direct violation of ABA Model Rule 4.3. Comment 2 to ABA Model Rule 4.3 further requires that, to avoid confusion, a lawyer with a pro se opponent should both:

- Identify its own client.
- Explain to the pro se opponent that its interests are opposed to the lawyer's client's interests.

Therefore, when dealing with a pro se borrower, the lender's attorney should put in writing to the borrower at the earliest opportunity that the attorney:

- Is not disinterested.
- Is representing the lender and seeking its best interests.
- Cannot give any legal advice to the pro se borrower on the proposed deal.

A PARTY'S LAWYER CANNOT GIVE LEGAL ADVICE TO A PRO SE OPPONENT

If the pro se party asks opposing counsel for legal advice, the only advice the lawyer can give is for the pro se party to seek its own counsel (ABA Model Rule 4.3). Regardless of whether the pro se party seeks legal advice, it is advisable for the attorney to recommend the pro se client seek its own counsel early in the course of the legal matter.

Immediately making this recommendation to the pro se borrower may not prevent the borrower from asking about the meaning or impact of certain provisions that may be subsequently negotiated as part of a workout agreement. For example, if the borrower later initiates direct communications, the attorney's instinct may be to explain to the pro se borrower what a document means. However, it is important that the attorney instead communicate with the pro se borrower what the bank wants or is willing to do, rather than what the document means.

A lawyer should not discourage an unrepresented party from seeking legal counsel (ABA Model Rule 4.3 cmt. 2).

A PARTY'S LAWYER MAY NEGOTIATE A SETTLEMENT WITH A PRO SE PARTY

While the rules make it clear that the boundaries of what constitutes impermissible advice fluctuates based on the experience, sophistication, and circumstances of the pro se party and the parties' instant matter, a lawyer is not prohibited from negotiating or settling a matter with a pro se party (ABA Model Rule 4.3 cmt. 2).

A lawyer cannot merely submit a settlement document to a pro se party and tell the pro se party to review it with its lawyer if it chooses. However, if a lawyer has clearly explained that it is representing its own client and not the pro se party, the lawyer can:

- Tell the unrepresented party the terms on which the lawyer's client will agree to a settlement.
- Prepare settlement documentation for the pro se party's signature.
- Explain to the pro se party the lawyer's view of:
  - what the document means; and
  - what the underlying legal obligations of the documentation are.

(ABA Model Rule 4.3 cmt. 2.)

THE IMPORTANCE OF ATTORNEYS IN LOAN WORKOUTS WITH PRO SE BORROWERS

While it may seem expedient to task the loan officer with negotiating a workout with a pro se borrower rather than an attorney to avoid various ethical pitfalls, an attorney can:

- Act as a buffer between the bank and the borrower.
- Straightforwardly set forth the lender's position.
- Quickly draft a workout agreement that accurately reflects the parties' agreement with no middleman.

OBLIGATIONS FOR TRUTHFULNESS: ABA MODEL RULE 4.1

ABA Model Rule 4.1 prohibits attorneys from making false or misleading statements:

- Knowingly.
- While representing a client.
- That constitute material misrepresentations, which can come through acts of:
  - commission by making a false statement or misrepresentation; or
  - omission from a failure to disclose material information.

MATERIAL MISREPRESENTATIONS

A material misrepresentation by a lender's attorney can create false expectations in the mind of the borrower or be designed to mislead a borrower.

For example, a lender's attorney may encourage a pro se borrower to sign a forbearance agreement where the borrower admits or concedes that the borrower sold collateral out of trust. This admission can be used if the borrower later files for bankruptcy to deny the dischargeability of the loan debt. However, in obtaining the borrower's admission, the attorney must not imply or suggest that all will be well if the borrower merely signs the forbearance agreement and complies with the workout payment schedule. Rather, the lender's attorney must tell the borrower that a loan workout requires that the borrower sign the agreement that the bank prepares and the forbearance agreement should plainly state that, in the event the terms are not fully met, the bank reserves all rights to pursue any and all legal or equitable remedies it may have.

An attorney may seek to obtain key information or documents from a borrower which may be helpful to the lender. For example, seeking patently privileged documents is dubiously ethical and likely to draw the ire of a court or ethics panel. However, properly inducing a pro se borrower to voluntarily provide key but non-privileged documents is reasonable. For illustration, as a condition of forbearance from exercising a lender's legal remedies, a borrower could be required under a forbearance agreement to voluntarily turn over, by a particular date, all financial records relating to their business dealings impacting a loan.

LEVERAGE

Part of an attorney's obligation for truthfulness is to be careful in how it leverages its position in a loan workout. An attorney cannot threaten a pro se borrower with criminal prosecution to leverage a civil result, even if the borrower's conduct is questionable. When dealing with a workout agreement, civil and criminal matters must be kept separate (see *Robertson's Case*, 626 A.2d 397 (N.H. 1993)).

OBLIGATIONS TO RESPECT THE RIGHTS OF THIRD PARTIES: ABA MODEL RULE 4.4

In dealing with pro se or minimally represented parties, attorneys are cautioned to always be professional and courteous (ABA Model Rule 4.4(a)). Apart from an attorney's professional and ethical obligations to act professionally, the mere fact that an attorney (who is perceived as holding a position of power over a pro se or minimally represented opponent) treats an unrepresented person with respect:

- Creates goodwill between the parties.
- Gives pro se persons the dignity that they deserve.
- Demonstrates character to the court.

Indeed, most pro se parties understand they are at a disadvantage in any loan workout scenario where they may be in default. Treating pro se parties with proper respect creates a path for these parties to voluntarily enter into a reasonable workout agreement.

If the pro se borrower inadvertently produces a privileged document, the lender's attorney must immediately comply with ABA Model Rule 4.4(b) and inform the producing party of the production so protective measures can be taken.

BEST PRACTICES FOR LENDERS' ATTORNEYS

It is common for attorneys representing lenders on small commercial or consumer loans to encounter pro se or minimally represented borrowers. While these dealings can create an opportunity for attorneys to use their knowledge and skill to the benefit of the lender, ethical obligations under the ABA Model Rules must guide attorneys to follow their ethical obligations with full integrity while zealously representing and seeking the best interests of their lender clients.

Best practices for lenders' attorneys when dealing with pro se or minimally represented parties in consumer loan workouts include:

- Confirming whether the borrower is truly pro se or if they are receiving assistance from minimally involved counsel.
- Advising the pro se borrower to retain counsel.
- Making clear to the pro se borrower that as the lender's attorney it cannot:
  - offer the pro se borrower any legal advice; or
  - draft documents on their behalf.
- Drafting a statement for acknowledgement and signature by the pro se borrower that:
  - the lender's counsel represents only the lender and not the pro se borrower;
  - the lender is adverse to the pro se borrower;
  - the pro se borrower did not receive legal advice from lender's counsel; and
  - the pro se borrower was advised to retain their own personal counsel.
- Actively communicating with the pro se borrower by timely responding to all phone calls, emails, and letters.
- Documenting all phone, email, or letter interactions with the pro se borrower, by:
  - taking dated notes on what was discussed over the phone or in person;
  - sending letters confirming the content and outcome of any discussion; and
  - sending all correspondence via certified mail or other documented form of service such as Federal Express or UPS.
- Giving the pro se borrower courtesy notice of any deadlines in writing.
- Always maintaining professionalism and respect with the pro se borrower. Be sure not to resort to bullying, threats, or intimidation.

The documentation and steps listed above could be critical in defending any lender's attorney in the event of a bar grievance.

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