

Communication is vital but can bring difficulties

by

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A large number of the complaints that the Office of Lawyers Professional Responsibility receives relate to a lack of communication between the client and attorney. While this lack of communication can generate a complaint, so can communications between an attorney and a represented adverse party or witness be an area that brings difficulties for attorneys.

A few recent admonitions have involved violations of Rule 4.2, Minnesota Rules of Professional Conduct. Rule 4.2, MRPC, prohibits a lawyer from communicating “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.”

In one of the admonitions, the respondent attorney was an assistant county attorney prosecuting a defendant on domestic abuse charges. The defendant’s wife, the victim, retained counsel, who sent a letter to respondent attorney stating that he represented the victim in all matters related to the incident and requested respondent attorney to “refer all communication and correspondence through my office and do not contact my client directly.” After receiving the letter from the victim’s counsel, respondent attorney nevertheless sent to the victim a letter outlining a plea offer and providing the next court date. Respondent attorney was given an admonition for her direct communication with a represented party — the victim — whom she knew was represented by counsel.

It is somewhat unusual for a victim in a criminal matter to retain counsel, so it is perhaps understandable that the respondent attorney communicated directly with the victim. Nonetheless, it is important for all practitioners to take steps to ensure that once a person becomes represented by counsel all communications are with counsel, not the represented person. Of course, communication includes letters, telephone contact, and emails, among other things.

In another admonition, the respondent attorney represented one party in a harassment restraining order (HRO). Respondent attorney was informed by letter that the opposing parties in the HRO were represented by counsel. Further, in two emails,

respondent attorney referred to the opposing parties as “your clients” in correspondence with opposing counsel. However, respondent chose to carbon copy one of the opposing parties in an email exchange between himself and opposing counsel. Respondent was given an admonition, in part, for his communication with a represented party — the opposing party — whom he knew was represented by counsel.

Email correspondence is very common and can be very beneficial for all parties. Some attorneys carbon copy their clients on email correspondence to opposing counsel. Be aware that inadvertently responding to such an email with the “reply all” button may mean that an attorney has just communicated about the litigation with a person that the attorney knows is represented by counsel.

Both of the above examples only resulted in admonitions and the conduct of the respondent attorney was non-serious. An important factor in considering the appropriate level of discipline is if any client or other individual was harmed because of the misconduct. It may seem that most violations of Rule 4.2, MRPC, would not result in any harm but in some situations serious harm may occur and any violation may result in public discipline.

A public reprimand and public probation was the discipline for the respondent attorney *In re Wilson*, 746 N.W.2d 643 (Minn. 2008). In *Wilson*, the attorney represented a criminal defendant, D.G., in a first-degree murder case. Another defendant, P.P., was charged with first-degree murder on facts related to D.G.’s case. P.P. was represented by a public defender. Wilson interviewed P.P. about the matters and P.P. disclosed information about the cases. At the time that Wilson interviewed P.P., he knew that P.P. was represented by counsel, he did not request permission from P.P.’s counsel to interview P.P., and he did not seek a court order for authorization to interview P.P.

As a result of Wilson’s interview with P.P., the plea agreement previously offered to P.P. was withdrawn by the prosecution, both P.P. and D.G.’s cases were delayed, and D.G. needed to retain new counsel because Wilson interviewed P.P. Not only was there serious harm to P.P., but also D.G., and the administration of justice was delayed.

Good communication is vital for all attorneys, but it is important for attorneys to be aware of the restrictions contained in Rule 4.2, MRPC and their duty to refrain from communicating with represented parties.