The no-contact rule and the *pro se* lawyer

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Rule 4.2, Minnesota Rules of Professional Conduct (MRPC), restricts a lawyer representing a client from communicating with a represented party about the subject of that representation. But how does this rule work if a lawyer is representing themselves, not another, in a matter? A Lawyers Professional Responsibility Board (LPRB) opinion, Opinion No. 25, and the text of the rule provide guidance.

The rule

Rule 4.2, MRPC, states:

> 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.

The purpose of the rule, as stated in the comments, is three-fold: to protect "a person who has chosen to be represented by a lawyer in a matter against [1] possible overreaching by other lawyers who are participating in the matter, [2] interference by those lawyers with the client-lawyer relationship and [3] the uncounselled disclosure of information relating to the representation." Comment [1] to Rule 4.2, MRPC.

The purposes of the rule remain present when a lawyer is representing themselves in a matter. However, the text of the rule clearly references an antecedent client/lawyer relationship that is not present when lawyers are representing themselves.

Conflicting opinions

This tension was on full display in American Bar Association Formal Opinion 502, entitled "Communications with a Represented Person by a *Pro Se* Lawyer," issued on September 28, 2022, which included, unusually, a majority opinion and a dissenting opinion. The majority opinion concluded that a *pro se* lawyer was representing a client—themselves—and as such was limited by the rule from contacting a represented person. Several states have ethics opinions and case law that are in accord. Because of the overriding purpose of the rule, the majority concluded that the general principle, also articulated in the comments, that "[p]arties to a matter may communicate directly with each other" was inapplicable to *pro se* lawyers. Comment [4].

The dissent was not swayed by the majority opinion due to the plain text of "In representing a client" found at the start of the rule. The dissent's takeaway was essentially, "does it mean what we wish it said," or does it mean what it says?

The Lawyers Professional Responsibility Board took up this debate in 2023. One of the authorized roles of the LPRB is to "issue opinions on questions of professional conduct." Rule 4(c), Rules on Lawyers Professional Responsibility. LPRB Opinion 25, issued on July 28, 2023, concurred with the dissent in ABA Opinion 502, opining that a *pro se* lawyer is not representing a client as the term is understood.

The Director's Office concurs with LPRB Opinion 25. Lawyers should be able to review the rule and understand from the text of the rule how to comply. As noted in the dissent to ABA Opinion 502, any differing interpretation is a trap for a lawyer. But it is also likely true, judging from the number of calls we receive on our ethics hotline, that most lawyers assume they cannot contact a represented party when they are representing themselves because the no-contact aspect of the rule is ingrained in them without regard for the text of the rule itself.

Thus, in Minnesota, a lawyer representing themselves in a matter *pro se* may contact the opposing party who is represented by counsel without running afoul of Rule 4.2, MRPC. But beware! If you are representing yourself in a matter in some other jurisdiction, make sure you understand how that jurisdiction approaches Rule 4.2 and the *pro se* lawyer. Under the ethics rules choice of law provision, Rule 8.5(b), MRPC, the ethics rules of the jurisdiction where a tribunal sits applies if the matter is before a tribunal, or where the conduct or its prominent effects occur. Many jurisdictions follow the ABA majority opinion.

Rule change?

While I concur with the text-based rationale for the position taken by the LPRB in Opinion 25, I'm not sure this is the optimal result. The purposes of the no-contact rule remain present when a lawyer represents themselves. A *pro se* lawyer contacting an opposing person represented by counsel presents the same opportunity for overreach, can interfere with the lawyer/client relationship on the opposing side, and presents a risk of disclosure of confidential information by the opposing, represented party. And those represented individuals likely have retained counsel because they are aware of the imbalance between the parties.

Oregon addressed this issue by amending the language of its rule—"In representing a client *or the lawyer's own interests*, a lawyer shall not communicate..." Oregon Rules of Prof'l Conduct 4.2 (emphasis supplied).

What do you think? Should Minnesota adopt a rule change to address this situation?

Practical advice

Just because you can contact a represented party when you are representing yourself, ask yourself if that is a good idea. If the represented party has indicated they want communications to occur through their counsel, what are you accomplishing by ignoring that request? Antagonizing the represented party? Delaying matters because the represented party will inevitably forward your communication to their lawyer for response? Just because the rule does not make such contact unethical, that does not mean it is a good idea. At the same time, there may be good reasons for principals to a matter to communicate directly even if one happens to be a lawyer. Professionalism while representing oneself is as important as when acting on behalf of a client, whether communicating with a represented person or their counsel.

Most of the time lawyers are not representing themselves, so the plain text of the rule governs their conduct. And unfortunately, every year several lawyers violate this rule, usually resulting in private discipline.

ABA Formal Opinion 503, issued in November 2022, opined on the "reply all" debate, providing that if you copy your client on an electronic communication sent to counsel representing others, you are implicitly consenting to "reply all" communications. Best practice is to blind copy or separately forward such communications to your client, unless you are okay with a "reply all" by the opposing attorney or are okay with your client weighing in on the email chain.

And remember, actual knowledge of the fact of representation may be inferred from the circumstances. Comment [8], Rule 4.2, MRPC. Thus, do not close your eyes to the obvious. At the same time, if a lawyer contacts you asking if you represent someone, have the courtesy to reply. So many times, we hear from lawyers on the ethics hotline who are struggling to advance a matter because they are unclear whether a representation is ongoing, do not get clarity from the lawyer involved when they reach out, and are (correctly) hesitant to ask the person because of Rule 4.2, MRPC. Please have the courtesy to reply.

Conclusion

The no-contact rule protects represented parties from contact by a lawyer representing a client. In Minnesota, according to LPRB Opinion 25, and the plain text of the rule, the no-contact rule does not prohibit *pro se* lawyers from communicating with a represented party. Would you support a rule change that would prohibit such communications by *pro se* lawyers, or do you concur that a self-represented lawyer should be able to do what any principal to a matter can do—that is, communicate directly with other persons in the matter, irrespective of whether they are represented? I can be reached at *susan.humiston@courts.state.mn.us.* ▲