ProfessionalResponsibility

By Susan Humiston

'Reply all' and some thoughts on flat fees

Earlier this year, this column included a summary of private discipline issued in 2015.[1] The article included a summary of an admonition for violation of Rule 4.2, Minnesota Rules of Professional Conduct (MRPC), resulting from an attorney's use of the "reply all" email feature. This summary caught the attention of many members of the bar in light of the prevalent use of email for communications, and made me raise an eyebrow since I had engaged in the described conduct many times in the past. Because I have also received a number of questions on this topic while presenting at recent CLEs, I thought additional information would be beneficial.

Rule 4.2, MRPC, states "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 "no-contact" rule is the protection of an individual who has chosen to be represented from "possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation."[2] Importantly, "[t]he rule applies even though the represented person initiates contact or consents to the communication."[3]

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The column cautioned lawyers against using "reply all" when an opposing counsel has copied her client on a communication because to do so results in direct communication with a person the lawyer knows to be represented. This happened several times in the matter that led to the admonition, and respondent in that case was disciplined for the Rule 4.2 violation. I first read this summary before I was appointed director of the Office of Lawyers Professional Responsibility (OLPR), and immediately thought of all of the times that I had done just that while serving as in-house counsel—when trying to settle a contentious dispute with an ongoing supplier, for example, and almost daily on several acquisitions where the investment bankers and certain internal finance personnel were generally on all of the emails between counsel sharing various iterations of draft purchase agreements.

More to the Story

When I looked into the matter after my appointment, I learned some additional facts that were not included in the summary. The admonished lawyer had been previously and specifically advised by opposing counsel not to contact the opposing party directly, including through direct email contact; yet the lawyer did so anyway in three successive emails, even initiating emails to opposing counsel's client. The admonition made sense in that context, but it did not help me understand whether I had done something wrong in the instances referenced above.

As I thought about it more, the cautionary language made sense even without the additional context. After all, when you draft a responsive letter to opposing counsel, it would never occur to you to mail your letter directly to opposing counsel's client. That is exactly what you are doing when you hit "reply all." It is no different, just easier. So why did I think it was okay? The answer lies in understanding what may constitute "consent" of opposing counsel, and whether such consent must be express or may be implied.

Minnesota case law is sparse on Rule 4.2. Most non-disciplinary decisions that address the issue substantively involve prosecutor or investigator contact of represented criminal defendants. Few secondary sources address this issue. The Restatement looks at consent broadly by suggesting a lawyer may "acquiesce" to the communication: "An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmative protests."[4]

The New York City Bar relied approvingly on the Restatement commentary when it issued Formal Opinion 2009-01 in 2009 specifically to address the "reply all" question. In that opinion, the bar committee opined that there are times that consent for the direct "reply all" contact can be reasonably inferred from the circumstances. The committee considered two factors as primarily relevant: "(1) how the group communication is initiated; and (2) whether the communication occurs in an adversarial setting." At heart, "[t]he critical question in any case is whether, based on objective indicia, the *represented person's lawyer* has manifested her consent to the 'reply all' communication." (emphasis supplied).

My previous "reply all" communications thankfully occurred under circumstances where consent could be reasonably inferred from opposing counsel's conduct, presumably rightly so because no one objected or attempted to correct me. That fact is probably more a matter of luck than anything else, because I had actually not stopped to give it one second of thought. Best practice, of course, is to ensure consent is express so there is no dispute. The rule is referred to as the "no contact" rule for a reason; it serves important purposes, and applies regardless of the represented person's consent. Do not let the informality of communications distract you (as it did me) from applying basic ethical tenets. That said, it seems reasonable that opposing counsel's consent need not always

be express, but may be implied under certain circumstances consistent with the purposes of the rule. But I recommend that you do not assume the mere fact that counsel has copied her client on a communication implies her consent to your direct, "reply all" contact with her client.

Flat Fees

We have encountered a number of Rule 1.5(b) errors lately and no one is sure why. By way of reminder, you can charge a flat fee for specified legal services, and need not hold those funds in your trust account until earned—but you can only do so *if* you have a written agreement with the client that contains the language specifically outlined in Rule 1.5(b)(1)(i)-(v). Namely, the written agreement must contain (i) a description of the nature and scope of the services, (ii) the total amount of the fee and any terms of payment, (iii) a specific statement that the fee will not be held in trust until earned, (iv) that the client has the right to terminate the relationship; and (v) the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

If you do not have a compliant written agreement, and put the advanced flat fee in your business account instead of your trust account, you have violated Rule 1.15(c)(5) (requiring a lawyer to "deposit all fees received in advance of the legal services being performed into a trust account" unless Rule 1.5(b)(1) or (2) is satisfied). Rule 1.5(b) also clearly and unequivocally states that fee agreements "may not describe any fee as nonrefundable or earned upon receipt."[5] Since 2011, it has been unethical in the state of Minnesota to describe your flat fee as nonrefundable, and yet I have encountered several such retainer agreements in my short four months with the OLPR. Please scrub your retainer agreements for compliance with the rules. If you have questions, do not hesitate to call the OLPR for an advisory opinion. ▲

Notes
[1] Timothy M. Burke, *Summary of Private Discipline*, Bench & Bar, February 2016 at 12-13.
[2] Rule 4.2, comment [1].
[3] *Id.*, comment [3].
[4] Restatement (Third) of the Law Governing Lawyers § 99 cmt. j (1998).
[5] Rule 1.5(b)(3).