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]

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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).

Meet Allison Marshall & Jenna Westby

'There are lots of ways to assist clients on a limited scope basis'

How would you describe your firm's practice?

LEGAL*nudge*, LLC represents clients in family law matters throughout Minnesota. We provide both full representation and limited scope legal services to clients in family law cases. And we offer a sliding fee scale as well as flat-fee payment options. The full representation is what most family law attorneys and clients would consider to be traditional representation—managing the case throughout. Limited scope can include assistance with self-help paperwork, court appearances, attendance at mediation, drafting or just consulting.

Our fee arrangements are income-based and we often work with clients to focus their resources on the issue or issues on which they need the most assistance. Flat-fee agreements can be a great arrangement for cases that are especially litigious or for clients who want certainty with their legal fees.

What factors led you to offer these arrangements?

We both understood that there was a gap in legal services—between those individuals who qualified for legal aid/pro bono services and those who could not afford most private law firms—that needed to be filled. A large number of family law cases have at least one, if not both, parties that are self-represented. People choose this path for a number of reasons, but cost is usually a primary reason. We thought, what if litigants could get effective legal assistance that would make the process of representing themselves easier and give them peace of mind? That was the question we wanted to answer. We provide the whole range of services, but often we give people that little nudge they need to effectively resolve their matter. Many clients only want or need brief legal advice or review of documents. Others desire full representation. We wanted to make family law advice and representation accessible to a wider range of clients.

How do you determine the particular type of arrangement you offer a client?

During the initial phone call we generally explain the different representation options to clients and present the option of an initial consultation. If we believe there are more appropriate or affordable services for the person calling, we may refer them out. There are so many great resources out there that a lot of potential clients and even attorneys don't know about. However, if he or she wants to meet with us, we begin our process with an initial consultation. During the consultation we are better able to gauge what the person needs. At this point we work with the client to determine what type of representation best suits their situation. It is important that the type and scope of representation are clear to both the attorney and client.

Generally we are able to offer limited scope, full representation, flat fee, or hourly services to most clients. There are some types of cases that lend themselves better to limited scope services. For example, it is more difficult to provide limited scope services in cases where the judicial branch does not provide forms for self-represented parties. We also decline to offer limited scope services to individuals who we believe may not understand the nature of limited scope legal representation.

What types of service do you offer as unbundled or limited scope?

There are lots of ways to assist clients on a limited scope basis, so we can get creative. We can do limited court appearances, attend mediation with a client, prepare a client for court, assist with self-help forms, consult through a dissolution, advise on child support hearings in front of a magistrate, consult on appeals, or even limit the scope to a period of time—for example, representation from case inception through an Initial Case Management Conference. We can also change between limited scope and full representation if the client's needs evolve. We always execute new representation agreements when this happens so everyone is clear about what the representation will be going forward.

What ethical rules guide your limited scope practice?

It is important to be clear with clients what services we are providing and what we are not doing. If everyone knows who is doing what, the case can be effectively managed. We are diligent in keeping fee agreements in line with the Minnesota Rules of Professional Responsibility so that clients are aware of their rights regarding representation and fees.

How does your limited scope fee agreement reflect ethical considerations?

We use the required language prescribed by the rules and LPRB opinions on the issue. We make sure that our agreements, especially if limited in scope, are very specific as to what we will do and even what we will not do for the client. If we have a disagreement about whether the agreement covers the specific issue or not, we err on the side of the client's interpretation. In the end, it is also a good business decision to keep a client happy and we simply learn to draft clearer representation agreements in the future. This is rarely an issue, however.

Are there any services that you choose not to offer as unbundled? Why is that?

It is important that the client know that the services are limited. Clients who do not understand that they are responsible for parts of their case are not good candidates for limited scope services.

In addition, limiting the scope of representation to a certain issue—for example, handling only the custody component of a divorce—is confusing. If we are going to be putting ourselves out there as the client's attorney for a limited purpose, it is much better to be limited scope for a fixed duration of time or a specific event such as a court hearing or mediation as opposed to an issue. That just confuses everyone—the other attorney or party, the judge, the mediator, the client. It doesn't make sense for us.

ALLISON L. MARSHALL (left) was admitted to practice in 2005. After a two-and-a-half-year judicial clerkship, she opened her own solo law firm focusing on family law. In 2011, she co-founded LEGAL*nudge.*

JENNA C. WESTBY (right) was admitted to the Minnesota bar in 2006. She has practiced exclusively in the area of family law. Jenna also serves as a Judge Advocate for the United States Army Reserve.

But we may consult on just some issues, if that is the only part of the case the client needs assistance with. The limits really come into play when we are representing the client to others in court, negotiations, or other proceedings.

How do clients react to the choice of unbundled service?

Mostly clients are surprised and relieved to find that we offer different types of representation options. They may have spoken with other attorneys who quote high retainer amounts and hourly rates; we offer them a more affordable alternative. Clients are empowered by the variety of legal services offered. Having clients choose where to spend their money on legal advice and representation often creates a positive relationship. We discuss what financial resources are available to the client and where the attorney can focus representation to be a value-add to the client.

How do judicial officers react when you appear in court on a limited scope basis for a client?

We have never had a judicial officer view a limited scope appearance as a negative event. In fact, our experience is quite the opposite. Judicial officers are very supportive of a litigant getting legal help even on a limited scope basis, so that they can be assured the party understands the process.

In our experience, judicial officers are grateful that clients have the ability to get questions answered, receive legal advice, and have documents reviewed during their case. For some cases, reviewing the self-help paperwork will catch an error that would otherwise take the judicial officer an entire hearing to resolve or require additional court appearances. Getting these issues resolved before pleadings are submitted saves the client's time in court as well as judicial resources.

Are there any significant experiences that guide your unbundled practice?

For both of us, clerking for the court had a huge impact on our view of family law. We were able to see the need for an alternative approach to family law and a client base that was vastly underserved. Like most attorneys, we both view being an attorney as a calling and we want to use our education and experience to help people in this critical time as well as address the financial limitations many people face in litigation.

Our practice is constantly evolving. A potential client will ask about a type of representation or division of labor that we had not previously considered. This is one thing that makes LEGAL*nudge* unique: We get to work directly with the client to be creative and structure the representation on an individual basis. Our flat-fee representation agreements have evolved as well.

How do the services you offer affect your business model?

As a business we run lean and make every effort to keep our overhead low. This allows for us to continue be flexible with clients on their representation options. We have maintained a successful practice for the past five years and we continue to grow every year.

What particular measures do you take to keep your business costs low?

Our office space is affordable and welcoming. It isn't fancy and we don't want it to be, but we do want our clients to be comfortable and secure when we meet with them. We work together really well as a team and we are constantly looking at our approach to both the business and representation in order to be efficient and successful.

Do you have any advice for an attorney who would like to start offering unbundled services?

If you are interested in offering unbundled services, flat fees, or other alternative legal representation, it is important to review all the applicable rules of professional responsibility and ensure the client is fully informed. Clients who do not understand the division of labor or fee arrangement are not a good fit for unbundled services.

Also, know what your limits are with regard to your own practice. What is comfortable for one attorney to offer on an unbundled basis may not be comfortable for another attorney. This is an important consideration in taking on any limited scope clients.

And finally, we have to ask: how did you choose the name LEGAL*nudge* for your firm?

Whether you love it or hate it, it's memorable! We wanted a name that suited the practice and indicated we were different from firms that offer only full representation on an hourly basis—yet also not a nonprofit. Many of our clients only need a "nudge" in the right direction to be successful in their case. That's our goal, to nudge people in the right direction so they can resolve their legal matter affordably and with peace of mind.