Ethical Obligations in Client Communications

By Joel R. Brandes

In the not too distant past, matrimonial lawyers performed legal services and met with clients in their law offices. Preliminary conferences, the argument of motions and trials were held at the Courthouse. Lawyers communicated with clients and others lawyers by telephone and mail. Pleadings and litigation papers such as motions for pendente lite relief were served by ordinary mail or by overnight delivery service. Usually, a lawyer would receive a response to a letter sent to a client or adversary, by letter or telephone a few days after it was sent.

Today, matrimonial practitioners argue motions, attend court conferences and try cases virtually. Those lawyers who do not opt-out, whose cases are electronically filed in the New York State Court Electronic Filing System (NYSCEF), serve papers by electronic filing. See CPLR§ 2111(b)(3) and 22 NYCRR § 202.5-bb. Lawyers and clients rarely call us or send us letters. Instead, they usually communicate with us by email. If they have our mobile phone number they even send us text messages. And they expect that we will read their email or text right away and respond promptly.

When we send an email communication to a client or lawyer we frequently receive a response in minutes-- sometimes we receive two or more responses. Often, the response requires a response, which results in a response to that email, which we must respond to, and, and so on and so forth. This appears to be a frequent occurrence today in matrimonial lawyer-client-adversary communications. Email communications appear to have inundated matrimonial practitioners who receive these communications from their clients at all hours of the day and night and on weekends. A lawyer friend of ours assumed that service of a judgment with notice of settlement by email was proper, and was surprised when we reminded him that service of papers by email is still not one of the methods of service authorized by CPLR 2103(b).

In this article we discuss the ethical obligation lawyers have to communicate with clients and adversaries and answer the question do we have to communicate by email?

Rule 1.4(a) of the New York Rules of Professional Conduct (“Rule”), titled “Communication,” sets out a lawyer’s obligations concerning communicating with clients. It provides that a lawyer shall: (1) promptly inform the client of (i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by the Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers. (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with a client’s reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law. Rule 1.4(b) provides that a lawyer must explain a

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Under Rule 1.4 a lawyer must “promptly inform a client” of certain events and developments; “promptly comply” with a client’s reasonable requests for information; “reasonably consult” with the client, and keep the client “reasonably informed” about the status of the matter. “

Attorneys have been disciplined for their failure to communicate with their clients in violation of Rule 1.4. In Matter of Frishberg, 163 A.D.3d 103, 79 N.Y.S.3d 184, 186–87 (1 Dept., 2018) an attorney representing a client on an appeal was disciplined for, among other things, his failure to communicate with his client, in violation of rules 1.4(a)(3) and 1.4(a)(4) where “[r]espondent did not produce any documentary evidence in support of his claim that he did not let a 30–day gap pass before returning LL's calls in 2012 and 2013 ... although he promised to do so.”

The New York State Bar Association Committee on Professional Ethics has pointed out in Opinion 1144 that “Although a lawyer’s obligations under this Rule are thus robust, neither Rule 1.4 nor other Rules prescribe a specific manner of communication, except when a Rule requires written instruments in specific circumstances, such as the rules governing legal fees, governing informed consent to conflicts and governing business transactions with clients. The Committee opined that Rule 1.4’s obligation that a lawyer keep the client “reasonably informed about the status of the matter” can be fairly read to require a lawyer to use methods of communication that are effective, timely, and not unduly burdensome to the client. However, the Rule does not prevent a lawyer from selecting the manner of communication. Rule 1.4(a)(4) specifically indicates that a lawyer need comply only with reasonable requests for information, thereby allowing lawyers the flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation. This provision recognizes that some clients may thrust upon their lawyers burdensome, immaterial requests for information and that lawyers need not meet such unreasonable demands.

In Opinion 1144 the Committee believed that a lawyer may limit communications to scheduled appointments or some form of written transmission readily accessible to the client. The Rules do not prohibit a lawyer from responding to a challenging client by limiting the time and manner of communications with the client as long as the lawyer fulfills the substantive communicative requirements contained in Rule 1.4. Similarly, Rule 1.4 does not prohibit a lawyer from controlling the timing of client communications. Other than the general requirement that developments in the case and responses to reasonable requests for information be “promptly” communicated, the Rule does not curtail a lawyer’s discretion to schedule the specific timing of lawyer-client communications. The opinion concludes that lawyers are *not required* to respond to communications from a client by email. Thus, the pre-covid 19 methods of communication, such as telephone and mail should suffice under Rule 1.4 today.

One well-respected commentator has opined that the Rule 1.4(a)(1) requirement to communicate "promptly" will depend on the context. When there is a definite deadline or other time limit of any kind, the meaning of "promptly" will be determined by that time limit. "Whenever a time limit exists, the lawyer must make every effort to reach the client sufficiently in advance of the deadline to explain the situation, convey risks and alternatives, obtain the client's decision, and convey the client's decision to the court, the offeror, or other appropriate person before the deadline". If there is no formal time limit, then the meaning of "promptly" is more relaxed. See Simon's NY Rules of Prof. Conduct § 1.4:3, Phrase-by-phrase analysis.

In contrast to the Rules which regulate communications with clients, the Rules of Professional Conduct do not regulate a lawyer's communication with opposing counsel. There is no provision in the Rules which mandates how lawyers must communicate with each other. Lawyers are not obligated to respond to email communications from adversaries by email. Lawyers are not obligated to respond to communications from adversaries promptly. While Rule 1.2 (g) provides that a lawyer does not violate the Rules of Professional Conduct "by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process," there is no duty to promptly respond, or for that matter, to respond at all. And, as a matter of law, the simple failure to respond to correspondence or to contest it does not rise to the level of an admission. There is no rule of law that requires a person to enter into correspondence with another about a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Gray v Kaufman Dairy & Ice-Cream Co., 162 N.Y. 388, 56 N.E. 903 (1900).

New York State Bar Association Committee on Professional Ethics Opinion 1124 deals with communication with counsel. One question presented in that opinion was must a lawyer abide by opposing counsel's direction that the lawyer not communicate with him by telephone? The opposing counsel advised the attorney posing the question not to communicate with him by telephone, but to communicate with him only in writing, and instructed him that all emails and writings sent to opposing counsel by the attorney should be copied to the opposing party. The Committee opined that a lawyer may communicate with opposing counsel in any manner he chooses, including by telephone, regardless of the instructions of opposing counsel. She is not required to respond by the opposing counsel's chosen method. There is no provision in the Rules of Professional Conduct that mandates how lawyers must communicate with each other. Nor does any provision in the Rules either prohibit a lawyer from placing a telephone call to opposing counsel or require counsel to accept a telephone call from another lawyer.

Conclusion

A lawyer has broad discretion as to the time and manner in which to respond to telephone calls and communications from adversaries. In responding to a communication from an adversary, a lawyer need not necessarily follow the same

means or format as the original communication, even though requested in the original communication.

A lawyer has reasonable latitude to schedule the time and manner of communications with a client provided the lawyer promptly informs and consults with the client on matters within the lawyer's duty of prompt communication. A lawyer may select any manner of communication with a client which is effective, timely, and not unduly burdensome to the client. The time and manner of communications with a client should be explained and be a part of a lawyer's retainer agreement. We suggest that the retainer agreement contain a provision explaining how the firm deals with client communications such as: "I do not accept nor respond to text messages from clients. I do not accept or respond to communications from clients when I am not in the office, or outside of my regular business hours which are between __a.m. and __ p.m. on Monday through Friday. I do not have business hours on weekends and all holidays."

It is also good professional practice when law firm email is not regularly monitored to have an automatic responder acknowledging receipt of the communication and notifying the sender that it will be read and responded to, if necessary, in the regular course of business.

A lawyer is not obligated to respond to an email communication by email. She may communicate and respond to an email communication from a client by ordinary mail, telephone, text message, or personal delivery, overnight delivery service, or facsimile transmission of written correspondence. See CPLR 2103(b).

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