

**SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Draft Ethics Opinion File No. EO-20-0011**

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1.

The State Bar of Arizona Ethics Opinion 02-02 addresses the propriety of a lawyer contemporaneously copying a party on communication to that party's lawyer, without first obtaining consent from that lawyer to communicate with their client. The opinion concludes that this is impermissible under Rule 4.2. This opinion affirms that conclusion and addresses whether a lawyer, by "cc'ing" their client on an email to another lawyer, has impliedly consented to that other lawyer communicating with the client by replying "to all." The opinion concludes that the act of copying their client is not enough by itself to imply consent under ER 4.2.

ISSUES PRESENTED

May a lawyer contemporaneously copy a party on a communication to that party's lawyer regarding the subject of the representation without first obtaining consent from that lawyer to communicate with their client?

Does a lawyer, by "cc'ing" their client on an email to another lawyer, impliedly consent to that other lawyer communicating with the client by replying "to all?"

RELEVANT ETHICS OPINIONS:

State Bar of Arizona Ethics Opinion 02-02

ABA Informal Op. 1348

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT:

ER 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

OPINION

Copying Another Lawyer's Client on a Communication

As explained in State Bar Ethics Opinion 02-02, a lawyer violates Rule 4.2 by copying a party on a letter or other document sent to that party's lawyer about the subject of the representation unless the receiving lawyer has consented to the direct contact with their client or the communication is authorized by law. This is the case even when the sending lawyer is "concerned that [the other lawyer] is not communicating adequately with their client or is no longer representing the party":

Even if the opposing party contacts a lawyer to state that they have discharged their attorney, counsel should make reasonable efforts to confirm this fact with opposing counsel, before engaging in any communications with an opposing party. ABA Op. 95-396; *In re News Am. Publi'g Corp., Inc.*, 974 S.W.2d 97 (Tx. App. 1998). Moreover, in most litigation contexts, an attorney is still counsel of record for a party until the lawyer's motion to withdraw is granted by a court or administrative law judge.

As a last resort, if an attorney is concerned that opposing counsel is not communicating information to the opposing party and the opposing counsel is failing to communicate with the attorney, the attorney should, after making reasonable efforts to contact opposing counsel, seek instructions from the court or ALJ prior to initiating any direct contact with an opposing party. Ethical Rule 4.2 is intended to protect represented parties from undue influence and pressure from an opposing counsel. Even the receipt of a copy of a demand letter, notice of a deposition, or motion for sanctions could unreasonably intimidate an opposing party to make decisions without adequate advice from their attorney. Once a party has retained counsel, the Rule is clear that there shall be no contact with that represented party, regarding that representation, without their attorney's consent, unless the contact is required by law.

And the "authorized by law" exception is narrowly construed:

Certain administrative proceedings may require unique procedures that might erroneously lead an attorney to conclude that it is ethically permissible to copy an opposing party on pleadings or correspondence. However, unless there is a specific administrative rule or statute requiring such contact, counsel should not send copies of any documents directly to an opposing party without opposing counsel's consent. See, e.g., *Lee v. Fenwick*, 907 S.W.2d 88 (Tx. App. 1994) (official notice required by law to be sent directly to a defendant is a permissible contact).

Implied Consent

Opinion 02-02 does not specifically address whether the required consent must be expressly given or can be implied. The general rule, however, is that consent to make direct contact with another attorney's client may be inferred:

[A] lawyer otherwise subject to the rule of this Section may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in 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 affirmatively protests.

Restatement (Third) of the Law Governing Lawyers § 99, cmt. j (2000). This Opinion agrees that consent can be inferred under the specific circumstances addressed here. The specific question being addressed is whether a lawyer, by cc'ing their client on an email to another lawyer, is impliedly consenting to that lawyer communicating directly with the client by replying "to all."

Several ethics advisory committees in other states have addressed that question. *See* N.J. Comm. On Prof. Ethics, Opinion 732 (March 10, 2021); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-100; S.C. Bar Ethics Adv. Op. 18-04 (2018); Alaska Bar Association Ethics Committee Opinion 2018-1; N.C. State Bar Council Ethics Comm., Formal Op. 2012-7; Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1.

All but the most recent of these opinions, from New Jersey, conclude that cc'ing a client¹ on an email to another lawyer does *not*, by itself, impliedly authorize the receiving lawyer to copy the sending lawyer's client on their response. Such consent may, however, be inferred from other circumstances. What other factors are sufficient to constitute implied consent will depend on all the facts and circumstances and cannot be precisely quantified. The North Carolina opinion lists four factors that should be given considerable weight when determining whether a lawyer has impliedly authorized another lawyer to communicate with their client:

(1) how the communication is initiated; (2) nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; (4) the extent to which the communication might interfere with the client-lawyer relationship.

N.C. State Bar Formal Eth. Op. 2012-7 at 1. The Pennsylvania opinion suggests essentially the same (but slightly reworded) list of factors but notes that implied consent should rarely, if ever, be inferred in the litigation context. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020 100, at 4. The California opinion provides a longer list of possible factors:

Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by

¹ The sending lawyer will not violate Rule 4.2 unless they *know* that the sending lawyer's client is among those cc'ed on the email. Under Rule 1.0(f), this knowledge can be inferred from the circumstances, and it will often be obvious, based on the email addresses – which the replying lawyer must carefully review before hitting "reply all" – that this is the case, even when there is no other indication that a client is part of the exchange. It is possible, however, for an email address to provide no clue as to the individual to whom it is attached.

whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

In contrast to the above, the New Jersey opinion concludes that a lawyer, simply by copying their client on an email to another lawyer, does authorize the receiving lawyer to copy the sending lawyer's client on their response. N.J. Comm. On Prof. Ethics, Opinion 732 (March 10, 2021). The opinion notes that there is general agreement that a lawyer who copies their client on a *letter* or other document sent to opposing counsel is *not* impliedly consenting to opposing counsel copying the client on a responsive communication. On the other hand, a lawyer who initiates a *conference call* with opposing counsel with their client on the line has "impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer's client." The opinion then opines that email communications, though written, are more like a conference call than a formal letter. Based on that analysis, it adopts a bright-line rule that a lawyer who copies a client on an email to another lawyer has impliedly consented to that lawyer copying the client on any responsive email, regardless of other circumstances.

This Committee does not agree that every email is more like a conference call than a letter. An email may be one of a series of short back-and-forth exchanges, or it may be a lengthy, letter-like, one-way communication. In addition, if a lawyer in a conference call or in-person meeting begins addressing a represented party directly, or the represented party begins to respond directly to the other lawyer, that party's lawyer can interrupt the exchange. There is no such opportunity with an email exchange. There is therefore no logical basis to treat an email differently from a hard-copy letter on which the author's client is "cc'ed," which does not justify the receiving lawyer copying the sending lawyer's client on a responsive communication.

The Committee therefore adopts the reasoning and conclusion of the majority. A lawyer does not, simply by copying their client on an email to another lawyer, impliedly consent to the receiving lawyer copying the sending lawyer's client on their response. Consent may, however, be inferred from other accompanying facts and circumstances. Under this approach, two transactional lawyers negotiating the wording of a contract, with sophisticated clients, who routinely reply all to emails on which those clients are copied, probably do not need to get express consent before replying to all with comments or a redlined draft, though the best practice is always to first confirm this by seeking the other lawyer's express consent. On the other hand, lawyers involved in a heated litigation matter with emotional clients would never be justified in inferring opposing counsel's consent. And even when consent can fairly be inferred, a lawyer must be careful to avoid abusing or exceeding that consent – for example, by including content in their responsive email that is intended to bypass or interfere with the attorney-client relationship of the recipients.

Best Practices

If the lawyer for the represented party has impliedly consented to contact by the other lawyer, such contact will not constitute a Rule 4.2 violation. And this Opinion concludes that consent can sometimes be inferred in the context of email exchanges. But, as a best practice, a lawyer receiving an email on which they know the sending lawyer's client was copied should seek express consent from the sending lawyer before replying to all.

Lawyers should also be cautious about cc'ing their clients on emails to other lawyers when they do not want them to be cc'd on the response. The other lawyer might mistakenly believe that Rule 4.2 consent has been implied or might not notice the cc or realize the email address belongs to the sending lawyer's client. The sending lawyer can address that problem by affirmatively stating, in the body of their email, that – although their client is copied on the email – they are *not* giving the receiving lawyer consent to copy the client on a response. But copying one's client on an email to another lawyer *also* creates a risk that the client will mistakenly hit “reply all” and include the sending lawyer in a communication intended to be confidential; this risk will not be mitigated by the sending lawyer expressly stating that the receiving/responding lawyer may not copy their client on a response.² Though it takes another step, separately forwarding the email to the client after it has been sent to the other lawyer avoids both problems and is by far the more prudent practice.

² This risk also is not mitigated by blind copying one's client on an email to another lawyer, though that will – at least in Outlook – prevent a “reply all” by the other lawyer from reaching one's client.