AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 503 **November 2, 2022**

"Reply All" in Electronic Communications

In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. Alternatively, lawyers may communicate in advance to receiving counsel that they do not consent to receiving counsel replying all, which would override the presumption of implied consent.

I. Introduction

Lawyers now commonly use electronic communications like email and text messaging in their law practice.[1] Subject to handling, security, and maintenance considerations beyond this opinion's scope,[2] the Model Rules permit these forms of electronic communication. This permissible communication extends to communications with counsel representing another person in the matter.

Under Rule 4.2 of the ABA Model Rules of Professional Conduct, in representing a client, a lawyer may not "communicate" about the subject of the representation with a represented person absent the consent of that person's lawyer, unless the law or court order authorizes the communication.[3]

When a lawyer ("sending lawyer") copies the lawyer's client on an electronic communication to counsel representing another person in the matter ("receiving counsel"), the sending lawyer creates a group communication.[4] This group communication raises questions under the "no contact" rule because of the possibility that the receiving counsel will reply all, which of course will be delivered to the sending lawyer's client. This opinion addresses the question of whether sending lawyers, by copying their clients on electronic communications to receiving counsel, *impliedly* consent to the receiving counsel's "reply all" response.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021) (discussing ethical considerations in virtual law practice); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (discussing lawyers' obligations in response to data breaches); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (discussing reasonable security precautions when communicating through email).

[3] The authorized-by-law exception is not the focus of this opinion.

[4] Throughout this opinion, the lawyer who sends the electronic communication is referred to as the "sending lawyer." The lawyer who represents another person in the matter and who receives the communication on which the sending lawyer's client is copied is referred to as the "receiving counsel."

Several states have answered this question in the negative, concluding that sending lawyers have *not* impliedly consented to the reply all communication with their clients. Although these states conclude that consent may not be implied solely because the sending lawyer copied the client on the email to receiving counsel, they also generally concede that consent may be implied from a variety of circumstances beyond simply having copied the client on a particular email.[5] This variety of circumstances, however, muddies the interpretation of the Rule, making it difficult for receiving counsel to discern the proper course of action or leaving room for disputes.

II. Copying a Client on Emails and Texts Is Implied Consent to a Reply All Response

We conclude that given the nature of the lawyer-initiated group electronic communication, a sending lawyer impliedly consents to receiving counsel's "reply all" response that includes the sending lawyer's client, subject to certain exceptions discussed below. Several reasons support this conclusion, and we think that this interpretation will provide a brighter and fairer line for lawyers who send and receive group emails or text messages.

First, Model Rule 4.2 permits lawyers to communicate about the subject of the representation with a represented person with the "consent" of that person's lawyer. Consent for purposes of Rule 4.2 may be implied; it need not be express.[6] Similar to adding the client to a videoconference or telephone call with another counsel or inviting the client to an in-person meeting with another counsel, a sending lawyer who includes the client on electronic communications to receiving counsel generally impliedly consents to receiving counsel "replying all" to that communication.[7] The sending lawyer has chosen to give receiving counsel the impression that replying to all copied on the email or text is permissible and perhaps even encouraged. Thus, this situation is not one in

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[5] *See, e.g.*, Wa. State Bar Ass'n Advisory Op. 202201 (2022); S.C. Bar Advisory Op. 18-04 (2018). For a list of the factors bearing on implied consent, *see* Cal. Standing Comm. on Prof'l Responsibility & Conduct Formal Op. 2011-181 ("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 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.").

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. j (2000) ("[A] lawyer . . . 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.").

[7] *See, e.g.*, N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread."); *see also* Va. Legal Ethics Op. 1897 (2022) ("A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel."); N.Y.C. Bar Formal Ethics Op. 2022-3 (similar).

which the receiving counsel is overreaching or attempting to pry into confidential lawyer-client communications, the prevention of which are the primary purposes behind Model Rule 4.2.[8]

This conclusion also flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context,[9] and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response. To be sure, the sending lawyer's implied consent should not be stretched past the point of reason.[10] Unless otherwise explicitly agreed, the consent covers only the specific topics in the initial email; the receiving counsel cannot reasonably infer that such email opens the door to copy the sending lawyer's client on unrelated topics.[11]

Second, we think that placing the burden on the initiator – the sending lawyer – is the fairest and most efficient allocation of any burdens. The sending lawyer should be responsible for the decision to include the sending lawyer's client in the electronic communication, rather than placing the onus on the receiving counsel to determine whether the sending lawyer has consented to a communication with the sending lawyer's client. Moreover, in a group email or text with an extensive list of recipients, the receiving counsel may not realize that one of the recipients is the sending lawyer's client.[12] We see no reason to shift the burden to the receiving counsel, when the sending lawyer decided to include the client on the group communication in the first instance.

Furthermore, resolving the issue is simpler for the sending lawyer. If the sending lawyer would like to avoid implying consent when copying the client on the electronic communication, the sending lawyer should separately forward the email or text to the client. Indeed, we think this practice is generally the better one. By copying their clients on emails and texts to receiving counsel, sending lawyers risk an imprudent reply all from their clients. Email and text messaging replies are often generated quickly, and the client may reply hastily with sensitive or compromising information.[13] Thus, the better practice is not to copy the client on an email or text to receiving

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[8] Model Rules of Prof'l Conduct R. 4.2 cmt. [1].

[9] *See* Model Rules of Prof'l Conduct R. 1.1, cmt. [8] ("To maintain the requisite level of knowledge and skill, a lawyer should keep abreast of the changes in law and its practice, including the benefits and risks of relevant technology[.]").

[10] *Cf.* Model Rules of Prof'l Conduct, Scope [14] ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.").

[11] *See also* Va. Legal Ethics Op. 1897 (2022) ("The reply must not exceed the scope of the email to which the lawyer is responding . . . as the sending lawyer's choice to use 'cc' does not authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email."); N.Y.C. Bar Ethics Op. 2022-3 ("Where an attorney sends an email copying their client, such communication gives implied consent for other counsel to reply all on the same subject within a reasonable time thereafter.").

[12] *See* N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("[M]any emails have numerous recipients and it is not always clear that a represented client is among the names in the 'to' and 'cc' lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.").

[13] *See, e.g.*, N.Y.C. Bar Ethics Op. 2022-3 (discussing the lawyer competence and client risk issues arising when lawyers copy their clients on emails to opposing counsel).

counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client.[14]

III. The Presumption of Implied Consent to Reply All Communications Is Not Absolute

The presumption of implied consent to reply all communications may be overcome. We highlight several common examples to guide lawyers.

First, an express oral or written remark informing receiving counsel that the sending lawyer does not consent to a reply all communication would override the presumption of implied consent. Thus, lawyers who do not wish for their client to receive a "reply all" communication should communicate that fact in advance to receiving counsel, preferably in writing.[15] This communication should be prominent; lawyers who simply insert this preference in a long list of boilerplate disclaimers in their email signature area run the risk of the receiving counsel missing it. Although such disclaimers are better than nothing, a more effective approach would be to inform the receiving counsel - at the beginning of the email or in an earlier, separate communication - that including the client in the communication does not signify consent (or as noted above, not copy the client at all).

Second, the presumption applies only to emails or similar group electronic communications, such as text messaging, which the lawyer initiates. It does not apply to other forms of communication, such as a traditional letter printed on paper and mailed. Implied consent relies on the circumstances, including the group nature and other norms of the electronic communications at issue. For paper communications, a different set of norms currently exists. There is no prevailing custom indicating that by copying a client on a traditional paper letter, the sending lawyer has impliedly consented to the receiving counsel sending a copy of the responsive letter to the sending lawyer's client. Accordingly, receiving counsel generally should not infer consent and reply to the letter with a copy to the sending lawyer's client simply because the sending lawyer copied that lawyer's client on a traditional paper letter. The sending lawyer, as a matter of prudence, should consider forwarding the letter separately, instead of copying the client, but failing to do so does not itself provide implied consent to the receiving counsel to copy the sending lawyer's client on a responsive letter. In sum, although Model Rule 4.2 applies equally to electronic and paper communications, only in group emails or text messages does copying the client convey implied consent for the receiving counsel to reply all to the communication.

Finally, although the act of "replying all" is generally permitted under Model Rule 4.2, other Model Rules restrict the content of that reply.[16]

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[14] A separate forward is safer than "bcc'ing" the client because in certain email systems, the client's reply all to that email would still reach the receiving counsel.

[15] As in many other areas of professional responsibility and the law generally, written communications are advisable because they create an accurate record and help to prevent misunderstandings. Moreover, to avoid implied consent, an oral statement of course would need to be made in advance of the email communication at issue.

[16] *See, e.g.*, Model Rules of Prof'l Conduct R. 4.4(a) cmt. [1] (prohibiting "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"); Model Rules of Prof'l Conduct R. 4.4(b)

IV. Conclusion

Absent special circumstances, lawyers who copy their clients on emails or other forms of electronic communication to counsel representing another person in the matter impliedly consent to a "reply all" response from the receiving counsel. Accordingly, the reply all communication would not violate Model Rule 4.2. Lawyers who would like to avoid consenting to such communication should forward the email or text to the client separately or inform the receiving counsel in advance that including the client on the electronic communication does not constitute consent to a reply all communication.

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cmt. [2] ("If a lawyer knows or reasonably should know that [an email] was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures."); Model Rules of Prof'l Conduct R. 8.4(c) (prohibiting counsel from making misrepresentations).