

Opinion RPC 4.2 Lawyer’s Email “Reply All,” Including Another Lawyer’s Client

Advisory Opinion 202201

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RPC: RPC 4.2

SUMMARY: If a lawyer emails a second lawyer with a copy to the first lawyer’s own client, and if the second lawyer “replies all,” whether the second lawyer violates the prohibition against communications to another lawyer’s client without that lawyer’s consent depends on the relevant facts and circumstances. Based on various factors, the second lawyer must make a good faith determination as to whether the lawyer who sent the initial communication had provided implied consent to a “reply all” responsive electronic communication.

Facts: Lawyer A initiates communication and sends an email to Lawyer B with a copy (cc) to Lawyer A’s own client. When responding, Lawyer B “replies all,” and in doing so simultaneously communicates with both Lawyer A and Lawyer A’s client.

Issue presented: Does Lawyer B violate RPC 4.2 when Lawyer B “replies all” and includes Lawyer A’s client in the communication without obtaining express prior consent from Lawyer A?

Short answer: It is the opinion of the Committee on Professional Ethics that “Reply All” may be allowed if consent can be implied by the facts and circumstances, but express consent is the prudent approach.

Rule:

RPC 4.2

Discussion:

RPC 4.2 prohibits a lawyer in the course of representing a client, from communicating about the subject matter 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 person’s lawyer or is authorized to do so by law or court order. Accordingly, it would be inconsistent with RPC 4.2 for a lawyer to initiate an email to another lawyer and that lawyer’s client without obtaining prior consent from that second lawyer.

The purpose of RPC 4.2 is to protect a client from overreaching by other lawyers who are participating in a matter, from interference by those lawyers with the client-lawyer relationship,

and from the uncounseled disclosure of information relating to a representation. RPC 4.2 Comment [1]. Consent to communicate about a matter with a represented person can be expressly granted by a client's lawyer. It also can be implied by the prior course of conduct among the lawyers in a matter, it can be inferred from a client's lawyer's participation in relevant communications, and it can be inferred from other facts and circumstances.

It would be inconsistent with RPC 4.2 for Lawyer A to initiate an email to Lawyer B and Lawyer B's client without obtaining prior consent from Lawyer B. Accordingly, the fact that Lawyer A copies her own client on an electronic communication to which Lawyer B is replying does not by itself permit Lawyer B to "reply all" without Lawyer A's consent. Rule 4.2 does not state that the consent of the other lawyer must be "expressly" given, but the best practice is to obtain express consent.

Whether consent may be "implied" in a particular situation requires an evaluation of all the facts and circumstances surrounding the representation, including how the communication was initiated and by whom; the prior course of conduct between the lawyers involved; the nature of the matter and whether it is transactional or adversarial; the formality of the communications; and the extent to which a communication from Lawyer B to Lawyer A's client might interfere with the client-lawyer relationship.

The Restatement of the Law Governing Lawyers provides that an opposing lawyer's consent to communication with her client "may be implied rather than express." Restatement (Third) of the Law Governing Lawyers § 99 comment j. Several bar ethics committees have examined this issue and concluded that while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances, it is prudent to secure express consent from opposing counsel. Opinions from other states that reflect this view include, South Carolina Bar Ethics Advisory Opinion 18-04; North Carolina State Bar 2012 Formal Ethics Opinion 7; California Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181; and Assn. of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1.

There are situations where prior consent might be implied by the totality of the facts and circumstances. One relevant fact is whether Lawyer A, initiating an electronic communication, cc'd her own client. But other factors should be considered before Lawyer B can reasonably rely on implied consent from Lawyer A.

- One important factor is the prior course of conduct of the lawyers and their clients in the matter. If the lawyers involved have routinely cc'd their clients on communications, in most circumstances they should be able to rely on that past practice in future communications of a similar type. In particular, the responding Lawyer B should be able to rely on the past practice of Lawyer A.
- The type of communication is a related factor. Emails and texts are often used as a substitute for oral communications, and the context of an electronic communication is important. For example, if a series of emails and texts among lawyers and their clients

takes the character of an active discussion among parties within a room, the “conversation” may not be different from a face-to-face conversation in which the lawyers are able to adequately protect the interests of their clients.

- A related factor is the number of persons Lawyer A cc’d on her initial communication. If Lawyer A sent an email solely to Lawyer B, with a copy to Lawyer A’s client, then Lawyer B should avoid “replying all” because the only other recipient other than Lawyer A is Lawyer A’s client (who should be readily identifiable in the address bar). However, if Lawyer A sends an email to multiple recipients, including her client as a “cc” among others, Lawyer B may be unaware that Lawyer A’s client is on the list and it may be unreasonable to expect Lawyer B to search through all the individuals on the cc list to determine if Lawyer A’s client is present. Further, if the recipients of Lawyer A’s cc’s are not visible to Lawyer B, the latter will not be able to know that a person on a cc list is a client of Lawyer A; in answering the email, Lawyer B should not be treated as having communicated with a client of Lawyer A without express prior consent.
- An important factor is the nature of the matter. It is common in some transactional fields of law for both lawyers and clients routinely to cc other lawyers and clients in certain communications related to a transaction, for example circulating revised documents among a transaction team comprised of multiple parties and their lawyers. Absent other circumstances, Lawyer B can rely on that past course of conduct among the lawyers and others involved in a transaction. Nevertheless, the best practice is to raise the issue early in the transaction and gain common consent among the lawyers and their clients—preferably confirmed in writing.
- Lawyers in adversarial matters should always avoid communicating with other lawyers’ clients without express permission. Because of the contentious nature of adversarial proceedings, there is a greater risk that such communications could interfere with other lawyers’ relationships with their clients and serve to harm those clients’ interests. This is of special importance in criminal cases, and prosecutors should always seek express consent from defense counsel before knowingly cc’ing the defendant.

Considering the intent of RPC 4.2, together with the above factors and other relevant facts and circumstances, Lawyer B must make a good faith determination whether Lawyer A has provided implied consent to a “reply all” responsive electronic communication from Lawyer A. Under no circumstances may Lawyer B respond solely to Lawyer A’s client without Lawyer A’s prior consent.

Because of the ease with which “reply all” electronic communications may be sent, the potential for interference with the client-lawyer relationship, and the potential for inadvertent waiver by the client of the attorney-client privilege, it is advisable for a lawyer sending an electronic communication and who wants to ensure that her client does not receive any electronic communication responses from the receiving lawyer or parties, to forward the electronic communication separately to her client. Sending a blind copy to the client on the original electronic communication is a potential option; however, because of differences in how various email applications handle bcc commands and replies, it is prudent for a lawyer instead to

separately forward an electronic communication to the client. A lawyer also may expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining under what circumstances the lawyers involved may “reply all” when a represented party is copied on an electronic communication.