

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE

Ethics Opinion File No. EO-20-_____

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order No. 2018-110.

The State Bar of Arizona Ethics Opinion 02-02 addresses the propriety of a lawyer contemporaneously copying a party on ~~communication~~documents sent to that party's lawyer, without first obtaining consent from that lawyer to communicate with their client. The opinion rightly 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~~a written communication to another lawyer, has impliedly consented to that other lawyer communicating with the client by ~~replying "to all."~~copying the client on their responsive communication. We conclude that the act of copying their client is on a letter or other document does not enough, by itself, to imply constitute consent under ER 4.2 to send the client a copy of any responsive communication, but that copying a client on an email communication does constitute such consent.

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 previously explained in State Bar Ethics Opinion 02-02, correspondence sent simultaneously to a party and their lawyer concerning the subject of the representation violates Rule 4.2 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

The general rule 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). It appears to be universally accepted that a lawyer is not, merely by showing their client as a “cc” on a formal letter or other document sent to another lawyer, impliedly consenting to the receiving lawyer copying the client on a responsive communication. But the effect of copying a client on an *email* communication is a closer question.

Several ethics advisory committees have addressed the question of 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.” ~~And they~~ Most have ~~all~~ concluded that this is not enough, in itself, to constitute implied consent, ~~though consent may be inferred from other~~ in the absence of additional circumstances indicating an intent to consent; therefore, a lawyer who replies to all knowing that the initiating lawyer’s client is copied, violates ER 4.2. 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. ~~The reasoning in these opinions is persuasive. Those opinions have listed various factors to be considered in determining whether consent has been implied, such as:~~

~~Consent under Rule 4.2 can be given impliedly, but the mere fact that a lawyer has cc’d their client on a communication is not enough. What is enough will depend on all the facts and circumstances and cannot be precisely quantified. The Pennsylvania opinion lists four factors to be considered when determining whether a lawyer has impliedly authorized another lawyer to communicate with their client:~~

~~In order to determine if consent to respond to a represented client in a transactional matter may be implied, lawyers should consider~~ (1) how the communication is initiated; (2) the prior course of conduct between or among the lawyers and their clients; (3) [the] potential that the response might interfere with the client-lawyer relationship; and (4) whether the specific content of the email is appropriate to send directly to a represented client.

Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2020 100. The California opinion provides a longer list of suggestions:

~~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.

~~For example, two transactional lawyers negotiating the wording of a contract, with sophisticated clients, who routinely reply all to emails on which those clients are copied, do not need to get express consent ahead of every email. On the other hand, lawyers involved in a heated litigation matter with emotional clients should be especially cautious about inferring opposing counsel's consent.~~

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. However, as a best practice, lawyers should seek express consent from opposing counsel before replying all to an email on which the lawyer knows the party was cc'd.~~

~~Lawyers should also be cautious about cc'ing their clients on emails to other lawyers when they do not want their clients 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. There is also a risk that the client will mistakenly hit "reply all" and include the other lawyer on a communication intended to be confidential. Though it takes an additional step, separately forwarding the email to the client after it has been sent to the other lawyer is a more prudent practice. The most recent opinion on the topic, however—issued by the New Jersey Advisory Committee on Professional Ethics—concludes otherwise. The opinion notes that a lawyer who copies their client on a letter to opposing counsel clearly is not impliedly consenting to opposing counsel copying the client on a responsive communication, but that 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 concludes that email communications, though written, are more like a conference call than a formal letter; it therefore 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.~~

Neither approach is ideal. The New Jersey rule assumes that all emails are equally conversational in nature when some are more formal and really are intended to function more like a letter. When that is obviously the case, the result may be counterintuitive and unanticipated by the initiating lawyer. Such is the nature of a bright line rule; it will inevitably appear arbitrary in certain circumstances. On the other hand, a bright line rule, unlike the "all the facts and circumstances" approach of the other ethics opinions, provides more certainty and predictability for lawyers who are seeking to comply with their ethical obligations. It also relieves the responding lawyer of the obligation to determine whether an email address in fact represents the presence of the initiating lawyer's client, which is not always obvious. Instead, the initiating lawyer, if they don't want the other lawyer to copy their client on a reply, can prevent this by separately forwarding their email to the client, which is a minimal burden.

However, this implied consent is limited. It does not extend to sending an email to another lawyer's client directly by separate email communications without copying the other lawyer.

The Committee has concluded that those latter considerations are compelling and it therefore adopts the New Jersey approach: a lawyer who copies a client on an email to another lawyer will be conclusively deemed, for ER 4.2 purposes, to have consented to the receiving lawyer copying the client on a responsive email. This does not include the situation in which email is used merely as a form of delivering an attached letter.