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This Week's Feature

Opposing Counsel CC'd Her Client; May I "Reply All"?

By Jonathan B. Skowron

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The "No-Contact" Rule Generally

Start with the basics. The American Bar Association Model Rule of Professional Conduct 4.2 is entitled "Communication with Person Represented by Counsel" and states:

> In representing a client, a lawyer shall not communicate about the subject 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 other lawyer or is authorized to do so by law or a court order.

Thus, a lawyer may not directly communicate with an opposing party without the consent of that party's lawyer. Comment 3 to the rule makes it clear that this prohibition cannot be waived by anyone else, not even the opposing party him- or herself. ("The Rule applies even though the represented person initiates or consents to the communication.") So according to the plain language of Model Rule 4.2, an attorney certainly cannot initiate an email exchange with an opposing party without first obtaining opposing counsel's consent.

But what if opposing counsel initiates the communication by copying her own client on an email? Does her act of voluntarily including her client in the email "conversation" constitute implied consent for you to include the client when you send your reply to opposing counsel? This is not an abstract question; there are certainly plenty of reasons for one to hover over the "reply all" option—some more noble than others.

Representative Ethics Opinions

The first opinion to consider the issue appears to have been Formal Opinion 2009-1 from the Association of the Bar of the City of New York, which stated that although copying a client on an email did not constitute "express" consent for the other lawyer to include the client in his response, it could constitute "implied" consent in some circumstances. In support, the New York City opinion cited comment j to section 99 of the *Restatement Third of the Law Governing Lawyers*, which noted,

> An opposing lawyer may acquiesce [to another lawyer communicating with his client], 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.

The New York City opinion likewise stated that in some situations—such as "group email communications involving multiple lawyers and their respective clients"—consent to "reply to all" can "sometimes be inferred from the facts and circumstances presented."

Formal Opinion 2009-1 provided two "important considerations" when evaluating whether implied consent exists: "(1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting." For example, if a lawyer copied her client on a threatening communication, this would likely not constitute consent to "reply all"; however, in the "collaborative non-litigation context" of drafting a joint press release, consent to reply to all parties would probably be much clearer. The New York City opinion stated that the "critical question" is whether the surrounding facts manifest consent by the opposing lawyer.

That said, New York City Formal Opinion 2009-1 urged caution even in situations where implied consent is clear: "Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented person's lawyer, and it will have both subject matter and temporal limitations." Three related guidelines were provided. First, in a "reply all" response a lawyer should usually keep any response limited to the subject matter of the original email. Second, an initial implied consent to "reply all" to one email does not extend to other communications or indefinitely into the future. Third, any implied consent to communicate could always, of course, be expressly revoked by the opposing counsel at any time.

Since 2009, several other state bar and ethics committees have considered the same question, and for the most part, they have come to similar conclusions. In 2011, the California Committee on Professional Responsibility and Conduct issued Formal Opinion 2011-181, which considered the question of "implied" consent in the abstract. California Formal Opinion 2011-181generally agreed with New York City Formal Opinion 2009-1, but it went on to provide additional factors that could weigh for or against finding implied consent, including:

- 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.

Accordingly, California Formal Opinion 2011-181 agreed that "common contexts where consent may possibly be implied include email correspondence from an attorney to an opposing attorney which includes the attorney's client as a copied recipient, thereby facilitating a communication by the opposing attorney by use of the 'Reply to All' email function."

In 2012, the North Carolina State Bar issued 2012 Formal Ethics Opinion 7, which expressly opined that the mere copying of a client on an email does not "in and of itself" constitute consent to include the client in a reply. Instead, a lawyer should consider various factors to determine whether any such consent could be implied, such as "(1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client–lawyer relationship." Only after considering these factors can a lawyer make a "good faith determination" whether it is proper to copy the opposing client on the reply. The North Carolina opinion, and aspects of the New York City opinion and California opinion before it, have since been considered and adopted by the Kentucky Bar Association (2017 Ethics Opinion KBA E-442), the Alaska Bar Association (Ethics Opinion No. 2018-1), and the South Carolina Bar Association (Ethics Advisory Opinion 18-04).

Key Takeaways

The above opinions yield the following general guidelines:

- You may not contact a represented party without his or her lawyer's consent.
- The mere fact that opposing counsel openly copied his or her client on an email does not, by itself, constitute consent to "reply all."
- In deciding how to respond to such an email, you should look to the content of the email and surrounding circumstances and make a good-faith determination whether consent to "reply all" was implied.
- If you do choose to "reply all," generally keep your response limited to the subject matter of the initial email.
- If you have any doubt pertaining to whether consent was implied, do *not* copy the opposing party on your reply.
- If the copying of clients on emails is likely to be a recurring issue (*e.g.*, in large cases with multiple parties and counsel), address the question at the outset to develop ground rules for who may or may not be copied on which emails.
- Finally, be extremely careful about copying your own client on your emails, lest it be interpreted as implied consent to "reply all" by other attorneys. (If you want to keep your client in the loop, simply forward the email to your client after it is sent.)

While the above advice is generally sound, always make sure to know the ethical rules and law that is applicable in your specific jurisdiction, which may or may not differ. But in the absence of any relevant opinion in your state, use common sense, look at the surrounding circumstances, and when in doubt, either leave the other party off your reply, or pick up the phone, call your opponent, and ask. Taking those extra steps is a very small price to pay to maintain your digital integrity.

Jonathan B. Skowron is an associate with Schnader Harrison Segal & Lewis LLP in Pittsburgh, and has a practice focusing on professional liability, product liability, insurance, business torts, and contractual litigation. He has represented clients in a wide variety of industries, including financial institutions, insurance companies, health-care providers, engineering firms, attorneys, and industrial manufacturers. Mr. Skowron is a member of the DRI Litigation Skills Committee.