ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-1

THE NO-CONTACT RULE AND COMMUNICATIONS SENT SIMULTANEOUSLY TO REPRESENTED PERSONS AND THEIR LAWYERS

TOPIC: The no-contact rule and communications sent simultaneously to represented persons and their counsel; implied consent to such communications.

DIGEST: The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.

CODE: DR 7-104

QUESTIONS: (1) When a lawyer sends a letter or an email directly to a person known to be represented by counsel, can the lawyer satisfy the prior consent requirement of DR 7-104(A)(1) by simultaneously sending a copy of the letter or email to the represented person's lawyer?

(2) In the context of an email chain involving lawyers and represented persons, does the prior consent requirement of DR 7-104(A)(1) require express consent for a "reply to all" communication or may consent be implied?

OPINION

I. Sending Simultaneous Correspondence to A Represented Person And Her Lawyer Without Prior Consent Violates the No-Contact Rule Unless Otherwise Authorized By Law

The "no-contact rule," DR 7-104 of the Code of Professional Responsibility (the "Code "), provides that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-104(A)(1).[1]

We have been asked whether simultaneously sending a letter or email to a represented person and her lawyer, by itself, satisfies the prior consent requirement. We believe this question is readily answered in the negative by both the text and purpose of the no-contact rule.

At the outset, it is clear that a letter or an email is a "communication" covered by DR 7-104(A)(1). As the New York State Bar Association has noted, "[t]he Code does not define the word 'communicate,' but the plain and ordinary meaning of the word – to 'impart,' 'convey,' 'inform,' 'transmit,' or 'make known,' *Webster's Third New International Dictionary (Unabridged)* 460 (1993); *see Black's Law Dictionary* 253 (5th ed. 1979) – all presuppose some form of transmission of information." N.Y. State 768 (2003).

The no-contact rule, by its terms, requires that a lawyer have the "prior consent" of a represented person's lawyer before communicating directly with that person. Simultaneously sending a letter or email to a represented person and her lawyer does not satisfy this "prior consent" requirement. Prior consent means just that – consent obtained in advance of the communication. A lawyer receiving a copy of a letter or email sent to her client has not, by virtue of receiving the copy, consented to the direct communication with her client.[2]

Our conclusion is supported by a recent case and prior ethics opinions. In *AIU Ins. Co. v. The Robert Plan Corp.*, 17 Misc. 3d 1104(A), 851 N.Y.S.2d 56, 2007 WL 2811366, at *14 (Sup. Ct. N.Y. County 2007), the plaintiffs' lawyers sent a letter to the directors of the defendant corporation with a copy to the company's counsel. Under New York law, the directors of a corporate client are included in the definition of "party" for purposes of DR 7-104. *See AIU Ins. Co.*, 2007 WL 2811366,

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1 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct ("the Rules"), which will become effective and replace the Code on April 1, 2009. Under the new Rules, DR 7-104(A)(1) of the Code has been adopted almost verbatim as Rule 4.2(a).

2 This opinion applies equally to simultaneous communications (i) addressed to the lawyer and "cc'd" to the client, (ii) addressed to the client and "cc'd" to the lawyer, and (iii) addressed to both lawyer and client.

at *14 (citing *Niesig v. Team I,* 76 N.Y.2d 363 (1990)). The court concluded that sending a letter to the directors, even with a copy sent to the company's counsel, violated DR 7-104 and enjoined plaintiffs' lawyers from any further contact with the directors.

In the same vein, the American Bar Association (the "ABA") has addressed the situation where a lawyer fears that opposing counsel has failed to relay a settlement offer to her client. The ABA concluded that sending the settlement offer directly to the represented party is improper, absent the other lawyer's consent or specific legal authority to do so. *See* ABA Formal Op. 92-362 (offering party's lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law), ABA Informal Op. 1348 (offering party's lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party's lawyer).

Our conclusion that the no-contact rule forbids sending simultaneous communications to client and counsel is bolstered by consideration of the rule's purpose. As the Court of Appeals explained in *Niesig*, DR 7-104(A)(1)

> fundamentally embodies principles of fairness. "The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact." *(Wright v Group Health Hosp.,* 103 Wash. 2d 192, 197, 691 P.2d 564, 567.) By preventing lawyers from deliberately dodging adversary counsel to reach – and exploit – the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions *(see* 1 Hazard & Hodes, Lawyering, at 434-435 [1989 Supp.]; Wolfram, Modern Legal Ethics § 11.6, at 613 [Practitioner's ed. 1986]; Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests,* 127 U. Pa. L. Rev. 683, 686 [1979]).

Niesig, 76 N.Y.2d at 370; *see also* ABA Formal Op. 95-396 ("[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.").

It could be argued that the purpose of DR 7-104(A)(1) is satisfied when a copy of a communication sent by counsel to a represented person also is sent to the represented person's lawyer. Under that theory, the represented person would be adequately protected because her lawyer would be aware of the communication and could consult with her client before responding to it. We do not agree with this view. While it is true that sending a copy of the communication to counsel reduces the risk that the represented person will be subject to overreaching, the risk is not eliminated. In practical terms, there is no assurance that a letter or email sent simultaneously to a lawyer and her client will be received by them at the same time. For any number of reasons – the vagaries of the postal or computer system, the lawyer's work or travel schedule, or delays in the distribution of mail at the lawyer's office – the lawyer might not receive her copy of the communication until after the client has received it and made a direct uncounseled response. The risk is magnified with email communications, where a response by the client can be made with the touch of a button on a keyboard.

More fundamentally, permitting a lawyer to communicate directly with a represented person by letter or email, even if a copy is also sent to counsel, would undermine the role of the represented person's lawyer as spokesperson, intermediary and buffer. Under DR 7-104(A)(1), a represented person is entitled to be insulated from any direct communications from opposing counsel, aside from direct communications otherwise authorized by law. All other communications relating to the subject matter of the representation, whether in person, by letter or via email, must proceed through the represented person's lawyer absent prior consent.

II. "Prior Consent" To the Simultaneous Communication May Be Inferred From The Lawyer's Participation In The Communication And Other Surrounding Facts and Circumstances

While the "prior consent" of a represented person's lawyer is required for direct communications with the client (as set forth above), the question remains whether the consent must be express or may be inferred from the circumstances. In this age of instantaneous electronic communications, the issue of implied consent often presents itself in the context of group email communications involving multiple clients and their lawyers. For example, does the fact that a lawyer copies her own client on an email constitute implied consent to a "reply to all" responsive email from the recipient attorney?[3]

While there is a surprising dearth of authority addressing the issue of implied consent in the context of the no-contact rule, a comment to the Restatement of the Law Governing Lawyers sensibly explains that 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." Rest. (Third) of Law Governing Lawyers § 99 cmt. j.

We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting.

<u>Initiation of communication</u>: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both

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[3] An attorney who sends an email to another attorney can eliminate the possibility of being found to have provided such implied consent by simply removing the client as a "cc" on the email – the sending attorney can instead use the "bcc" or blind copy feature to send the email to the client or can forward to the client a copy of the email sent to the other lawyer.

to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a "reply to all" response from any one of the email's recipients.

Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the "cc" cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to "reply to all" communications.

The critical question in any case is whether, based on objective indicia, the represented person's lawyer has manifested her consent to the "reply to all" communication. *Accord* ABCNY Formal Op. 2007-1 (setting forth objective indicia to determine whether in-house counsel is acting as a lawyer for purposes of DR 7-104(A)(1)). Using an objective test, express consent is preferable, but not invariably required, because actual consent may be inferred from counsel's conduct.

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. An email sent by a lawyer to opposing counsel, with a copy to the client, would imply the lawyer's consent to a "reply to all" response limited to the subject matter of the initial email (unless otherwise clearly indicated). And the duration of the implied consent would last only for a reasonable period of time based on the particular circumstances. It bears emphasis that an attorney who has previously consented to a direct communication with her client, or who has not explicitly objected to it, can make clear at any time that she does not consent. Consent, whether express or implied, can be revoked at any time by a clear statement to that effect.

The implied consent endorsed here is limited to those situations where a lawyer has initiated contact with other counsel and has done something to manifest consent to a response from counsel addressed to the initiating lawyer's client. This situation is to be distinguished from that presented in ABCNY Formal Op. 2005-4, where we were unwilling to recognize implied consent because the lawyer had not engaged in any conduct from which consent could be implied. In that opinion, we evaluated whether a lawyer was permitted to speak directly with a non-lawyer insurance adjuster where the insurance adjuster represented that counsel had consented to the communication. We noted that the other lawyer could not rely on the insurance adjuster's representation and that consent could not be implied in that situation. We reasoned:

> [T]he plain language of DR 7-104(A)(1) requires that opposing counsel receive notice and provide actual consent before an attorney may participate in such communications with a non-lawyer representative. We further conclude that the opposing counsel's consent cannot be inferred from the circumstances, and that the consent must be conveyed in some form by opposing counsel to the attorney.

* * *

> Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.

ABCNY Formal Op. 2005-4.

In the foregoing opinion, the Committee found no adequate indication of consent where the allegedly consenting lawyer was not a party to the communication in question and did nothing from which consent could be inferred. The type of implied consent recognized here, by contrast, presupposes that the lawyer is a party to the email exchange and has manifested consent to the direct communication.

A cautionary note is in order. An attorney who relies on "implied consent" to satisfy DR 7-104(A)(1) runs the risk that the represented person's lawyer has not consented to the direct communication. To avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent. However, the absence of express consent does not necessarily establish a violation of DR 7-104(A)(1) if the represented person's lawyer otherwise has manifested her consent to the communication.

We are mindful that the ease and convenience of email communications (particularly "reply to all" emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequences of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication.

CONCLUSION

We conclude that sending a letter or email to a represented person, and simultaneously sending a copy of the communication to counsel, is impermissible under DR 7-104(A)(1) unless the represented person's lawyer has provided prior consent to the communication or the communication is otherwise authorized by law.

We further conclude that express consent to such simultaneous communication, while preferred, is not always required. A lawyer's prior consent may be inferred where the represented person's lawyer has taken some action manifesting her consent. The scope of the implied consent will be determined by subject matter and temporal considerations, based on what a reasonable lawyer would understand was authorized by the represented person's lawyer. The safest course always is to obtain express prior consent.