

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2022-3: COPYING CLIENTS ON EMAIL COMMUNICATIONS
WITH OTHER COUNSEL**

DIGEST: Attorneys who copy their clients on email communications with other counsel may expose their clients to risks, including: (1) that the client will receive a direct communication from other counsel; and (2) that the client will intentionally or inadvertently reveal confidential information or waive privilege by replying to all. Under Rule 1.1(a), as part of the duty to provide competent representation, an attorney should understand and consider those risks before copying clients on communications with other counsel. Attorneys who copy their clients on emails with other counsel generally give implied consent for other counsel to reply all, permitting such other counsel to communicate directly with the represented client under Rule 4.2(a). This implied consent is limited and must be construed reasonably under the circumstances. Such implied consent may not be found, however, when an attorney bcc’s their client on email communications with other counsel and the client replies all to the email chain, absent some indication of prior authorization from the client’s attorney.

RULES: 1.1; 4.2

OPINION:

I. Introduction

Most communication by attorneys with other counsel is now done by email.¹ Some attorneys will cc or bcc their clients on emails with other counsel. This Opinion addresses the ethical issues associated with that practice.

First, the Opinion addresses the risks and explains that copying (i.e. “cc’ing”) a client on an email to other counsel will create the risk that the client will be exposed to direct communications from those other counsel and the risk that the client will—whether intentionally or inadvertently—reply all to other counsel and reveal confidential communications or even waive privilege. That latter risk also exists if an attorney bcc’s their client on an email to other counsel, because the client could use the reply all function to directly communicate with the other counsel.

Second, the Opinion looks at this practice from the perspective of the attorney *sending* such communications and intentionally copying their own client. Under Rule 1.1(a), attorneys have a duty to provide competent representation, which duty includes an obligation to understand the risks and benefits of technology. This Opinion cautions that, as part of that duty, an attorney

¹ We note that other forms of digital communication today—such as texting and instant messaging over an ever-growing selection of applications—are also increasingly utilized by lawyers and clients alike. The guidance set forth in this Opinion would apply with equal force to any “group chat” function in such communications.

should consider the risks associated with the practice of copying clients (whether by cc or bcc) on emails to other counsel.

Third, the Opinion looks at the issue from the perspective of an attorney *receiving* an email sent by other counsel, copying that other counsel's clients. Rule 4.2 places limitations on when an attorney may communicate with a person represented by counsel. Nonetheless, the Opinion explains that when an attorney receives an email from other counsel, copying such counsel's client, the attorney may reasonably understand that such other counsel has given implied consent to the receiving attorney's ability to "reply all" and thereby communicate with the client permissibly under Rule 4.2(a). The same implied consent normally cannot be found, however, when an attorney bcc's their client on email communications with other counsel and the client replies all, communicating directly with other counsel.

II. The Risks Associated with Copying Clients on Email Communications with Other Counsel

Any time an attorney copies their own client on a communication with other lawyers, they are divulging their client's contact information. In addition, they are creating the opportunity for other lawyers to directly communicate with the attorney's client. This may undermine the role that an attorney can serve as a buffer in protecting their client from an opposing party's lawyers.

Moreover, there is a risk that the client will reply all and thereby communicate directly with such other lawyers. Even if the client's communication is intentional, there is always the risk that, without the prior advice of counsel, the client will write something that reveals confidential information, waives attorney-client privilege, or is otherwise prejudicial to their position and that may be exploited by opposing counsel. Where the client's communication is inadvertent—*i.e.*, where the client mistakenly replies all and only intends to communicate privately with their own lawyer—the risk of the client writing something prejudicial is exponentially greater. These same risks are amplified when the client is bcc'd and may not realize it.

Identifying these risks, prior opinions of this Committee and other bar associations have cautioned lawyers against copying and even blind copying their clients on emails with other counsel.² These risks can be entirely avoided by simply forwarding emails to the client, rather than copying them. This will ensure that the client's personal contact information is protected and that there is no chance that the client will wittingly or unwittingly communicate with other lawyers and potentially expose confidential communications or otherwise make prejudicial statements. It will also preserve the attorney's ability to act as a buffer against opposing counsel's advocacy.

² See, e.g., NYCBA Prof'l Ethics Comm., Formal Op. 2009-1 (2009) ("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."); NYSBA Comm. on Prof'l Ethics Op. 1076 (2015) (discussing reasons why use of cc and bcc to client "is not a best practice").

We note, however, that copying clients on emails may be entirely appropriate and acceptable under certain circumstances, particularly in non-litigation situations. For example, in transactional practice, it is common for attorneys on different sides of a deal to copy their respective clients on email communications. In such situations, the advantages of ensuring that counsel and client are both directly involved in all developments and negotiations may outweigh the risks associated with copying clients. This practice may make the most sense where the parties can, at the outset, agree who should be included in communications and where the clients are sophisticated, such that they understand the risks associated with revealing confidential information to opposing counsel and that opposing counsel's communications should be understood as a form of advocacy.

III. Rule 1.1 and Copying Clients on Emails

Rule 1.1(a) provides that:

A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [8] to Rule 1.1 notes that “[t]o maintain the requisite knowledge and skill, a lawyer should ... keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients”

In light of the risks associated with copying clients on emails with other attorneys, as outlined above, attorneys should only do so if they understand and consider the benefits and risks associated with the practice. In a litigation or other adversarial context, an attorney who copies or blind copies clients on emails with opposing counsel undertakes significant risks without commensurate reward. Indeed, especially with respect to a bcc, we are hard-pressed to identify any reward or purpose, let alone one that outweighs the very real risks. Such risks may be mitigated simply by forwarding to the client a copy of an email previously sent to opposing counsel.

In the non-litigation or non-adversarial context, there will generally be less risk and potentially greater reward from the practice of copying clients on communications with other counsel. Nonetheless, even in such circumstances, attorneys who intend to copy their clients on communications with other attorneys should consider: (1) entering into an agreement with the other attorneys making clear who is to be cc'd on communications; and (2) discussing the risks of such communications with the client, advising the client to be mindful of such risks, and ensuring the client's appreciation of the risks and agreement to proceed as contemplated.

In sum, if an attorney wishes to copy their clients on emails, they should consider whether the benefits of doing so outweigh the risks and whether precautionary measures can or should be taken.

IV. Copying Clients on Emails and Rule 4.2

As the foregoing establishes, attorneys should give careful consideration before copying their clients on communications. We now turn to the question of what an attorney can do upon receiving an email from another attorney, copying that other attorney's clients.

A. The No-Contact Rule

Rule 4.2(a), sometimes called the no-contact rule, places limits on when a lawyer may communicate with a party whom the lawyer knows is represented by counsel.

In an opinion addressing Rule 4.2(a)'s predecessor, DR 7-104(a), the New York Court of Appeals observed that the no-contact rule "fundamentally embodies principles of fairness." *Niesig v. Team I*, 76 N.Y.2d 363, 370 (1990). "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." *Id.* (quotation omitted).

Rule 4.2(a) provides that:

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 prior consent of the other lawyer or is authorized to do so by law.

The Rule thus permits communications with a represented person where the communicating attorney has received "prior consent" from the represented person's lawyer.³

B. This Committee's Prior Opinion Applying the No-Contact Rule in the Context of Emails Copying a Client

In Opinion 2009-1, addressing DR 7-104(a), this Committee previously addressed the application of the "no-contact" rule and the prior consent exception where an attorney cc's their client on an email. We concluded that prior consent "may be implied rather than express"⁴ and that in the context of email chains in which a client is copied, "consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented." *Id.* We therefore advised that an attorney needs to consider the context of the communication to determine whether a reply all is permitted and explained that the critical questions in determining whether consent has been implied include especially: "(1) how the group communication is initiated; and (2) whether the communication occurs in an adversarial setting." *Id.* We concluded that the ultimate question "is whether, based on objective indicia, the represented

³ To be clear, communications only come within the ambit of Rule 4.2 insofar as they concern "the subject of the representation" undertaken by the client's lawyer.

⁴ NYCBA Prof'l Ethics Comm., Formal Op. 2009-1 (2009) (quoting with approval RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 99 cmt. j).

person’s lawyer has manifested her consent to the ‘reply to all’ communication.” *Id.* And we explained that “[e]ven when consent is implied, it is not unlimited.” *Id.*

Since we issued that opinion, DR 7-104(a) was replaced by Rule 4.2(a) and other professional ethics committees across the country have weighed in, with divergent points of view, on how the “no-contact” rule applies where an attorney cc’s or bcc’s their client on an email.⁵

C. Application of Rule 4.2(a) Where an Attorney Cc’s Their Client

As we explained in Opinion 2009-1, consent to reply all can sometimes be inferred when an attorney cc’s their client on an email. That opinion was based on the language of DR 7-104(a), which has been adopted nearly verbatim in Rule 4.2(a) and therefore its reasoning continues to apply.⁶

The opinions from jurisdictions weighing in on these issues have followed the general rule that we announced in Opinion 2009-1: that copying a client in an email chain may give implied consent for other counsel to respond to the client, depending on the circumstances.⁷ But, they have given very different interpretations of that general rule. Some opinions have, with varying degrees of adamancy, cautioned attorneys *not* to infer such consent absent something more than the mere sending of an email.⁸ These opinions, while acknowledging the theoretical idea that consent can be inferred, caution attorneys to always seek affirmative consent. A recent opinion has, however, advised attorneys that they normally *can* infer consent simply from the

⁵ See the opinions addressed in footnotes 7, 8, and 9.

⁶ Compare Rule 4.2(a) (“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 prior consent of the other lawyer or is authorized to do so by law.”) with DR 7-104(a) (“During the course of the representation of a client a lawyer shall not: (1.) Communicate 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.”).

⁷ See, e.g., New Jersey Advisory Comm. on Prof’l Ethics Op. 739 (Mar. 10, 2021); Illinois State Bar Ass’n Op. No. 19-05 (Oct. 2019); South Carolina Bar Ethics Advisory Opinion 18-04 (2018); Kentucky Bar Ass’n Ethics Op. KBA E-442 (Nov. 17, 2017); North Carolina 2012 Formal Ethics Op. 7 (Oct. 25, 2013); California Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2011-181.

⁸ See, e.g., North Carolina 2012 Formal Ethics Op. 7 (Oct. 25, 2013) (“There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a “reply to all” responsive electronic communication.”); Illinois State Bar Ass’n Op. No. 19-05 (Oct. 2019) (“If the mere copying of one’s own client on an e-mail were considered to be an invitation to opposing counsel to do the same, the purposes of Rule 4.2 could be thwarted.”); South Carolina Bar Ethics Advisory Op. 18-04 (2018) (“The mere fact that a lawyer copies his own client on an email does not, without more, constitute implied consent to a “reply to all” responsive email.”); see also Alaska Bar Association Ethics Op. No. 2018-1 (Jan. 18, 2018) (“A lawyer who copies their client in an e-mail communication with opposing counsel is not, merely by copying the client, giving consent to the receiving lawyer. ...”).

sending of the email with a client cc'd.⁹ While these opinions from across the country agree with the same common premise that consent to reply all can sometimes be inferred, read together they leave practicing attorneys with little guidance about whether consent to reply all can be implied from an attorney's decision to cc their client.

We believe that the bar would benefit from more concrete guidance on this topic, particularly with the now ubiquitous use of email as the most common and efficient form of communication. Accordingly, we go beyond the guidance we set forth in Opinion 2009-1 and now express the view that *an attorney's deliberate choice to cc their own client on a communication to other counsel generally implies that the sending attorney consents to such other counsel replying all and thereby responding to the sending attorney's client*. This implied consent is limited, however, and must be construed reasonably under the circumstances.

We believe that this approach makes sense as a matter of widely accepted email etiquette, as including someone via cc is a well-recognized way of inviting others to also include such person in future correspondence on the same thread through use of the reply all function. Accordingly, it makes sense to place the burden on the *sending* attorney to determine whether they wish to cc their own client, and not upon the *receiving* attorney to parse through all of the copied addresses to determine whether any one or more of them contains that of an opposing counsel's client. Were it otherwise, placing the burden on the receiving attorney could encourage attorneys to cc their clients on emails in order to achieve a "gotcha moment" in which they can accuse opposing counsel, who reply all, of violating the no-contact rule.¹⁰ Finally, we believe that this approach is beneficial for clients, as a contrary approach that placed the burden on receiving counsel to investigate each time whether they are permitted to reply all would increase the costs of legal services for clients.

In short, we conclude an attorney who cc's their own client on an email to other counsel should reasonably expect that such other counsel will use the reply all function and thus consents to the other counsel doing so within the meaning of Rule 4.2(a).

We emphasize, however, that portion of our prior opinion explaining: "Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented

⁹ New Jersey Advisory Comm. on Prof'l Ethics Op. 739 (Mar. 10, 2021) ("lawyers who include their clients in group emails are deemed to have impliedly consented to opposing counsel replying to the entire group, including the lawyer's client"); *see also* California Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181 (finding that consent could be implied in a face-to-face discussion where "Attorney A initiated the substantive conversation regarding the litigation between Client A and Client B, by asking Attorney B (in the presence of Client A) about the need to call a witness in the case. By doing so, Attorney A invited the communication").

¹⁰ Such gamesmanship appears to have been the background to the New Jersey opinion referenced above, which was written in response to an inquiry from a lawyer who seems to have made a practice of copying clients on emails to opposing counsel and then accusing opposing counsel of violating the New Jersey equivalent of Rule 4.2 when they replied all. New Jersey Advisory Comm. on Prof'l Ethics Op. 739 (Mar. 10, 2021).

person's lawyer, and it will have both subject matter and temporal limitations."¹¹ Implied consent is limited. It can be trumped by express communications explaining that a client who was copied on an email should not be copied on future emails. And implied consent is limited to the consent that might reasonably be inferred from the context. 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. Such an email would *not*, however, permit other counsel to send a reply *only* to the copied client. Nor would it permit the other counsel to years later dig up the old email and use it as a pretext to send a communication, copying the client, on a different topic.

D. Application of Rule 4.2(a) Where an Attorney Bcc's Their Client and the Client Replies All

Our prior Opinion did not directly address whether consent could be implied when an attorney bcc's their client on an email with other counsel and the client then replies to all. A lawyer on the receiving end of such an email may *not* then reply to all, let alone directly to the client, because in those circumstances it cannot be reasonably said that the client's lawyer has impliedly given the "prior consent" required by Rule 4.2(a) to authorize such a communication. Consent may only be found if the client's attorney responds to the client's communication in a way that either expressly or impliedly suggests that other counsel are permitted to respond to the client.

We recognize that the above guidance places a burden on attorneys who receive a direct communication from a represented person under such circumstances. Attorneys should take the time to determine whether the represented person was in fact cc'd on the original email chain (in which case a reply all would generally be permissible because the represented person's attorney will have impliedly consented) or bcc'd (in which case a reply would not be permissible, absent some indicia of consent to the communication from the represented party's counsel).

V. Conclusion

A lawyer's duty of competence under Rule 1.1(a) means that a lawyer needs to understand and consider the risks associated with copying and blind copying clients on emails with other counsel before engaging in the practice. An attorney who cc's a client on email communications with other counsel has impliedly consented to other counsel replying all and thereby communicating directly with the attorney's client as authorized by Rule 4.2(a). This implied consent is limited and must be construed reasonably under the circumstances. Where the attorney bcc's their own client, who then replies all, however, the attorney has not impliedly consented, without more, to other counsel's contacting the attorney's client.

¹¹ NYCBA Prof'l Ethics Comm., Formal Op. 2009-1 (2009).