

## To cc or bcc (clients) - That is the Question

In this article we consider from both the sending and receiving lawyers' perspectives, the ethical responsibilities when a sending lawyer's client is cc'd or bcc'd on an email.

The Washington State Bar Association recently addressed this topic in its Advisory Opinion 202201 ("the Opinion") through the hypothetical situation where a sending lawyer sends an email to a receiving lawyer and copies the sending lawyer's own client. The Opinion considers whether the receiving lawyer violates the prohibition against communication to the sending lawyer's client by responding "reply all." The Opinion concludes that before doing so the receiving lawyer must make a good faith determination as to whether the sending lawyer has provided implied consent to a "reply all" responsive email.

Such consent can be implied through "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 [the receiving lawyer to the sending lawyer's] client might interfere with the client-lawyer relationship." WA Eth. Op. 202201 (2022).

Similar to ABA Model Rules, Washington State Rule of Professional Conduct ("Rule") 4.2 states as follows:

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.

The purpose of the rule is to protect a client "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." Rule 4.2, cmt. [1].

Therefore, it would be a violation of Rule 4.2 for a receiving lawyer to "reply all" to an email that included a sending lawyer's client without obtaining prior consent from the sending lawyer. In addition, it would be inappropriate for the receiving lawyer to respond solely to the sending lawyer's client.

The Opinion advises that the best practice is for the sending lawyer to forward the email separately to the client instead of copying him or her. Forwarding the email to the client avoids any potential for an inadvertent waiver of the attorney-client privilege by the sending lawyer's client. The Opinion adds that forwarding the email to the client is preferred over the use of bcc because there is inconsistency in how email applications handle bcc commands and replies. Furthermore, the Opinion recommends a sending lawyer may expressly state in the email that consent is not granted to copy the client on any responsive email.

Finally, the Opinion advises that express consent is the prudent approach. To that end, counsel should establish at the outset a procedure for determining if and when counsel may "reply all" to a represented party copied on the email. This will also avoid any incorrect assumption about implied consent.

Other state and local bar associations have addressed this issue and also concluded that consent to “reply all” communications may be inferred from the facts and circumstances, but it is prudent to secure express consent from opposing counsel. See SC Eth. Op. 18-04 (2018); NC Eth. Op. 7 (2012); CA Eth. Op. 2011-181 (2011); NYC Eth. Op. 2009-1 (2009). On the other hand, at least one state has advised that a sending lawyer initiating an email that cc’s their client are “deemed to have impliedly consented to opposing counsel replying to the entire group, including the lawyer’s client.” NJ ACPE Op. 739 (2021).

Even if the receiving lawyer believes that the sending lawyer has given implied consent to a “reply all” that includes the sending lawyer’s client, the receiving lawyer should not interpret the implied consent as an invitation to email the sending lawyer’s client directly. Similarly, the receiving lawyer should not make the substance of the group email directed at the sending lawyer’s client instead of the sending lawyer. Finally, the receiving lawyer’s responsive email should cover the same subject matter.

Other states also advise that the sending lawyer should forward emails to clients instead of cc’ing or bcc’ing the client. PA Eth. Op. 2020-100 (2020); AK Eth. Op. 2018-1 (2018); KY Eth. Op. E-442 (2017); NY Eth. Op. 1076 (2015). These opinions shared the same concern that the client included on the email with the receiving counsel may respond “reply all” to the sending lawyer’s communication and disclose confidential or privileged

information to the receiving lawyer. At least one court has struggled with this issue and ultimately found that there was no waiver but warned the parties “and others” that “Reply all is risky. So is bcc. Further carelessness may compel a finding of waiver.” *Charm v. Kohn*, No. 08-2789-BLS2, 2010 WL 3816716, at \*2 (Mass. Super. Sept. 30, 2010). At a minimum, the sending lawyer that includes the client in the cc or bcc field should advise the client not to reply to any group communication.

There are risk management lessons for lawyers on the receiving end of messages where the sending lawyer’s client was copied on an email. When this happens for the first time, the receiving lawyer would be well advised to notify the sending lawyer of the risks that the sending lawyer’s client may inadvertently or advertently waive attorney-client privilege in any “reply all” response, and that the sending lawyer should immediately notify the client not to “reply all.” It would also be perfectly proper for the receiving lawyer to state that any responses from the sending lawyer’s client to similar communications in the future will constitute a knowing and deliberate waiver of the attorney-client privilege. In this way, since the onus is now placed on the sending lawyer to cease the practice and to notify the client of the risks, failure by the sending lawyer to take those steps in the future should constitute implied consent to “reply all.” In addition, it seems likely that any court reviewing the situation will agree that any response by the client, following notice to the sending lawyer, will indeed constitute such a waiver.

## Further information

If you would like further information on any issue raised in this update please contact:

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