

**Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-442
Issued: November 17, 2017**

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Question 1: When an attorney (Lawyer A) sends an email to another lawyer (Lawyer B) and Lawyer A sends a copy of such communication to Lawyer A’s client, should Lawyer A’s action be regarded as giving Lawyer B consent to use the “reply all” function when replying to Lawyer A?

Answer: No

Authorities: SCR 3.530 (4.2), North Carolina State Bar Formal Ethics Opinion 7 (2013), Association of the Bar of the City of New York Formal Opinion 2009-1, Restatement of the Law Governing Lawyers, section 99, comment j.

Question 2: When Lawyer A sends an email to Lawyer B with copy of such email being sent to Lawyer A’s client, does the act of sending the client a copy of the email reveal “information relating to the representation of the client?”

Answer: Yes

Authority: SCR 3.530 (1.6(a))

Question 3: What precautions should an attorney take in using the “reply all” button?

Answer: See opinion

Discussion

1) If a lawyer (Lawyer A) sends an email to another lawyer (Lawyer B), who is not affiliated with Lawyer A, and copies Lawyer A’s client by using “cc,” Lawyer B should not correspond directly with Lawyer A’s client by use of the “reply all” key. A lawyer who, without consent, takes advantage of “reply all” to correspond directly with a represented party violates Rule 4.2.

Further, showing “cc” to a client on an email, without more, cannot reasonably be regarded as consent to communicate directly with the client. In North Carolina State Bar Formal Ethics Opinion 7 (2013), the Committee opined:

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. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (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.

In Formal Opinion 2009-1 the Association of The Bar of The City Of New York, Committee on Professional and Judicial Ethics opined that 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. Further, prior consent to the communication means actual consent. The New York Bar advised that while consent may be inferred from the conduct of the represented person’s lawyer, a lawyer communicating with a represented person without first securing the other lawyer’s express consent runs the risk of violating the no-contact rule. (Emphasis added.) This Committee agrees with the opinions of North Carolina and New York and endorses their use for Kentucky lawyers.

2) Showing another lawyer that a copy of an email is being sent to a lawyer’s client reveals the following information relating to the lawyer’s representation: 1) the identity of the client; 2) the client received the email including attachments, and 3) in the case of a corporate client, the individuals the lawyer believes are connected to the matters and the corporate client’s decision makers. Hence, it is best to avoid a problematic result by not sending and showing a copy of the sending lawyer’s email to the sending lawyer’s client. Of course, “cc”ing a client does not violate Rule 1.6, if the client expressly or impliedly consents to the limited disclosure of “information related to the representation.”

3) To avoid the problems identified in (1) and (2), attorneys should either forward their emails to their client or use their system's blind carbon copy feature ("bcc"), after first assuring that the "reply all" feature is limited to those in the "cc" line. Sending a blind copy to the client ("bcc) or forwarding the email to the client protects a confidential communication (sending the copy to client), avoids inappropriate confusion, and forecloses an implied consent argument. If Lawyer A wants Lawyer B to know that Lawyer A's client has been informed of the communication, then Lawyer A may either so advise Lawyer B of such fact or, if deemed necessary, show that a copy of the email communication is being made to Lawyer A's client, while at the same time giving clear written notice to Lawyer B that Lawyer B is not authorized to respond or communicate with Lawyer A's client.

Avoiding use of "cc" also prevents the client to inadvertently communicate with opposing counsel by hitting the "reply all." key. A proposed (2017) amendment to comment 6 to Rule 1.7 would add "the risks and benefits of technology" to lawyers' obligations to maintain the requisite knowledge and skill. The "reply all" button presents a dangerous risk to the sending lawyer because the sender might inadvertently send an embarrassing or harmful email to unintended recipients. The web contains many examples of funny, embarrassing or harmful uses of "reply all." In addition to "think before you reply," the Wall Street Journal suggests:

If the system allows customization of the toolbar. "Reply All" can be made more difficult to use accidentally by moving it away from the Reply button. Organizations can also install add-ons for Outlook which prompt people when they are using Reply All. Similar to the helpful, "Are you sure you want to delete this?" or the "is the attachment actually attached" pop-ups, this add-on wants confirmation before enabling Reply All, giving senders the chance to reconsider whether that's really their intention. (Let's Make it Harder to Use "Reply All," Wall Street Journal, November 13, 2016).

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.