



ISBA Professional Conduct Advisory Opinion

ILLINOIS STATE
BAR ASSOCIATION

Opinion No. 19-05

October 2019

Subject: Communication with represented person; E-mail

Digest: Unless consent to such contact has been obtained, it is a violation of Rule 4.2 for a lawyer to copy another lawyer's client on a reply e-mail, even though the client was copied on the e-mail to which the lawyer is replying.

References: Illinois Rule of Professional Conduct 4.2

Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion 2009-1

Kentucky Bar Association, Ethics Opinion E-442, November 17, 2017

North Carolina State Bar, Formal Ethics Opinion 2012-7, October 25, 2013

Alaska Bar Association, Ethics Opinion 2018-1, January 18, 2018

South Carolina Bar Ethics Advisory Opinion 18-04

FACTS

Lawyer represents various condominium associations, which occasionally get into disputes with other parties who are represented by counsel. When Lawyer communicates by e-mail with opposing counsel (occasionally in litigation but usually not), he sometimes adds the condominium association board president (who regularly consults with the lawyer on matters in dispute) as a cc (not bcc) recipient of the e-mail.

Lawyer has noticed that some of the opposing lawyers, in replying to him, have copied the board president, presumably by hitting Reply All when sending him their responses. Lawyer has not authorized any opposing counsel to communicate with any of his clients.

While some of the replying lawyers are aware that they have copied the condo board president, others may not know who the cc recipient is.

QUESTIONS

1. Is an opposing lawyer who copies the board president acting in violation of Rule 4.2 of the Rules of Professional Conduct (concerning communications with persons represented by counsel)?

2. Does the answer to question 1 change if the opposing counsel does not know who the cc recipient is?

OPINION

As the inquiry states, the issue of question 1 is governed by Rule 4.2 of the Illinois Rules of Professional Conduct, which provides as follows:

Communication with Person Represented by Counsel

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.

In answering the first question, the Committee presumes that the responding lawyer knows that he has copied the first lawyer's client on the reply e-mail.

Under the facts presented, Lawyer has not consented to having the board president (who is considered to be a represented person; see Comment [7] of Rule 4.2) receive an e-mail from opposing counsel (but has not taken the trouble to inform opposing counsel not to send one), nor is there any law or court order that would authorize the practice. Thus, the question is whether the first lawyer's copying his client on the e-mail constitutes consent for a replying lawyer to do likewise. Several bar associations have concluded that such consent is not implied, and the Committee agrees.

Comment [1] of Rule 4.2 states:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

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. For instance, it is foreseeable that the client will read the reply e-mail before his lawyer does—and make an

uncounselled response. That “would undermine the role of the represented person’s lawyer as spokesperson, intermediary and buffer.” Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion 2009-1. (The opinion also states that it makes no difference whether the reply is by an ordinary letter or by e-mail. Footnote 2.) “A lawyer who, without consent, takes advantage of ‘reply all’ to correspond directly with a represented party violates Rule 4.2.” Kentucky Bar Association, Ethics Opinion E-442, November 17, 2017.

Instead of assuming that a lawyer who has copied his own client on an e-mail has invited opposing counsel to include the client in reply, the replying lawyer “must make a good faith determination” as to whether consent has been granted. North Carolina State Bar, Formal Ethics Opinion 2012-7, October 25, 2013. “The easiest and most direct way to determine whether the receiving lawyer can ethically ‘reply all’ is to ask the sending lawyer.” Alaska Bar Association, Ethics Opinion 2018-1, January 18, 2018.

“That is not to say that consent to a ‘reply all’ email may never be implied. The particular circumstances surrounding an email communication could amount to implied consent to a ‘reply all’ from opposing counsel.” South Carolina Bar Ethics Advisory Opinion 18-04. If the lawyers and clients involved had a long-standing custom and practice to include their clients on routine emails (which is not the case in the present inquiry), then Rule 4.2 would permit it. Some of the considerations that demonstrate acquiescence are mentioned in the North Carolina, Alaska and South Carolina opinions cited above.

Of course, the best ways to avoid the problem entirely are to establish the ground rules with opposing counsel early on, or simply to refrain from copying one’s own client on an e-mail to opposing counsel. Given the informal and instantaneous nature of such communications, Lawyer could not have been surprised by his clients’ receipt of reply e-mails.

Both the Kentucky and Alaska opinions recommend that it is better to keep clients informed of their matters by forwarding them e-mails to opposing counsel, rather than using the “cc” function. This Committee agrees and supports the following admonition of the Alaska Bar Association: “While all lawyers must be vigilant in following the ethics rules in e-mail correspondence, the primary responsibility lies with the lawyer who has chosen to ‘cc’ the lawyer’s own client.”

The second question can be answered summarily. If the replying lawyer is not being willfully ignorant of the status of the cc recipient, that lawyer should not be taken to task for a violation of Rule 4.2. But if that lawyer truly does not know at least the role of each person to whom an e-mail is sent, the lawyer might be providing information and legal opinions to someone who later could use them against the lawyer’s client.

CONCLUSION

It does not contravene a rule of professional conduct for a lawyer to cc the client when corresponding with another lawyer by e-mail. But unless a lawyer has an agreement or understanding with opposing counsel that a reply e-mail may be sent to the client, the Committee

believes that the better practice is for the lawyer to avoid sending a cc to that client. At the same time, and for the reasons stated above, a recipient attorney violates Rule 4.2 if he or she, having received an e-mail with such a cc and knowing the person cc'd to be a represented party, includes that party in an e-mailed reply in the absence of some form of consent from the sending lawyer.

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