ETHICS ADVISORY OPINION

18-04

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

South Carolina Rules of Professional Conduct: 4.2

Factual Background: Lawyer A sends an email to Lawyer B and copies several people, including Lawyer A's client. Lawyer A has not previously consented to Lawyer B contacting Lawyer A's client and does not expressly do so in the email.

Question: If Lawyer B receives an email from Lawyer A on which Lawyer A's client is copied, may the lawyer "reply to all" – copying Lawyer A's client with the response – without the express consent of Lawyer A?

Summary: Copying an opposing party on an email or letter is communication for purposes of Rule 4.2, SCRPC. Absent the consent of Lawyer A, Lawyer B may not communicate with Lawyer A's client about the subject of the representation either directly or by copying Lawyer A's client in an email sent in response to Lawyer A's email on which the client was copied. 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.

Discussion:

Rule 4.2, SCRPC, provides that,

> [i]n 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 Rule 4.2 is to ensure "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." Rule 4.2, Comment 1.[1] For that reason, the protection afforded by the Rule cannot be waived by the client. Rule 4.2, Comment [3] ("The Rule applies even though to represented person initiates or consents to the communication.").

In two prior opinions, this Committee has concluded that copying a represented party on correspondence to the party's lawyer is communication subject to Rule 4.2 for which – in the absence of authorization by law or court order – the party's lawyer must give prior consent.[2]

In S.C. Bar Eth. Adv. Op. 91-02, this Committee was asked if a prosecutor copying criminal defendants on court appearance notifications (i.e., trial date, roll call, etc.) and consequences for failure to appear would violate Rule 4.2. Unless the lawyer for the opposing party consented to the communication or the communication was authorized by law, the Committee opined the notification would violate Rule 4.2. In S.C. Eth. Adv. Op. 93-16, the Committee was asked two questions about communication with a represented person, one of which was whether a plaintiff's lawyer can copy a represented defendant on any settlement proposals sent to the defendant's lawyer. Looking to the language of Rule 4.2 and noting the absence of any South Carolina law that would allow for the contemplated communication, the Committee concluded that "Rule 4.2 proscribes all communication with a represented party; thus, precluding copying the represented party on written letters directed to that party's attorney. The lawyer may contact the represented party only if that party's attorney so consents." S.C. Eth. Adv. Op. 93-16 at 2.

In the same way that sending a letter is prohibited, copying an opposing party on an email is prohibited by Rule 4.2 absent consent of opposing counsel. The question then becomes whether

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[1] Although not before the Committee, the practice of copying one's client – by either "cc" or "bcc"- when emailing with opposing counsel poses some risks. With a "cc", a lawyer is disclosing his client's email address, and with both "cc" and "bcc", the lawyer risks having the client "reply to all" and potentially disclose confidential or other information. *See*, *e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1076 at ¶¶10 – 13. It is also not uncommon for a recipient of a group email to "reply to all" unintentionally or without knowing the identity of each recipient, which in this context might expose the client to what were intended to be lawyer-to-lawyer communications. For these reasons, it is generally unwise to "cc" a client on email communications to opposing counsel.

[2] Advisory committees in other jurisdictions have reached the same conclusion. *See*, *e.g.*, Utah St. Bar Eth. Op. 15-02 (reviewing opinions from other jurisdictions concluding Rule 4.2 is violated by copying a represented person on correspondence or e-mail related to the subject of the representation); Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1 (in the absence of some law authorizing the communication, a lawyer cannot simultaneously send a letter or email to a represented person about the subject of the representation without the consent of the represented person's lawyer). These opinions are consistent with opinions issued by courts. *See*, *e.g.*, *In re Uttermohlen*, 768 N.E.2d 449 (Ind. 2002) (lawyer violated the no-contact rule by sending a letter to represented person with a copy to the person's lawyer without the lawyer's prior consent).

consent, for purposes of communication under Rule 4.2, must be express or may be implied.[3] The Rule itself provides no answer; however, the Restatement (Third) of the Law Governing Lawyers provides that a lawyer's consent to communication with the lawyer's client may be implied.

> 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 the Law Governing Lawyers §99 cmt. J (2000). Likewise, in CA Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181, the Committee found that the state's no-contact rule was silent on the matter, but that implied consent was recognized in other legal contexts and was suggested by two other California ethics opinions. It concluded that consent under that state's no-contact rule need not be express, but may be implied by the facts and circumstances surrounding the communication with the represented person. The Committee set out nine factors to be considered: (1) whether the communication is in the presence of the other lawyer; (2) prior course of conduct; (3) the nature of the matters; (4) how the communication is initiated and by whom; (5) the formality of the communication; (6) the extent to which the communication might interfere with the lawyer-client relationship; (7) whether there exists a common interest or joint defense privilege between the parties; (8) whether the other lawyer will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and (9) the instructions of the represented party's lawyer. *Id.* at 5-7.

Three bar advisory committees have addressed the question posed here. First, the North Carolina Bar considered whether consent to communication under that state's no-contact rule may be implied in the context of an email sent to opposing counsel by a lawyer who copied his own client. Noting that North Carolina's Rule 4.2[4] does not specify that consent must be expressly given, the Committee opined that consent may be implied under the totality of the 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

[3] This Committee has previously discussed whether consent may be implied for purposes of other Rules. *See, e.g.*, S.C. Bar Eth. Adv. Comm. Op. 92-35 (consent may be implied for purposes of Rule 1.6); S.C. Bar Eth. Adv. Comm. Op. 89-03 (same).

[4] North Carolina's Rule 4.2 is similar, but not identical to the South Carolina Rule. The primary difference is that the North Carolina Rule contains exceptions for when a lawyer, who is representing a client who has a dispute with a government agency or body, may communicate about the subject of the representation with the elected officials who have authority over the government agency or body and who are represented by counsel in the matter.

> with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2.

N.C. State Bar Formal Eth. Op. 2012-7 at 1 (emphasis added).

Also, in Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1 at 5-6, the Committee concluded that the state's no-contact rule allowed for implied consent for a "reply to all" email communication on which represented parties have been copied where the represented person's lawyer has taken some action manifesting her consent. While not attempting to provide an exhaustive list of factors, it noted that two important considerations are (1) how the group communication was initiated; and (2) whether the communication occurs in an adversarial setting. Finally, earlier this year, in Alaska Bar Ass'n Eth. Op. 2018-1, the Committee concluded that a lawyer who responds to an e-mail where the opposing lawyer has copied his client has a duty to obtain consent prior to copying the represented client on any responsive email by inquiring whether the opposing party should be included in a reply. That Committee recommended that lawyers cc clients only "regarding scheduling or other purely administrative matters." *Id.*

South Carolina's Rule 4.2 does not specify that consent must be express, leading to the conclusion that it may be implied. However, this Committee agrees with the North Carolina, Alaska, and New York City Bar Committees that, while consent may be implied, the mere fact that an attorney has copied his client on an email sent to opposing counsel does not, by itself, constitute implied consent to a response sent to both the opposing lawyer and the opposing client. 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. This Committee agrees with the other jurisdictions' reasoning that whether the matter is adversarial is an important factor. Additionally, if the email is about scheduling under circumstances where the client's availability is at issue along with counsel's; if email conversations among counsel and sophisticated clients together are the normal course of dealing; or if the lawyer who initially cc'd the client expressly invites a "reply all" response, then the receiving lawyer might reasonably understand that consent under Rule 4.2 is implied.