

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS  
NO. 23-01**

**I. Questions Presented**

May lawyers Carbon Copy (CC) or Blind Carbon Copy (BCC) their own client on an email to opposing counsel?

Does the receiving lawyer violate ethics rules by “replying all” to an email where opposing counsel has CC’d opposing counsel’s own client?

**II. Summary of Opinion**

Lawyers may not CC their client on an email to opposing counsel unless the client has given informed consent to the disclosure of their email address.

Lawyers may BCC their client on an email to opposing counsel, though the practice is not recommended.

Lawyers who CC their client on an email to opposing counsel have given implied consent for a receiving attorney to “reply all” in response to the communication.

**III. Statement of Facts**

A Nebraska lawyer has requested an advisory opinion regarding interpretation of the Nebraska Rules of Professional Conduct concerning the practice of carbon copying and blind carbon copying a client on an email to opposing counsel. Further, the lawyer has requested an opinion regarding whether a lawyer who purposely or inadvertently hits “reply all” to an email where the opposing party is carbon copied violates the Rules of Professional Conduct.

**IV. Applicable Rules of Professional Conduct**

**Neb. Ct. R. of Prof. Cond. § 3-504.2 Communications 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.

**Neb. Ct. R. of Prof. Cond. § 3-501.4(a)(3) Communications**

A lawyer shall: keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information...

**Neb. Ct. R. of Prof. Cond. § 3-501.6(a). Confidentiality of information.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)

#### V. Discussion

**Lawyers may not CC their client on an email to opposing counsel unless the client has given informed consent to the disclosure of their email address.**

Electronic communication is now a common, quick, and effective tool for lawyers either communicating with their clients or with other lawyers. Lawyers may be tempted to include their clients in communication with opposing counsel in an attempt to keep clients informed and up to date regarding the client’s matter; however, lawyers who CC their clients without the client’s informed consent have violated Neb. Ct. R. of Prof. Cond. § 3-501.6(a) by disclosing the client’s confidential information. As detailed by the Kentucky Bar Association, this information includes “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.”<sup>1</sup> The client’s email may also reveal personal information related to a client’s fictitious name or employer; revealing these details could “open avenues for investigation by opposing counsel that were previously unknown . . . .”<sup>2</sup>

**Lawyers may BCC their client on an email to opposing counsel, though the practice is not recommended.**

In addition to adding a client’s email address via CC, lawyers may alternatively BCC their client. This function keeps the client’s email address hidden from all recipients of the communication. This prevents the disclosure of the client’s confidential information; however, it is not the preferred practice.

Both a BCC and a CC recipient can hit “reply all” and directly respond to the original sender, the original recipient, and any CC recipients. This creates the potential for the client to inadvertently disclose confidential and privileged information to opposing counsel. The first comment to Neb. Ct. R. of Prof. Cond. § 3-504.2 states that the 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.**

Emphasis added. Both carbon and blind copying the client creates a foreseeable risk that the client will “reply all” to the email and inadvertently disclose confidential information directly to opposing counsel. Given the instantaneous nature of email and the constant pressure the modern lawyer is under to quickly read and respond to email, it is natural to assume that Lawyer B opens an email from Lawyer A’s client within moments of it being sent—potentially before Lawyer A is

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<sup>1</sup> Ky. Bar Ass’n. Ethics Op. KBA E-442 at 2

<sup>2</sup> PBA Formal Op. 2020-100 at 2

aware of the email being sent. If the client sent a physical letter to Lawyer B, Lawyer B has a much greater chance of realizing the sender is a represented party before reading the correspondence. The same is not true with email.

Lawyers are required to keep their client reasonably informed about their client's matter.<sup>3</sup> Enthusiastic compliance with this rule is encouraged; however, there are better methods of keeping the client informed than a CC or BCC. The preferred method is to forward correspondence to the client.

**Lawyers who CC their client on an email to opposing counsel have given implied consent for a receiving attorney to “reply all” in response to the communication.**

Neb. Ct. R. of Prof. Cond. § 3-504.2 allows lawyers to communicate with a known represented party regarding the subject of representation if the represented party's counsel has provided consent. Express consent is not required, and consent may instead be implied. Many jurisdictions addressing this issue have found that consent to a “reply all” is not implied when lawyers CC their client.<sup>4</sup> These jurisdictions hold, however, that consent can be implied by a variety of additional facts and circumstances. Some of these jurisdictions, in an attempt to clarify such facts and circumstances, state that a receiving lawyer can determine the existence of implied consent by looking at “(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.”<sup>5</sup> Still, as concluded by the American Bar Association, this view “muddies the interpretation” of Neb. Ct. R. of Prof. Cond. § 3-504.2 and makes it “difficult for receiving counsel to discern the proper course of action . . . .”<sup>6</sup> Alternatively, a presumption of implied consent makes sense in the context of modern-day electronic communication and fairly places the burden on lawyers who initiate electronic communication. And this presumption, as with any other, can be overcome by the introduction of additional evidence, which can be more easily identified than evidence relied upon in a “facts and circumstances” approach.

Electronic communication is a more informal, conversational mode of communication in comparison to the writing, mailing, and receiving of letters. Emails often inspire multiple, quick responses, these responses typically not receiving the same scrutiny as those in paper letters. These distinctions sharpen in the context of group emails, making these communications more comparable to conference calls or in-person meetings. The conversational tone of group emails makes the “reply all” function the convenient, and sometimes default, choice of replying in group exchanges. Receiving lawyers using “reply all” to respond to the initiating counsel's communication are replying directly to the message received, and “[t]he clients are mere bystanders to the group email conversation between the lawyers.”<sup>7</sup>

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<sup>3</sup> Neb. Ct. R. of Prof. Cond. § 3-501.4(a)(3)

<sup>4</sup> Wash. State Bar Ass'n Advisory Op. 202201 (2022); Il. State Bar Ass'n Op. No. 19-05 (2019); Alaska Bar Ass'n Ethics Op. No. 2018-1 (2018); S.C. Bar Ethics Advisory Op. 18-04 (2018); Ky. Bar Ass'n Ethics Opinion KBA E-442 (2017); N.C. Bar Formal Ethics Op. 2012-7 (2013); Cal. LEO 2011-181 (2011); N.Y.C. LEO 2009-1 (2009).

<sup>5</sup> N.C. State Bar Formal Eth. Op. 2012-7 at 1.

<sup>6</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 503 (2022)

<sup>7</sup> See ACPE Opinion 739 (2021) at 2.

Additionally, lawyers initiating electronic communications are in a far better position to prevent unlawful communication between their client and the receiving lawyer. Placing the burden on lawyers receiving electronic communication would put them in a state of uncertainty anytime they reply to an email with multiple recipients, as an email address may not include a client's name.<sup>8</sup> On the other hand, lawyers initiating messages can avoid unwanted communication by simply not including their client in the email sent to opposing counsel; lawyers can instead decide to separately forward these communications to their client. Otherwise, lawyers initiating communication should be fully aware that their CC invites a "reply all" response.

However, lawyers receiving emails which include an opposing counsel's client must still act carefully. This opinion does not sanction "reply all" responses which surpass the scope of the initial communication; lawyers initiating communications do not "authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email."<sup>9</sup> Additionally, lawyers initiating communications may explicitly notify opposing counsel that the inclusion of a client via CC does not grant consent to a "reply all" response; a lawyer can nullify the presumption of implied consent at any point, including at the outset of communications between the lawyers or at the specific point in time where a client is included in an initiating lawyer's email. So, while lawyers receiving an email from opposing counsel may be tempted to respond quickly, they must ensure they respond appropriately, both in scope and method, when opposing counsel includes their client.

Overall, a bright-line presumption in favor of implied consent is preferable to the uncertainty of a "facts and circumstances" approach applied elsewhere. Lawyers initiating communication with opposing counsel should be aware of the nature of electronic communication; these lawyers can then prevent any undesired disclosure or response by not including their client in the exchange. Further, this rule places clear limitations on a lawyer's ability to respond when an opposing counsel's client is included in an email or similar electronic communication.

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<sup>8</sup> *See id.* at 3

<sup>9</sup> Va. Legal Ethics Op. 1897 (2022).