Washington Defense Trial Lawyers *Defense News*
Fall 2022

"Reply All":
Washington Takes a More Cautious Approach than the ABA

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The ABA recently issued an ethics opinion—Formal Opinion 503 (2022)—addressing "reply all" emails in the context of the "no contact" rule, ABA Model Rule 4.2. The ABA concluded that a lawyer who copies a client on an email to opposing counsel impliedly consents to the receiving lawyer using "reply all" in response. The ABA opinion generated considerable notice in the legal media. Washington lawyers, however, should be wary about relying unreservedly on the ABA opinion because the WSBA also recently issued an opinion—Advisory Opinion 202201 (2022)—on the same topic that is considerably more cautious. In this article, we'll survey both.

The ABA Opinion

ABA Formal Opinion 503 notes that since email became the dominant form of communication between lawyers, "reply all" has raised a difficult question under the "no contact" rule: if the sending lawyer copied the sending lawyer's client, did that impliedly grant permission to the receiving lawyer to hit "reply all" when responding? The ABA opinion surveys authorities nationally on this topic—including Washington's recent opinion—and concedes that there are a variety of approaches on this point. The ABA opinion, however, opts for a bright line rule: as a general proposition, copying the client impliedly gives the receiver

permission to use "reply all." The ABA opinion reasons that as between the sender and the receiver, the onus should be on the sender to inform the receiver that no permission is implied.

ABA Formal Opinion 503 includes several practice recommendations and qualifiers. The principal practice recommendation is to forward copies of emails to clients rather than copy them directly to avoid the implied authority issue altogether. The primary qualifier is that the conclusion is limited to email and *not* paper mail because historically there was no implied consent with a paper letter.

The WSBA Opinion

WSBA Advisory Opinion 202201 takes a much more cautious approach. Unlike its ABA counterpart, the Washington opinion does *not* assume that simply because opposing counsel has copied their client that a receiving lawyer has implied permission to use "reply all" in response.

Rather, the Washington opinion suggests that the overall circumstances must be examined:

> Whether consent may be "implied" in a particular situation requires an 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 Lawyer B to Lawyer A's client might interfere with the client-lawyer relationship.

The Washington opinion also counsels that implied permission would be especially rare in litigation:

> Lawyers in adversarial matters should always avoid communicating with other lawyers' clients without express permission. Because of the contentious nature of adversarial proceedings, there is a greater risk that such communications could interfere with other lawyers' relationships with their clients and serve to harm those clients' interests. This is of special importance in criminal cases, and prosecutors should always seek express consent from defense counsel before knowingly cc'ing the defendant.

In sum, while not categorically ruling out that permission can be implied through, for example, a course of conduct, the Washington opinion is far more circumspect than its ABA counterpart. That caution is prudent. Ethics opinions are advisory only and do not necessarily bind either courts or regulatory agencies. The Washington Supreme Court in *In re Carmick*, 146 Wn.2d 582, 597, 48 P.3d 311 (2002), has emphasized that the purpose of the "no contact" rule "is to prevent situations in which a represented party is taken advantage of by adverse counsel." Washington is not an outlier in its measured approach, with, for example, Alaska Bar Ethics Opinion 2018-1 (2018) essentially taking the same tack. Regionally, lawyers have also been disciplined for using "reply all"—

with *In re Trigsted*, 32 D.B. Rptr. 208 (Or. 2018), a comparatively recent illustration from Oregon.

Summing Up

ABA Formal Opinion 503 offers prudent advice that lawyers are usually safer forwarding email traffic with opposing counsel to their clients rather than copying them directly. But, given the risks in this sensitive area, WSBA Advisory Opinion 202201 offers equally prudent advice that a receiving lawyer should not assume, without more, that a sender has impliedly granted permission for the receiving to use "reply all" if the sender copied their client on the original email.

ABOUT THE AUTHOR

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