LEGAL ETHICS OPINION 1897

Rule 4.2 - Replying all to an email when the opposing party is copied

QUESTION PRESENTED

The question presented is whether a lawyer who receives an email from opposing counsel, with the opposing party copied, violates Rule 4.2 if he replies all to the email, sending the response to both the sending lawyer and her client.

SHORT ANSWER

The committee concludes that the answer is no, Rule 4.2 is not violated. A lawyer who includes their client in the “to” or “cc” field of an email has given implied consent to a reply-all response by opposing counsel.

Applicable Rule of Professional Conduct

Rule 4.2 Communication With Persons 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 by law to do so.
ANALYSIS

Ethics opinions from a number of other jurisdictions\(^1\) have concluded that a lawyer copying his client does not on its own provide consent to communication by opposing counsel. While cautioning that it is best practice to blind copy all recipients or separately forward an email to the lawyer’s client, the opinions conclude that failing to follow that best practice does not provide consent under Rule 4.2 and that the receiving lawyer must review the list of recipients and remove the opposing party from his response. A recent opinion from New Jersey\(^2\) reaches the opposite conclusion, expressly rejecting the reasoning of those other jurisdictions to find that lawyers who include their clients in the “to” or “cc” field of a group email will be deemed to have provided informed consent to a reply-all response from opposing counsel. The committee believes that a bright-line rule is appropriate here, rather than a “totality of the circumstances” test used in the opinions of other states, for example North Carolina. Both lawyers who are trying to comply with the Rules while practicing law, and the disciplinary process that seeks to impose discipline on lawyers who do

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\(^2\) ACPE Opinion 739 (2021).
not comply with the Rules, benefit from an unambiguous answer to allow
lawyers to engage in the communications they are permitted to have while
making clear that there are certain communications that are off-limits.

As for what that bright-line rule should be, the committee agrees with
the analysis of the New Jersey opinion. By this point in its evolution, email
is not analogous to paper letters, and is often treated more like an ongoing
conversation than with the formality of written correspondence. The literal
mechanics of copying are an important difference as well – there is no
option to “reply all” to a written letter, without copying and separately
sending a response to each copied recipient. When email is used, the
committee believes that the onus should be on the sending lawyer to blind
copy all recipients, or separately forward the email to the client, if they do
not want a reply-all conversation. As the New Jersey opinion explains:

Email is an informal mode of communication. Group emails often
have a conversational element with frequent back-and-forth
responses. They are more similar to conference calls than to
written letters. When lawyers copy their own clients on group
e-mails to opposing counsel, all persons are aware that the
communication is between the lawyers. The clients are mere
bystanders to the group email conversation between the lawyers.
A “reply all” response by opposing counsel is principally directed
at the other lawyer, not at the lawyer’s client who happens to be
part of the email group. The goals that Rule of Professional
Conduct 4.2 are intended to further – protection of the client from
overreaching by opposing counsel and guarding the clients’ right
to advice from their own lawyer – are not implicated when
lawyers “reply all” to group emails.
The committee finds that this analysis of the text and purposes of Rule 4.2 provides appropriate guidance to lawyers and is consistent with the nature of email as opposed to paper communication. A lawyer who includes their client in the “to” or “cc” field of an email to opposing counsel has given implied consent under Rule 4.2 for opposing counsel to reply-all to the message.