

1 LEGAL ETHICS OPINION 1897

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

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5 QUESTION PRESENTED

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

10 SHORT ANSWER

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

15 Applicable Rule of Professional Conduct

16 Rule 4.2 Communication With Persons Represented By Counsel
17 In representing a client, a lawyer shall not communicate about
18 the subject of the representation with a person the lawyer knows
19 to be represented by another lawyer in the matter, unless the
20 lawyer has the consent of the other lawyer or is authorized by
21 law to do so.

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27 ANALYSIS

28 Ethics opinions from a number of other jurisdictions¹ have concluded
29 that a lawyer copying his client does not on its own provide consent to
30 communication by opposing counsel. While cautioning that it is best
31 practice to blind copy all recipients or separately forward an email to the
32 lawyer’s client, the opinions conclude that failing to follow that best practice
33 does not provide consent under Rule 4.2 and that the receiving lawyer
34 must review the list of recipients and remove the opposing party from his
35 response. A recent opinion from New Jersey² reaches the opposite
36 conclusion, expressly rejecting the reasoning of those other jurisdictions to
37 find that lawyers who include their clients in the “to” or “cc” field of a group
38 email will be deemed to have provided informed consent to a reply-all
39 response from opposing counsel. The committee believes that a bright-line
40 rule is appropriate here, rather than a “totality of the circumstances” test
41 used in the opinions of other states, for example North Carolina. Both
42 lawyers who are trying to comply with the Rules while practicing law, and
43 the disciplinary process that seeks to impose discipline on lawyers who do

¹ Illinois State Bar Association Opinion No. 19-05 (2019); Alaska Bar Association Ethics Opinion No. 2018-1 (2018); South Carolina Bar Ethics Advisory Opinion 18-04 (2018); Kentucky Bar Association Ethics Opinion KBA E-442 (2017); North Carolina Bar Formal Ethics Opinion 2012-7 (2013); California LEO 2011-181 (2011); New York City LEO 2009-1 (2009).

² ACPE Opinion 739 (2021).

44 not comply with the Rules, benefit from an unambiguous answer to allow
45 lawyers to engage in the communications they are permitted to have while
46 making clear that there are certain communications that are off-limits.

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

57 Email is an informal mode of communication. Group emails often
58 have a conversational element with frequent back-and-forth
59 responses. They are more similar to conference calls than to
60 written letters. When lawyers copy their own clients on group
61 emails to opposing counsel, all persons are aware that the
62 communication is between the lawyers. The clients are mere
63 bystanders to the group email conversation between the lawyers.
64 A “reply all” response by opposing counsel is principally directed
65 at the other lawyer, not at the lawyer’s client who happens to be
66 part of the email group. The goals that Rule of Professional
67 Conduct 4.2 are intended to further – protection of the client from
68 overreaching by opposing counsel and guarding the clients’ right
69 to advice from their own lawyer – are not implicated when
70 lawyers “reply all” to group emails.

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72 The committee finds that this analysis of the text and purposes
73 of Rule 4.2 provides appropriate guidance to lawyers and is
74 consistent with the nature of email as opposed to paper
75 communication. A lawyer who includes their client in the “to” or “cc”
76 field of an email to opposing counsel has given implied consent under
77 Rule 4.2 for opposing counsel to reply-all to the message.

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