



## **ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**

**Appointed by the Supreme Court of New Jersey**

### **ACPE OPINION 739**

#### **RPC 4.2 – Lawyers Who Include Clients on Group Emails and Opposing Lawyers Who “Reply All”**

The Advisory Committee on Professional Ethics received an inquiry from a lawyer who stated that when he sends email to opposing counsel, he often copies his client. He finds that opposing lawyers often “reply all” with a response that is then delivered directly to his client without his prior consent. Inquirer suggested that this violates Rule of Professional Conduct 4.2.

Lawyers who initiate a group email and find it convenient to include their client should not then be able to claim an ethics violation if opposing counsel uses a “reply all” response. “Reply all” in a group email should not be an ethics trap for the unwary or a “gotcha” moment for opposing counsel. The Committee finds that lawyers who include their clients in group emails are deemed to have impliedly consented to opposing counsel replying to the entire group, including the lawyer’s client.

Rule of Professional Conduct 4.2 provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter . . .

.” This Rule is intended to protect clients from possible overreaching by opposing counsel. ABA Model Rule of Professional Conduct 4.2 Comment 1.

There is no question that a lawyer who receives a letter from opposing counsel on which the sending lawyer’s client is copied may not, consistent with Rule of Professional Conduct 4.2, send a responding letter to both the lawyer and the lawyer’s client. In contrast, if a lawyer were to initiate a conference call with opposing counsel and include the client on the call, the lawyer would be deemed to have impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer’s client.

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 emails 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.<sup>1</sup> 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.

While there is no requirement that a lawyer use email or other forms of technology in professional communications,<sup>2</sup> when a lawyer voluntarily chooses to do so, that choice carries with it

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<sup>1</sup> Of course, if opposing counsel replies only to the other lawyer’s client, or if the substance of the lawyer’s group reply is directed to the other lawyer’s client and not to the other lawyer, the replying lawyer violates Rule of Professional Conduct 4.2. Further, the sending lawyer who includes the client on a group email can advise the client not to reply to any group communication when the group includes opposing counsel.

<sup>2</sup> See Administrative Determinations by the Supreme Court on the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions, p.4 (Apr. 14, 2016) (declining to

an assumption upon which others may rely that the lawyer is conversant with the customary usages of that technology, and thus intends the natural result of those usages. While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the "to" or "cc" field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread. If the lawyer merely wants the client to see a copy of the correspondence but does not want the client to receive subsequent emails from other lawyers, then use of the "bcc" field would accomplish that goal.<sup>3</sup>

Moreover, many emails have numerous recipients and it is not always clear that a represented client is among the names in the "to" and "cc" lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.

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adopt proposed comment to RPC 1.1 requiring a lawyer to "keep abreast of . . . benefits and risks associated with relevant technology" in order to "maintain requisite knowledge and skill.").

<sup>3</sup> The inquirer states that there are times he wishes to demonstrate to opposing counsel that he has copied his client but does not want to invite direct communication with the client as a result, *i.e.*, he wants a "one way street." We think however that if a lawyer wishes to engage in this somewhat atypical tactic, it is not unfair that he should bear the minimal burden of making it happen without using the email "cc" field that will likely lead to use of the "Reply All" function. The lawyer could simply manually type "cc: [client name]" in the text of the email message or in any attached letter, so that other counsel know the client has been copied but the client is not included in any "Reply All" communication. This alternative seems to us eminently more sensible and equitable than requiring all other lawyers in an email thread to search the email address fields and purge them of possible added client email addresses each time they add to the thread.

The Committee is aware that other jurisdictions have rejected the concept of implied consent to communications to represented parties in group emails and have decided that such conduct is a violation of Rule of Professional Conduct 4.2.<sup>4</sup> Many of these opinions caution the sending lawyer that it is inadvisable to include the client on the email, acknowledging that the sending lawyer may be “setting up” opposing counsel for an ethics violation. The Committee finds that these opinions from other jurisdictions do not fully appreciate the informal nature of group email or recognize the unfairness of exposing responding lawyers to ethical sanctions for this conduct.

Accordingly, the Committee finds that lawyers who include their clients in the “to” or “cc” line of a group email are deemed to have provided informed consent to a “reply all” response from opposing counsel that will be received by the client. If the sending lawyer does not want opposing counsel to reply to all, then the sending lawyer has the burden to take the extra step of separately forwarding the communication to the client or blind-copying the client on the communication so a reply does not directly reach the client.

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<sup>4</sup> See, e.g., Illinois State Bar Association Opinion No. 19-05 (October 2019); Alaska Bar Association Ethics Opinion No. 2018-1 (January 18, 2018); South Carolina Bar Ethics Advisory Opinion 18-04 (2018); Kentucky Bar Association Ethics Opinion KBA E-442 (November 17, 2017); North Carolina 2012 Formal Ethics Opinion 7 (October 25, 2013).