

# Bench & Bar

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## Ethical Practices in the Email Age: Rule of Professional Conduct 4.2 and 'Reply All' Emails

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As more and more legal communications are via email rather than carefully proof-read letters sent via the U.S. mail, new ethical minefields are being discovered. For example, the New Jersey Supreme Court's Advisory Committee on Professional Ethics recently opined on the intersection of ABA Model Rule of Professional Conduct 4.2<sup>1</sup> and the use of "Reply All" function in emails when your client and opposing counsel are both recipients<sup>2</sup>, coming to a different conclusion than the ISBA had in 2019.<sup>3</sup> This article will discuss the use of the "reply all" in emails and suggest best practices to use in light of competing ethical advisory opinions.

ABA Model Rule of Professional Conduct 4.2 states that: "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."<sup>4</sup> In ISBA Professional Conduct Advisory Opinion 19-05, it held that including a client in an email does not constitute consent to allow communication by opposing counsel and that under a contrary holding "the purposes of Rule 4.2 could be thwarted."<sup>5</sup> In the case of receipt of an email where opposing counsel's client is

copied, the *receiving* attorney "must make a good faith determination" as to whether consent has been granted.<sup>6</sup> "The easiest and most direct way to determine whether the receiving lawyer can ethically 'reply all' is to ask the sending lawyer."<sup>7</sup> ISBA Op. 19-50 concludes that: "the better practice is for the lawyer to avoid sending a cc to that client. At the same time, and for the reasons stated above, a recipient attorney violates Rule 4.2 if he or she, having received an e-mail with such a cc and knowing the person cc'd to be a represented party, includes that party in an e-mailed reply in the absence of some form of consent from the sending lawyer."<sup>8</sup>

New Jersey's EO 739 rejects this reasoning and holds that a lawyer who includes his/her client in an email chain impliedly consents to his/her client receiving any replies directly from opposing counsel, stating:

"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>9</sup>

The New Jersey Advisory Committee analogized this to a conference call in which the attorney, his/her client and opposing counsel are all participating. In such a case, the attorney has "impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer's client."<sup>10</sup>

**Suggested Best Practices:** While NJ EO 739 is, currently, the minority view<sup>11</sup>, the ethical opinions raised show that including your client on an email with opposing counsel is fraught with peril. We agree with ISBA Op 19-50 that the best practice is still to *not* include your client in emails with opposing counsel (even using the "bcc" field) and, instead, send you client a separate email.<sup>12</sup> That way, the inadvertent use of "reply all" will not disclose any confidences or unintentionally place opposing counsel in a potential trick bag. ■

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1. All fifty states have adopted ABA Model Rule of Professional Conduct 4.2. Illinois adopted it with no variation, and New Jersey's version has a minor variation. [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_4\\_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.pdf) (last visited August 9, 2021).
2. New Jersey Supreme Court's Advisory Committee on Professional Ethics Opinion 739 (March 10, 2021) <https://www.njcourts.gov/notices/2021/n210316a.pdf> (last visited August 9, 2021) (hereinafter "NJ EO 739").
3. ISBA Professional Conduct Advisory Opinion 19-05 (October 2019) <https://www.isba.org/sites/default/files/ethicsopinions/04-02.pdf> (last visited August 9, 2021) (hereinafter "ISBA Op. 19-50").
4. Illinois Rule of Professional Conduct 4.2 <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/57e0877f-9cce-4d8c-81e7-609467a91686/RULE%204.2.pdf> (last visited August 9, 2021).
5. ISBA Op. 19-50, *supra*, at 2.
6. ISBA Op. 19-50, *supra*, at 3, quoting North Carolina State Bar, Formal Ethics Opinion 2012-7 (October 25, 2013) <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/> (last visited August 9, 2021).
7. ISBA Op. 19-50, *supra*, at p. 3, quoting Alaska Bar Association, Ethics Opinion 2018-1, (January 18, 2018) <https://alaskabar.org/wp-content/uploads/2018-1.pdf> (last visited August 9, 2021).

8. ISBA Op. 19-50, *supra*, at 3.
9. NJ EO 739, *supra*, at 3 [footnote omitted].
10. NJ EO 739, *supra*, at 2.
11. See, e.g., Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal 2020-100 (January 22, 2020) [https://www.dcba-pa.org/userfiles/files/events/brochures/820\\_1.pdf?mc\\_cid=0b5b440cff&mc\\_eid=c473764433](https://www.dcba-pa.org/userfiles/files/events/brochures/820_1.pdf?mc_cid=0b5b440cff&mc_eid=c473764433) (last visited August 9, 2021); ISBA Op. No. 19-05, fn. 2, *supra*; Alaska Bar Association Ethics Opinion No. 2018-1 (January 18, 2018), *supra*; South Carolina Bar Ethics Advisory Opinion 18-04 (2018) [https://www.scbare.org/media/filer\\_public/f6/59/f65974b8-7721-45ab-96e3-c1ba881a2e5c/18-04.pdf](https://www.scbare.org/media/filer_public/f6/59/f65974b8-7721-45ab-96e3-c1ba881a2e5c/18-04.pdf) (last visited August 9, 2021); Kentucky Bar Association Ethics Opinion KBA E-442 (November 17, 2017) [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics\\_opinions\\_\(part\\_2\)/KBA\\_E-442.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions_(part_2)/KBA_E-442.pdf) (last visited August 9, 2021); New York State Bar Association Ethics Opinion 1076 (December 8, 2015) <https://nysba.org/ethics-opinion-1076/> (last visited August 9, 2021); North Carolina State Bar 2012 Formal Ethics Opinion 7 (October 25, 2013), *supra*; New York City Bar Association Formal Opinion 2009-01 (January, 2, 2009) [https://www2.nycbar.org/pdf/report/uploads/20071674-Formal\\_Opinion\\_2009-1\\_No-contact\\_Rule\\_and\\_Communications\\_Sent\\_Simultaneously\\_to\\_Represented\\_Persons\\_and\\_Their\\_Lawyers.pdf](https://www2.nycbar.org/pdf/report/uploads/20071674-Formal_Opinion_2009-1_No-contact_Rule_and_Communications_Sent_Simultaneously_to_Represented_Persons_and_Their_Lawyers.pdf) (last visited August 9, 2021).
12. ISBA Op. 19-50, *supra*, at 3. See also, J D Supra, *New Jersey Issues Guidance to Attorneys Regarding 'Reply All' Emails* (March 23, 2021) ("Regardless of what state an attorney is practicing in, they should pay particular attention to who is copied on any email they receive before responding to all, and if there are any doubts about whether there is consent to reply to all email recipients, attorneys should check with opposing counsel to be sure. Best practices also suggest that attorneys should avoid copying their clients

on emails they send to opposing counsel so as not to imply consent for opposing counsel to communicate with the client. Any email sent to opposing counsel can just as easily be forwarded to a client.") <https://www.jdsupra.com/legalnews/new-jersey-issues-guidance-to-attorneys-6366355/> (last visited August 9, 2021); Michael Kennedy, *NJ Committee concludes that a lawyer who copies a client on an email to opposing counsel impliedly consents to "reply-all."* (March 26, 2021) ("I'm not as concerned that the receiving lawyer might reply-all as I am that the sending lawyer puts their client at risk of doing the same, thereby disclosing confidential information to opposing counsel. Thus, to me, the lawyer who copies a client on certain emails to opposing counsel risks running afoul of Rule 1.1 (competence) and Rule 1.6 (confidentiality).") <https://vtbarcounsel.wordpress.com/2021/03/26/nj-committee-concludes-that-a-lawyer-who-copies-a-client-on-an-email-to-opposing-counsel-implicitly-consents-to-reply-all/> (last visited August 9, 2021).