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"Reply All" Redux: Does ABA Formal Opinion 503 Elevate Lawyers' Interests above the Client's?

ABA Formal Opinion 503 undermines Rule 4.2's intended purpose of protecting non-lawyers, while affording minimal, if any, corresponding benefit.

By Daniel Harrington

Formal Opinion 503 of the ABA Standing Committee on Ethics and Professional Responsibility, issued November 2, 2022, concludes that lawyers who copy or "cc" their clients on emails to opposing counsel impliedly consent to opposing counsel communicating with their client by hitting "reply all" when responding. Opinion 503 relies heavily on the reasoning of New Jersey Advisory Committee on Professional Ethics Opinion 739 that was issued in March 2021.

Prior to the issuance of the New Jersey opinion in 2021, all of the ethics opinions that addressed this subject had adopted a "totality of the circumstances" approach in assessing whether lawyers waived their clients' protection against direct contact from opposing counsel under ABA Model Rule 4.2 by "cc'ing" their clients on emails to opposing counsel. See the previously published article on the New Jersey Opinion, "Conversation vs. Correspondence: New Jersey Ethics Opinion Goes its Own Way on 'Implied Consent'."

Rule 4.2 Protections Are Lost by Copying the Client

In lieu of considering all of the potentially relevant circumstances in which an email might be sent and received, ABA Opinion 503 mirrors the New Jersey opinion in concluding that the sole determinant of whether a sending lawyer's client will lose the protections otherwise afforded under Rule 4.2 is whether the sending lawyer "cc'd" their client on the email to opposing counsel. A theme that pervades Opinion 503 and the state and local bar ethics opinions it follows is that the imposition of "implied consent" to direct communication between opposing counsel and a sending lawyer's client is an appropriate penalty for the poor judgment of lawyers who directly copy their clients on emails to opposing counsel—whether by accident or on purpose. Those lawyers are deemed to bring

upon themselves and, unfortunately, their clients, the loss of the client protections afforded under Rule 4.2. This reasoning is akin to an assertion that a victim of a mugging shares blame for their misfortune because they chose to walk alone down a deserted alley. In this case, however, the consequences have the potential to adversely affect the sending lawyer's client as much as, if not more than, the lawyer.

Lawyers May Benefit More Than Clients

Adoption of this expansive exception to Rule 4.2 appears to gut the rule's intended purpose of protecting non-lawyers, while affording minimal, if any, corresponding benefit. In doing so, it undermines the comments to Rule 4.2 as well. As described in Opinion 503, any such benefit runs exclusively to lawyers, not clients. Indeed, the opinion professes to establish a "brighter and fairer line *for lawyers*" (emphasis added).

There is no question that a lawyer who chooses to copy their client on an email affords opposing counsel an opportunity and, under Opinion 503, an excuse and possibly an invitation, to include the represented client on any response. However, opposing counsel is under no compulsion to knowingly include the opposing party in his or her reply. And, "knowingly" is the watchword. If a lawyer receives an email and does not know who one or more of the "cc'd" addressees are, there is no reason to "reply all" and include them. Moreover, if the lawyer unwittingly includes an opposing lawyer's client on the reply by "replying all", there is no violation of Rule 4.2, which only prohibits "knowingly" communicating with represented parties.

Thus, the burden upon a lawyer to refrain from knowingly including opposing, represented parties in a "reply all" response is featherlight. Whether eliminating the client protection afforded by Rule 4.2 is a fair trade for relieving lawyers of that burden seems dubious at best.

Know the Rule Where You Practice

Finally, while purportedly seeking to avoid muddying the interpretation of Rule 4.2 by adopting a broad implied exception to the rule, Opinion 503, like its New Jersey forebear, then cautions lawyers who might avail themselves of this newfound exception to the "no contact" rule that the exception is, itself, subject to amorphous, implied restrictions on the "topics" that fall within the permissible scope of the lawyer's response to the represented party.

Thus, rather than eliminating ambiguity, Opinion 503 serves merely to move the line of scrimmage, so to speak. Under Opinion 503, lawyers who make an effort to avoid including

represented parties in their email replies will not need to concern themselves about the scope of permissible "topics" in those replies.

Only time will tell whether those states who have issued contradictory opinions will reverse course or if those who have not issued an opinion on this topic will follow the ABA. Given the split in opinions, the wise lawyer will, of course, know and follow the interpretation of Rule 4.2 in the jurisdictions where they practice.

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