# Ethics & Professionalism

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# Conversation vs. Correspondence: New Jersey Ethics Opinion Goes Its Own Way on "Implied Consent"

## A new ethics opinion from New Jersey turns the concept of "implied consent" under ABA Model Rule 4.2 on its head.

By Daniel Harrington

## The March 10, 2021 Ethics Opinion from New Jersey

A recent opinion from the New Jersey Advisory Committee on Professional Ethics, Opinion 739, concludes that "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." In relieving the recipient lawyer of the responsibility to assess whether a "reply all" includes adverse, represented parties, which would potentially violate ABA Model Rule 4.2, (the "no contact" rule), the New Jersey opinion expresses concern over "gotcha" moments and "ethics traps" between lawyers.

The committee worries over the "burden" of requiring lawyers in an email thread "to search the email address field and purge them of possible added client email addresses each time they add to the thread," adding that "it is not always clear that a represented client is among the names in the 'To' and 'cc' lines." This reasoning ignores the language of Rule 4.2 that only prohibits "knowingly" communicating with a represented party—inadvertent communications with a represented party would not violate the rule.

The "predicament" of a lawyer potentially not knowing who they are responding to also begs the question: Why include somebody on a responsive email if you do not know who they are? Lawyers who indiscriminately "reply all" to emails, including other lawyers' emails, could also risk violating confidentiality agreements that have "attorney's eyes only" or similar restrictions. To "think like a lawyer" requires thought—and that includes taking the time to know who you are emailing before pressing "send." It is not a predicament or burden to do so.

Apart from its focus on the alleged "unfairness of exposing responding lawyers to ethical sanctions" for not bothering to investigate who is included on their email messages, the New Jersey opinion justifies its position by noting the difference between oral conversations and written correspondence. It concludes, with little explanation or support, that emails are "more similar to conference calls than to written letters."

In doing so, it ignores the key distinction between email and conference calls or meetings, that is, that the lawyer, the client, and the opposing counsel are all present during an in-person meeting or telephone call. In those situations, "implied consent" is not a question—the lawyer is allowing their client to be present when opposing counsel is speaking, and if opposing counsel says something provocative that prompts the client to respond, the lawyer is there to intercede.

Email, on the other hand, is sent and received at all hours of the day and night, every day of the week. If a lawyer "cc's" the client on an email to opposing counsel, it is unlikely that they will be watching in real time if opposing counsel "replies all" and communicates directly with the client. Similarly, if the client is "cc'd" or "bcc'd" on an email to opposing counsel, the guardrail against ill-advised client responses—the lawyer's presence—does not exist.

## The Contrary View

The New Jersey opinion is the only published ethics opinion to conclude that simply copying ("cc'ing") a client on an email is sufficient to establish the implied consent necessary for the opposing counsel to directly communicate with the client—a represented party. Among the many ethics opinions that hold otherwise are those from Pennsylvania, Illinois, Alaska, Kentucky, South Carolina, North Carolina, and New York City.

These opinions have largely coalesced around a non-exclusive four-factor test to evaluate whether and when such consent may be implied. Those factors are:

1. how the communication is initiated;
2. the nature of the matter (transactional or adversarial);
3. the prior course of conduct of the lawyers and their clients; and
4. the extent to which the communication might interfere with the client-lawyer relationship.

Prior to the New Jersey opinion, it was universally agreed that "cc'ing" the client on an email to opposing counsel should be avoided altogether, particularly in a contentious matter. Doing so not only invites opposing counsel to include the client in a reply, but it also creates a danger that the client may inadvertently or impulsively "reply all" and reveal

confidential and potentially damaging information to opposing counsel. In some instances, the identity of the client contact and their email address may be considered confidential information that should not be shared with the opponent. Whether the practice of copying the client on emails to opposing counsel gives rise to potential violations of ABA Model Rule 1.6 (confidentiality) or Rule 1.1 (competence) is open to debate, but it cannot be denied that copying the client presents unnecessary risks that are easy to avoid.

Blind copying ("bcc'ing") the client on emails to opposing counsel is not significantly better than openly copying them. While a "bcc" does not directly invite a communication to the client from opposing counsel or expose the client's email address, it is still setting the stage for the client to make damaging or privileged revelations to opposing counsel in a "reply all" message.

## Email Communication: Formal, Informal, or Both?

The New Jersey opinion acknowledges some—but not all—of the contrary opinions and the cautions that they include, but it discounts them as not fully appreciating "the informal nature of group email." In doing so, it ignores the fact that for the past year, professional communications between lawyers, both informal and formal, largely took place via email. Coming on the heels of a year of remote working, this declaration that email is "informal in nature" seems out-of-step and misinformed.

In addition to its reliance on the "informality" of email communication in the practice of law, the New Jersey opinion also defends its conclusion by observing that "group emails often have a conversational element with frequent back-and-forth responses."

Finally, despite the professed concern over "ethics traps", the New Jersey opinion sets its own trap for lawyers who choose to rely on its guidance. It does so by stating that "if the substance of the lawyers' 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." Thus, the opinion replaces one "trap" with another: It is not hard to envision future grievances in which disciplinary authorities and hearing panels are required to parse lawyers' "reply all" emails to determine whether the "substance" of the reply was directed to opposing counsel or to the opposing party.

Whether the New Jersey opinion will ultimately influence a change in the application or meaning of the "no contact" rule across the country is unknown; what we do know is that the best way to make sure that the client is receiving every email to opposing counsel and avoid any direct email from opposing counsel to the client is to leave the client off the original email entirely and then forward the sent email to the client. On the other hand, lawyers on the receiving end of an email from an opposing counsel who have copied their

own client should not "reply all" and include the opposing party on the reply unless they have express permission from opposing counsel to do so. In most situations, it would be unprofessional at best and an ethics violation at worst and can easily be avoided no matter where you are practicing.

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