Q&A

LAWYER LIABILITY AND ETHICS

"Reply All," Ethics, and You

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Among the many problems created by the information technology revolution that has taken place in the last twenty-five years, the "Reply All" button must be one of the biggest troublemakers. How ironic and unfair that your wittiest comments probably have no business reaching a wide audience and yet we have developed a way to make that happen in an instant.

The "Reply All" button also presents potential ethical concerns for lawyers. We have all probably received an e-mail from a lawyer in which the lawyer has copied their client on that e-mail. ER 4.2 prohibits a lawyer from communicating with a party that the lawyer knows to be represented. This raises the question: does the lawyer copying his client on the e-mail sent to you (or any other lawyer) constitute consent for a replying lawyer to e-mail the client of the sending lawyer? Or, to put it in practical terms, can you respond by hitting "Reply All," thereby sending a communication to the client represented by the e-mail's sender?

The answer, as a general matter, is no. The purpose of ER 4.2 is to protect a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation. It is foreseeable that, if you "Reply All," the client will read the reply e-mail before his lawyer does—and make an uncounseled response. That would undermine the role of the represented person's lawyer as spokesperson, intermediary, and buffer, thereby thwarting the purposes of ER 4.2.

Every bar association to address the issue prohibits the receiving lawyer from replying all to include the represented party. Arizona has not squarely addressed this issue in the context of e-mail, but Ethical Opinion 02-02 does state that a lawyer should not send copies of documents to a represented person, even if the copies are sent to opposing counsel.

What about the lawyer who copied their client on the e-mail in the first place? That lawyer may not have waived the prohibition on the other lawyers contacting their client, but that is hardly the only issue. By including the client's e-mail in the "cc" of electronic communication, the lawyer is risking violating Rule 1.6 (a) and Rule 4.2 in the ongoing electronic communications or "conversation." E-mail addresses often do not obviously indicate the identity of the person behind the address. A lawyer who "replies all" may therefore be unaware that the "cc" includes a represented party. So too, e-mails can often include a long list of "cc'd" recipients, once again making it difficult to discern if a represented party has been included in that list. Inadvertent communications with represented parties can easily occur even with reasonable care exercised by the recipient of the e-mail. Inclusion in the e-mail exchange may also signal to a client that their participation in the exchange is invited or a good idea. Rarely are either true.

What about blind copying the client? Just as with a "cc," a client who receives an e-mail as a "bcc" may "Reply All" and inadvertently communicate directly with opposing counsel. At least one court has found that blind copying a client gave rise to a foreseeable risk that the client would respond to all recipients. (Charm v. Kohn, 2010 WL 3816716 [Mass. Super. Sept. 30, 2010]).

Fortunately, the solution here is easy. Lawyers should generally refrain from copying clients on e-mails with other lawyers, unless the lawyers have conferred and agreed to a protocol regarding such communications. You can always forward e-mails to the client to keep them apprised of the conversation. The "Reply All" button will remain a menace, but at least it will not get you sideways with the state bar. ■

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