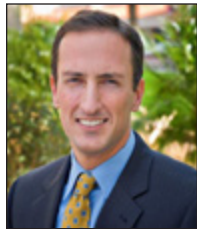


# Q&A

## LAWYER LIABILITY AND ETHICS



### “Reply All” — Part 2



Joseph Brophy

Last year, this column discussed the potential ethical concerns raised by responding “reply all” to emails where opposing counsel has copied their client (a represented party), but has not given permission for the replying lawyer to communicate with that client. Until recently, every bar association to address the issue prohibits the receiving lawyer from replying all to include the represented party. The reasoning underlying these opinions is that ER 4.2 protects a person who has chosen to be represented by a lawyer in a matter against (1) possible overreaching by other lawyers who are participating in the matter; (2) interference by those lawyers with the client-lawyer relationship; and (3) the uncounseled disclosure of information relating to the representation. According to this majority rule, 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.

Well, the Garden State has decided to go its own way regarding this matter. In Opinion 739, New Jersey’s Advisory Committee on

Professional Ethics opined 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. According to the Committee, reply all in a group email should not be an ethics trap for the unwary or a gotcha moment for opposing counsel.

The Committee made a distinction between emails and letters, reaffirming the long-held rule that a lawyer who receives a letter from opposing counsel on which the sending lawyer’s client is copied may not, consistent with ER 4.2, send a responding letter to both the lawyer and the lawyer’s client. In contrast, the Committee asserted that copying a client on an email was similar to a lawyer initiating a conference call with opposing counsel and including their client on the call, in which case the initiating lawyer would be deemed to have impliedly consented to opposing counsel speaking on the call and thereby communicating with both the opposing lawyer and the lawyer’s client.

The opinion explained that email is an informal mode of communication, and group emails have a conversational element with frequent back and forth responses. The Commit-

tee believed that 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. The goals that ER 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.

The Committee acknowledged that Opinion 739 is an outlier nationally. But the Committee found that the opinions finding that responding reply all was a potential ethical violation did not fully appreciate the informal nature of group email or sufficiently recognize the unfairness of allowing the sending lawyer

to expose the responding lawyer to ethical sanctions for responding “reply all.” Those New Jersey lawyers sure are a cynical bunch to suggest that a lawyer would attempt to set up opposing counsel for an ethical violation. Arizona lawyers are obviously above such petty gamesmanship.

Arizona has not squarely addressed this issue in the context of e-mail, but Ethics Advisory Opinion 02-03 does state that a lawyer should not send copies of documents to a represented person, even if the copies are sent to opposing counsel. Now that New Jersey has created a split of authority on the matter, the question remains even more open than it was before. ■

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### Join the Maricopa County Bar Association Board of Directors

*Make a difference in the Maricopa County legal community and help guide the Maricopa County Bar Association into the future by joining the MCBA Board of Directors, which oversees the management of the Association.*

The MCBA is inviting members to declare their candidacy for five available seats on the Board of Directors for 2022-2023. Those with terms ending in 2021 are: Josephine Giordano, Beach Fleischman; Cary Lackey, Maricopa County Office of the Public Advocate; Colin Proksel, Osborn Maledon; Stanley Silas, Community Legal Services; Comm. Melissa Zabor, Maricopa County Superior Court. (These board members may run for re-election.)

Board members attend monthly meetings, liaise with one or more MCBA sections, divisions, or committees, and support the work of the association. They are expected to make every effort to attend MCBA events and assist with fundraising and member recruitment.

Candidates must be active members in good standing with the MCBA. Candidates are asked to submit a formal letter of candidacy to the board of directors, with the candidate’s signature, a 200-word bio, and a high-resolution color photo. Resumes or CVs are not acceptable. The bio may include an optional position statement of the candidate’s vision and priorities for the MCBA. Position statements and any other campaign or election materials may not refer to other candidates or include defamatory or inappropriate language, as determined by an ad hoc election review committee appointed by the president of the association.

**Send election materials to MCBA Executive Director Beth Sheehan either by email: [bsheehan@maricopabar.org](mailto:bsheehan@maricopabar.org); or postal mail: MCBA, 3030 N. 3rd Street, Suite 1260, Phoenix, AZ 85012 no later than 5 p.m., September 15, 2021.**

*An electronic election will be provided to members on November 1, 2021. For complete election information, go to [maricopabar.org](http://maricopabar.org) for a copy of our by-laws on the Board of Directors webpage.*

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