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RPC 4.2 and the "Reply All" Conundrum

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The "no contact" rule—RPC 4.2—has been around for a long time. Reflecting the timeless concern over opposing counsel directly contacting a lawyer's client, the prohibition was included as Canon 9 in the original set of ABA Canons of Professional Ethics adopted in 1908. Although the wording of the prohibition has changed over time, the gist has not as forms of communication have evolved.

A particularly difficult area in recent years is "reply all" emails. If a lawyer copies their client on an email to, among others, opposing counsel, and then opposing counsel hits "reply all" when responding, a prohibited communication technically results. Moreover, no harm needs to be shown to find a violation of the rule. The Oregon Supreme Court put it this way in *In re Hedrick*, 312 Or. 442, 449, 822 P.2d 1187 (1991), when describing the current rule's similar predecessor, DR 7-104(A)(1), as "categorical" in a case involving a lawyer who copied an opposing party on a letter to opposing counsel:

> [C]ommunication in the manner covered by the rule is forbidden, period. A lawyer is not permitted to ignore the plain words of the rule and then escape responsibility for violating it because no harm was caused, or because counsel for the party receiving the communication was alerted that it had been made.

Although *Hedrick* involved a paper letter, many more recent cases following in its wake have applied the same approach to emails (*see, e.g., In re*

Towne, 36 DB Rptr. 12, 13, (Or. 2022); *In re Trigsted*, 32 DB Rptr. 208, 209 (Or. 2018)). In late 2022, the ABA issued an ethics opinion—Formal Opinion 503—that addressed "reply all" in the context of ABA Model Rule 4.2. The ABA concluded—with some qualifications—that a lawyer who copies their client on an email impliedly grants permission to opposing counsel to use "reply all." In this column, we'll first survey the ABA opinion and what other regional jurisdictions have done in this regard. We'll then discuss why—pending clarification from the Oregon Supreme Court—Oregon lawyers should be wary about hitting "reply all" in those circumstances.

The ABA Opinion

ABA Formal Opinion 503 is grounded on three central points. First, ABA Model Rule 4.2 allows direct contact with a represented person when that person's lawyer has given consent. Second, the opinion reasons that the sending lawyer is in the best position to control whether to inject their client directly into the email by deciding whether to "cc" the client on the email. Third, it posits that email is inherently less formal than paper letters and encourages what amounts to group communication. It concludes, therefore, that a sending lawyer who copies their client has impliedly consented to opposing counsel using "reply all" in response.

ABA Formal Opinion 503 tempers this position by noting that a sending lawyer can tell opposing counsel that permission is not granted. The opinion also concludes that its analysis is not applicable to more formal paper communications. The ABA opinion also acknowledges that some jurisdictions that have addressed the issue have reached differing conclusions. Washington, for example, opted for a much more nuanced approach in WSBA Advisory Opinion 202201 (2022)—concluding that permission might be implied if a variety of circumstances were present but simply copying a client on an email would not. Alaska Bar Ethics Opinion 2018-1 (2018) found that a receiving lawyer had a duty to ask the sender for permission.

Oregon

As the cases cited earlier illustrate, Oregon does not write on a blank slate.

In *Hedrick*, the Oregon Supreme Court articulated a clear prohibition in the context of paper letters. Although *Hedrick* did not squarely address implied consent, other Oregon disciplinary cases have come close—and found the lawyers violated RPC 4.2. The *Trigsted* case noted earlier, for example, involved a series of emails initiated by a sending lawyer who copied his clients and at least one email in which the responding lawyer used "reply all." Following a later

demand letter (and a request by the sending lawyer that all communications be directed to him), the responding lawyer again used "reply all." That led to a bar complaint—and discipline under RPC 4.2. *In re Luby*, 33 DB Rptr. 71 (Or. 2019) also involved a series of emails copying all before a bar complaint and discipline under RPC 4.2 followed. Although *Trigsted* and *Luby* were stipulated resolutions, they suggest the approach traditionally followed by the Disciplinary Counsel.

Three other points underscore the wariness of relying unreservedly on the ABA opinion. First, while the ABA opinion distinguished emails from paper letters, Oregon RPC 1.0(q) defines "writing" broadly to include both paper and electronic communications. Second, Oregon's rule is similar to, but slightly different than, its ABA Model Rule counterpart and prefaces the word "consent" with the somewhat more emphatic term "prior." Third, in light of *Hedrick*, clear guidance on this issue will likely need to come directly from the Oregon Supreme Court. Under Oregon RPC 8.6, even an ethics opinion issued by the OSB would be advisory only and would not be binding on either the Disciplinary Counsel or the Supreme Court.

Although the ABA opinion may be grist for a future test case, it does not provide much comfort in Oregon now.

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