VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday, the 19th day of September 2022.

On July 7, 2022, came the Virginia State Bar, by Stephanie E. Grana, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1897.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1897 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1897. RULE 4.2 - REPLYING ALL TO AN EMAIL WHEN THE OPPOSING PARTY IS COPIED

QUESTION PRESENTED

The question presented is whether a lawyer who receives an email from opposing counsel, with the opposing party copied, violates Rule 4.2 if he replies all to the email, sending the response to both the sending lawyer and her client.

SHORT ANSWER

The committee concludes that the answer is no, Rule 4.2 is not violated. A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel.

Applicable Rule of Professional Conduct

> Rule 4.2. Communication With Persons Represented By Counsel. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

ANALYSIS

Ethics opinions from a number of other jurisdictions[1] have concluded that a lawyer copying his client does not always provide consent to communication by opposing counsel. While cautioning that it is best practice to blind copy all recipients or separately forward an email to the lawyer's client, the opinions conclude that failing to follow that best practice does not provide consent under Rule 4.2 and that the receiving lawyer must review the list of recipients and remove the opposing party from his response. A recent opinion from New Jersey[2] reaches the opposite conclusion, expressly rejecting the reasoning of those other jurisdictions to find that lawyers who include their clients in the "to" or "cc" field of a group email will be deemed to have provided implied consent to a reply-all response from opposing counsel. The committee believes that a bright-line rule is appropriate here, rather than a "totality of the circumstances" test used in the opinions of other states, for example North Carolina and Washington. Both lawyers who are trying to comply with the Rules while practicing law, and the disciplinary process that seeks to impose discipline on lawyers who do not comply with the Rules, benefit from an unambiguous answer to allow lawyers to engage in the communications they are permitted to have while making clear that there are certain communications that are off-limits.

[1] Washington State Bar Association Advisory Opinion 202201 (2022); Illinois State Bar Association Opinion No. 19-05 (2019); Alaska Bar Association Ethics Opinion No. 2018-1 (2018); South Carolina Bar Ethics Advisory Opinion 18-04 (2018); Kentucky Bar Association Ethics Opinion KBA E-442 (2017); North Carolina Bar Formal Ethics Opinion 2012-7 (2013); California LEO 2011-181 (2011); New York City LEO 2009-1 (2009).

[2] ACPE Opinion 739 (2021).

As for what that bright-line rule should be, the committee agrees with the analysis of the New Jersey opinion. By this point in its evolution, email is not analogous to paper letters, and is often treated more like an ongoing conversation than with the formality of written correspondence. The literal mechanics of copying are an important difference as well – there is no option to "reply all" to a written letter, without copying and separately sending a response to each copied recipient. When email is used, the committee believes that the onus should be on the sending lawyer to blind copy all recipients, or separately forward the email to the client, if they do not want a reply-all conversation. As the New Jersey opinion explains:

> Email is an informal mode of communication. Group emails often have a conversational element with frequent back-and-forth responses. They are more similar to conference calls than to written letters. 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.
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> 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 Rule of Professional Conduct 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 finds that this analysis of the text and purposes of Rule 4.2 provides appropriate guidance to lawyers and is consistent with the nature of email as opposed to paper communication. A lawyer who includes their client in the "to" or "cc" field of an email to opposing counsel has given implied consent under Rule 4.2 for opposing counsel to reply-all to the message. The reply must not exceed the scope of the email to which the lawyer is responding, however, as the sending lawyer's choice to use "cc" does not

authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email.

The committee reiterates that the lawyer sending an email should control the recipients and who may respond by using "bcc" for all recipients, or separately forwarding the email to the lawyer's client. Including or copying the lawyer's client risks not only that the opposing lawyer, or another recipient of the email, will respond directly to the lawyer's client, but also that the lawyer's client will respond in a way that the lawyer would not advise or desire. All of these issues can be prevented by appropriately limiting the recipients. Lawyers should note further that merely blind copying their own client, while including other recipients in the "to" field, will not fully prevent these issues; a blind copied client may still be able to reply all to everyone who was in the "to" field of the original email. All recipients must be blind copied to avoid the risk of a reply all response.

A Copy,

Teste:

Clerk