



CHRISTOPHER B. HOPKINS

The Misguided Practice of CC'ing Clients on Emails to Opposing Counsel

A mundane litigation case is silent for months until opposing counsel fires off an out-of-character email extolling the strength of his case, the virtue of his client, and the futility of your counter arguments. Why such vitriol? Nestled in the email header is the answer: an odd Hotmail.com address was cc'ed. Opposing counsel had copied *and was grandstanding for* the client. Practitioners be warned! At least six different bars have concluded this practice is risky, if not unethical. Worse, lawyers who carelessly "reply all" violate the ethics rules.

Ten years ago, the Bar of the City of New York ("NYC") examined the ethics involved when Lawyer A sends an email to both Lawyer B and Lawyer's B client. Similar to Florida's Rule 4-4.2(a), New York's no-contact rule holds that a "lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented... unless the lawyer has consent..." Opinion 2009-1 also considered whether Lawyer A could copy Lawyer A's client in an email to Lawyer B. The bar spotted two potential risks: one, the ease and convenience of "reply all" could lead Lawyer B to inadvertently communicate with Lawyer A's client which would violate the no-contact rule and, two, the risk of Lawyer A's client accidentally responding and disclosing confidential information to Lawyer B. While the City was the first bar association to address the issue, it mistakenly suggested that the "sending lawyer can instead use the 'bcc' or blind copy feature to send the email" which left open the risk that Lawyer A's client might respond and copy Lawyer B.

In 2012, the North Carolina Bar ("NC") agreed that, under the same scenario, Lawyer B could not ethically "reply all" in response to an email from Lawyer A who had copied Lawyer A's client. Relying upon the no-contact rule, North Carolina concluded that Lawyer A's client could not be contacted by Lawyer B without prior consent. Opinion 2012-7 sagely noted that "reply all" creates a "potential for interference with the attorney-client relationship and the potential for inadvertent waiver by the client" such that a smart lawyer should

simply *forward* the lawyer-to-lawyer email.

The New York State Bar, in 2015, determined that it was not deceptive, under the equivalent to Florida Rule 4-8.4, for a lawyer to blind copy a client on an email to opposing counsel. However, like the prior bar associations, New York found that blind copying "raises other problems if the client mistakenly responds..." The opinion cites to *Charm v. Kohn*, 27 Mass L. Rep. 421 (Mass. Super. 2010) which also recognized that "blind copying a client on lawyer's email to adversary gave rise to the foreseeable risk that the client would respond without taking careful note of the list of addresses..."

The Kentucky Bar Association agreed with the NYC and NC in its 2017 opinion KBA E-442 and further emphasized that Lawyer A's open copy to the client would reveal the identity of the client, that the client received the email and any attachments, and, in the case of a corporate client, the identity of individuals who Lawyer A believes are the decision-makers. The Kentucky Bar proposed forwarding the email to the client or bcc'ing the client only if "reply all" was disabled. Finally, the bar noted that, in the comment following the equivalent to Florida's Rule 4-1.1, lawyers were tasked with an "understanding of the benefits and risks associated with the use of technology..." The opinion renders an ominous warning: "the reply all button presents a dangerous risk."

In 2018, both the Alaska and South Carolina bars wrote on the topic. In opinion 2018-1, Alaska agreed with NYC and NC and concluded that "we recommend that attorneys not cc or bcc their clients in correspondence with opposing counsel." In opinion 18-04, South Carolina echoed, "it is generally unwise to 'cc' a client on email communications to opposing counsel."

While not squarely tackling this issue, in 2017 the American Bar Association published its opinion 14-006 maintaining that lawyers may still communicate with clients via email however the use of email triggered duties of competence (Florida Rule 4-1.1) and confidentiality (Florida Rule 4-1.6).

While The Florida Bar has not issued a specific opinion, there is guidance. First, Rule 4-1.6(e) mandates a lawyer take "reasonable efforts" to prevent "inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client." Second, The Florida Bar's Best Practices for Effective Electronic Communication cautions lawyers to "appropriately" use cc, bcc, and "reply all." It explains, "[t]ypically, you should address a reply only to a single person and not to all those who received the original message."

According to Jan L. Jacobowitz, director of the Professional Responsibility & Ethics Program at the University of Miami School of Law, "[a]lthough email has become an 'old school' example of the use of technology in the practice of law, it must remain in forefront when discussing The Florida Bar's technology competence requirement. Unlike more recent technological innovations, most lawyers have become comfortable incorporating email into their practices and do not necessarily consider the ethical landmines that await them when they copy a client or respond with a 'reply all.' Although efficiency is an admirable goal, it should give way to best practices. In the case of email, apply the old adage, 'less is more,' and forward correspondence to your client rather than using a cc or bcc. You may also want to consider disabling your 'reply all' option."

In sum, barring the unlikely situation where prior consent is provided, the sending lawyer risks a bar violation by open copying the client while the receiving lawyer commits a violation by inadvertently hitting "reply all."

Christopher B. Hopkins is a member of McDonald Hopkins, LLC. This article arose from email discussions among members of the Association of Professional Responsibility Lawyers.

Advertise with the
Palm Beach County Bar Association
Online
Digital Marketing
for Your Firm
For more information visit: www.palmbeachbar.org