ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2018-1

E-mail Correspondence with Opposing Counsel While Sending a Copy to the Client

ISSUE PRESENTED

Under what circumstances, if any, may a lawyer "cc" or "bcc" the lawyer's client in e-mail correspondence with opposing counsel? What are the ethical responsibilities of opposing counsel in responding to an e-mail where the e-mail includes a "cc" to opposing counsel's client?

SHORT ANSWER

A lawyer who copies a client on e-mail communications with opposing counsel risks waiver of attorney/client confidences. A lawyer who responds to an e-mail where opposing counsel has "cc'd" the opposing counsel's client has a duty to inquire whether the client should be included in a reply. A lawyer may "bcc" the lawyer's own client on electronic communications, however the better practice is to forward the communication to the client to avoid inadvertent responsive communications by the client to opposing counsel.

ANALYSIS

Several attorneys have inquired whether it is ethically permissible to "reply all" to e-mails that may include represented opposing parties in the "cc". There are few opinions from other jurisdictions addressing this issue.[1] The ethical rules implicated are Rule 1.6 (a) (duty to protect client confidences and secrets), Rule 4.2 (prohibiting communicating about the subject of representation with a person the lawyer knows to be represented by another lawyer), and Rule 4.4 (b) (receiving a document relating to the representation of the lawyer's client that was inadvertently sent). This opinion will examine both the duties of the sending lawyer in choosing to "cc" or "bcc" the lawyer's client and the duties of the receiving lawyer when choosing to "reply all".

[1] North Carolina's opinion directly addresses these issues and we agree with that opinion's rationale and conclusions (see NC 2012 Formal Ethics Opinion 7). New York has addressed the issue of blind copying a client in e-mail in NYSB Ethics Opinion 1076.

Duty to Protect Client Confidences & Prohibition on Communicating about the Subject of the Representation with a Person the Lawyer Knows to be Represented

Recognizing the obligation to protect a client's secrets and confidences, it is not advisable for a lawyer to "cc" their client in a message to opposing counsel concerning the subject of the representation or any other matter that may give rise to a response that could reveal a client confidence or secret.

It should be obvious as well that a lawyer cannot "cc" opposing counsel's client in a communication without the consent of the opposing lawyer. What is less obvious is any duty an opposing lawyer may have when receiving a communication where the sending lawyer has "cc'd" their own client. North Carolina's 2012 formal ethics opinion 7 provides a thorough analysis that we adopt here.

The North Carolina opinion notes that Rule 4.2 does not permit communication with the opposing represented party without consent. A lawyer who copies their client in an e-mail communication with opposing counsel is not, merely by copying the client, giving consent to the receiving lawyer. The easiest and most direct way to determine whether the receiving lawyer can ethically "reply all" is to ask the sending lawyer. The North Carolina opinion also recognizes that there may be circumstances where the sending lawyer has given implied consent to "reply all". Factors to be considered in determining whether there is implied consent include:

> (1) how the communication is initiated;
> (2) the nature of the matter (transactional or adversarial);
> (3) the prior course of conduct of the lawyers and their clients; and
> (4) the extent to which the communication might interfere with the client-lawyer relationship.

Notwithstanding the above factors, 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.

The rules only apply to the subject of the representation or other client confidences or secrets however. So it is likely not problematic to "cc" a client on electronic communications regarding scheduling or other purely administrative matters.[2]

The Committee recommends that lawyers establish early on in a relationship with another lawyer whether they may "reply all" in communications concerning a representation. We also recommend that lawyers not "cc" their clients on electronic communications with opposing counsel, but instead, forward the communication to the client. The ease of "reply all" increases the risk of unauthorized communication with a party who has been "cc'd" on the electronic "conversation". While all lawyers must be vigilant in following the ethics rules in e-mail correspondence, the primary responsibility lies with the lawyer who has chosen to "cc" the lawyer's own client.

Dangers in "Bcc" to a Client

A separate question relates to the use of "bcc". The New York State Bar has addressed whether a lawyer may "bcc" the lawyer's own client in correspondence with opposing counsel (NYSB Ethics Opinion 1076). A client who receives an e-mail as a "bcc" may "reply all" and inadvertently communicate directly with opposing counsel. An unsophisticated client may not realize the effect that the communication may have on disclosing matters that otherwise would be confidential. A case cited by the New York opinion apparently 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)).

Consequently, we recommend that attorneys not "cc" or "bcc" their clients in correspondence with opposing counsel relating to the matter of the representation or that may give rise to a response that could reveal client secrets or confidences. Care should be used if "cc" or "bcc" is used for scheduling or other administrative matters and when permission appears to have been given for ongoing communication. Prudent lawyers will agree to a protocol for "reply all" with opposing counsel.

Approved by Alaska Bar Association Ethics Committee on November 9, 2017.

Adopted by the Board of Governors on January 18, 2018.

[2] There may be some instances where disclosure of an e-mail address may, in itself, violate a court order or other confidentiality requirement (i.e., if there is a protective order or if the fact that the person is represented is confidential).