PENNSYLVANIA BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

January 22, 2020

FORMAL OPINION 2020-100

Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

Introduction and Background

This opinion addresses the ethical issues arising if an attorney uses the carbon copy ("CC") or blind carbon copy ("BCC") functions to send to the attorney's client a copy of email communications by the attorney with opposing counsel.[1] The use of CC, BCC, and "reply to all" in emails raises the following ethical issues:

(i) whether including a client's email address in the CC line may disclose confidential information about the representation in violation of Rule 1.6;

(ii) whether opposing counsel may reply to all in a response to a distribution chain that includes opposing counsel's client;

(iii) whether the use of a broadcast email will create an unacceptable risk that a client will respond to the entire distribution list and disclose privileged and/or confidential information;

(iv) whether sending an email to opposing counsel with a CC or BCC to the attorney's client may create a risk that the client will respond to all and that the opposing attorney will deem such a response as consent for the opposing attorney to communicate directly with the client; and

(v) whether counsel who receives privileged information on an email chain created by the use of CCs or BCCs has a duty to report the disclosure to opposing counsel.

This opinion addresses these questions, discusses best practices pertaining to email communications involving opposing counsel and clients, and concludes that because attorneys risk divulging attorney client confidential information and privileged information when they communicate with opposing counsel and include their clients on the same email, they should, as outlined in Section III of this Opinion:

(i) limit the circumstances in which they include a client as a CC or BCC on an email,

(ii) when appropriate, specifically advise opposing counsel and their client of their inclusion, and

(iii) specify whether the client and/or the attorney may "reply to all" or must exclude the client in any responses.

Adopting these practices will reduce the likelihood that attorney recipients of these email communications may be deemed to violate the no contact rule if they, in turn, reply to all or otherwise directly contact an adverse client without the other attorney's express consent.

I. DISCUSSION

These questions implicate several of the Pennsylvania Rules of Professional Conduct:

- Rule 1.4 (Communication);
- Rule 1.6 (Confidentiality);
- Rule 4.2 (Communication with Person Represented by Counsel); and
- Rule 4.4 (Respect for Rights of Third Persons)

Several other state and local bar associations have issued opinions on the same or related issues. (*See,* New York City Bar Association (Formal Opinion 2009-01), North Carolina (2012 Formal Ethics Opinion 7, adopted 10/25/13), New York (Opinion 1076, 12/8/15), Kentucky (Ethics Opinion KBA E-442, 11/17/17), and Alaska (Opinion 2018-1, 1/18/18). Collectively, the opinions recognize several potential risks associated with including a client on an email communication sent to opposing counsel. These risks include (i) the lawyer sending the email may disclose confidential information about the client; (ii) opposing counsel may reply to all parties on the original distribution list including a represented party in violation of the no contact rule; (iii) the client may respond to all, thereby disclosing confidential information and/or privileged information to opposing counsel.

A. Client Confidentiality

When an attorney copies a client on an email to opposing counsel, the email discloses the client's email address. By disclosing the client's email address, an attorney risks violating Rule 1.6(a) which prohibits a lawyer from revealing "information relating to [the] representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation." As recognized by the bar ethics opinions on this topic and specifically noted by the Kentucky Bar Association, copying a client on an email will reveal "1) the identity of the client; 2) the client received the email including attachments; and 3) in the case of a corporate client, the individuals the lawyer believes are connected to the matters and the corporate client's decision makers." (*See,* KY Bar Association Ethics Opinion KBA E-442 at 2). In addition, disclosing the client's email address may open avenues for

investigation by opposing counsel that were previously unknown, including a client's fictitious name or the identity of the client's employer.

In addition to the broad obligation that a lawyer may not reveal confidential information without a client's consent, a lawyer also has a duty under Rule 1.6(d) to make reasonable efforts to prevent the inadvertent disclosure of confidential information. When a client is copied on email (either by carbon or blind copy), the client or its email system may default to replying to all. In doing so, the client may reveal confidential information intended only for his or her lawyer or waive the attorney-client privilege.

In *Charm v. Kohn*, 2010 WL 3816716 (Mass. Super. 2010), the defendant's counsel sent an email to opposing counsel with a CC to his co-counsel and a BCC to his client, the defendant. The defendant replied to all on the email, and thereby forwarded his comments to opposing counsel. The content of the email clearly was intended only for his counsel. When defense counsel noticed the error, he sent an email to opposing counsel demanding deletion of his client's email. Opposing counsel declined, and later used the opposing party's email as an exhibit to his opposition to a motion for summary judgment. Defendant's counsel moved to strike the email. The Massachusetts trial court evaluated whether the inadvertent disclosure of an attorney-client communication served to waive the benefit of the attorney-client privilege, and whether the client and counsel took reasonable steps to preserve the communication's confidentiality. The court suggested that blind copying a client creates a foreseeable risk that the client will reply to all and inadvertently communicate with opposing counsel.

B. Contact With A Represented Party

As noted by the ethics authorities in the opinions cited above, an opposing counsel who replies to an email chain that includes a represented client may violate the no contact rule by communicating directly with a represented client. Rule 4.2 (Communication with Person Represented by Counsel) mandates that 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 to do so by law or a court order." Sending an email to a represented person relating to the subject of the representation without the attorney's consent constitutes a violation of Rule 4.2.

The question of whether consent may be implied if the initiating attorney copies his or her client has been considered in the bar ethics opinions cited above. Those authorities have concluded that, while not a prudent practice, it is, in some circumstances, possible to infer consent of opposing counsel to include his or her client in a reply to all to an email initiated by counsel in which his or her client was copied. The cited opinions generally recognize a four factor test for determining if an opposing lawyer may reply to all including a represented client. The passage below from North Carolina 2012 F.E.O. 7 summarizes the background and current status of the four factor test:

> The *Restatement of the Law Governing Lawyers* provides that an opposing lawyer's consent to communication with his client "may be implied rather than express." *Rest. (Third) of the Law Governing Lawyers* § 99 cmt. j. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("New York Committee") and the California Standing Committee

> on Professional Responsibility & Conduct ("California Committee") have examined this issue. Both committees concluded that, while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented, the prudent practice is to secure the express consent from opposing counsel beforehand. Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1; CA Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181.
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> There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a "reply to all" responsive electronic communication. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (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.

This Committee agrees with the cited opinions to the effect that a reply to all does not create a *per se* violation of Rule 4.2. In order to determine if consent to respond to a represented client in a transactional matter may be implied, lawyers should consider (1) how the communication is initiated; (2) the prior course of conduct between or among the lawyers and their clients; (3) potential that the response might interfere with the client-lawyer relationship; and (4) whether the specific content of the email is appropriate to send directly to a represented client. For example, in the transactional context, there may be circumstances where the lawyer and client are part of a working group on a commercial transaction and replying to all may be appropriate, particularly where there is a tight timeline and the respective clients need to review iterations of documents simultaneously with their respective counsel. Although a better practice is to obtain express consent to this type of email exchange at the outset, a response which includes a represented client does not necessarily violate Rule 4.2.

On the other hand, circumstances rarely exist in the context of litigation or other disputes where replying to all (including the opposing client) is appropriate, and therefore such a direct communication should ordinarily be avoided absent opposing counsel's express consent. Consent to respond to a communication that includes a represented opposing client may be implied where the response is a non-substantive communication. For example, if a lawyer sends a group email including her client that says, "Let's all meet in the court café before the hearing and see if we can reach agreement on some of the issues to be addressed at the 2 p.m. hearing," a response to all from the opposing lawyer along the lines of "OK, see you there at 1:45," should not be deemed a violation of Rule 4.2, even though the communication concerns "the subject of the representation."

C. Respect for Rights of Third Parties

As noted above, a client may mistakenly reply to all of the members of a distribution chain, including opposing counsel and potentially disclose information that would otherwise be protected by the attorney-client communication privilege or Rule 1.6. If the receiving lawyer knows or reasonably should know that the opposing client's email was inadvertently sent to the

receiving lawyer, that lawyer is bound by Rule 4.4(b) to promptly notify opposing counsel of the disclosure.[1] As further clarified in this Committee's earlier opinion on Inadvertent Disclosures, a lawyer who receives an inadvertent disclosure relating to the recipient's representation of a client has a duty to notify the sender, but whether the receiving attorney may review the contents of the disclosure is a matter of professional judgment. (*See,* PBA Revised Formal Opinion 2007-200).

D. Communication

Simply copying a client on an email may not fulfill the attorney's duty to communicate. Rule 1.4(b) states that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Therefore, when forwarding or copying a client on an email, attorneys should also consider the nature and complexity of the subject matter in the email and their client's ability to evaluate the information being shared so as to be in a position to make an informed judgment. In the event the lawyer intends to copy the client on communications with third parties, the lawyer should advise and caution the client that any reply all should not be used if it will include or divulge confidential or privileged information or legal advice.

II. BEST PRACTICES

The concerns outlined above can be avoided by following recommended best practices:

(i) Forward a copy of communications separately to the client or use a secure client portal to store emails for a client's review;

(ii) Obtain express consent at the outset of a matter from opposing counsel to reply on an email chain that includes counsel's client where circumstances dictate the need for such email distribution chains; and

(iii) Provide adequate context and explanation to the client when sharing an email exchange among third parties.

III. CONCLUSION

Attorneys risk divulging attorney client confidential information and privileged information when they communicate with opposing counsel and include their clients on the same email. Attorney recipients of such email communications may be deemed to violate the no contact rule if they, in turn, reply to all or otherwise directly contact an adverse client without the other attorney's express consent except in situations where it is objectively reasonable to infer consent from the circumstances.

[1] *See* Pennsylvania Ethics Handbook, § 8.6d (PBI Press 5th ed. 2017).