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New York State Bar Association
Committee on Professional Ethics

Opinion 1076 (12/8/15)

Topic: Email; blind copy of correspondence; communication with client.

Digest: A lawyer may blind copy a client on e-mail correspondence with opposing counsel, despite the objection of opposing counsel. Because a lawyer is the agent of the client, sending such a blind copy is not deceptive. However, there are practical reasons why the lawyer should consider forwarding the e-mail correspondence to the client rather than using "bcc".

Rules: 1.4(c) & (b), 4.1, 4.2, 8.4 (b) & (c)

FACTS

1. Opposing counsel has sent the inquiring attorney an email stating that opposing counsel does not consent to inquiring attorney blind copying inquiring attorney's client on inquiring attorney's emails to opposing counsel.

QUESTION

2. May a lawyer ethically send the lawyer's client a blind copy of an email to opposing counsel where opposing counsel has objected to such practice?

DISCUSSION

3. Two opposing lawyers do not have a relationship of confidentiality. Consequently, a lawyer who receives correspondence from opposing counsel is not obligated under the Rules of Professional Conduct (the "Rules") to maintain the confidentiality of those communications. A lawyer does not need the "consent" of opposing counsel to send the client copies of correspondence between the inquirer and opposing counsel. Since a lawyer is an agent of the lawyer's client, opposing counsel should expect that the lawyer may share correspondence relating to the representation with the client.

4. A lawyer is required to communicate regularly with the client on the status of the matter for which the lawyer has been retained. Rule 1.4 (a)(i)(iii) requires the lawyer to inform a client promptly of material developments in the matter. Rule 1.4 (a)(3) requires the lawyer to keep the client reasonably informed about the status of the matter. Finally, Rule 1.4(b) requires the lawyer to provide information that is reasonably necessary for the client to make informed decisions regarding the representation. *See also* Rule 1.4, Cmt. [4] (lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation) and Cmt. [5] (client should have sufficient

information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued).

5. Traditionally, one method lawyers have used to keep clients reasonably informed of the progress of the matter is to send the client a copy of the correspondence from the lawyer and providing a copy of correspondence received by the lawyer. Before modern technology, the lawyer's own typewritten correspondence was copied by means of a carbon copy. Subsequently, carbon copies were replaced with photocopies. With the advent of e-mail, lawyers also gained the ability to send copies electronically.

6. When the sender of a communication copies others, it is possible to inform the principal recipient of all recipients of copies of the communication. This is often done by indicating the names of recipients at the top or bottom of the communication under the abbreviation "cc:" – which formerly indicated a "carbon copy," but now is often described as a "courtesy copy." It is also possible for the sender to provide copies to others without indicating to the principal recipient that such other recipients exist. This can be done with a "blind copy" or "bcc" on either hard copy communications or e-mails or by forwarding the original e-mail.

Is a Blind Copy Deceptive within the Meaning of Rule 8.4(c)?

7. Under Rule 8.4(c), a lawyer may not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." The term "deceit" is not defined in the Rules, and thus we believe it should be interpreted under common usage, i.e. having a purpose to deceive or give a false impression. *See* Webster's Third New International Dictionary (unabridged) (2002). The question here is whether the lawyer's failure to indicate to opposing counsel that the lawyer's client is the recipient of a blind copy of correspondence between the lawyer and opposing counsel is intended to or is likely to give opposing counsel the false impression that he or she is the only recipient of the communication.

8. Because the lawyer is the agent of the client,[1] we do not believe that it is deceptive for a lawyer to send to his or her own client copies of correspondence with opposing counsel.[2] Opposing counsel may not reasonably assume that the lawyer will not share communications with his or her principal, the client.

9. Moreover, in the context of e-mails, there are good reasons for the lawyer not to send the client a "cc." E-mails sent as a "cc" indicate the e-mail address of the person copied, and neither the inquirer nor the client may wish to provide this information to opposing counsel. See also the discussion below under *Reasons Not to Use either "cc:" or "bcc:" When Copying e-mails to the Client*.

[1] See ALI, *Restatement, The Law Governing Lawyers* ("a lawyer is an agent, to whom clients entrust matters").

[2] This is not a case where one lawyer proposes to send a copy of correspondence to the other lawyer's client without the consent of the other lawyer, which would violate Rule 4.2 (the "no contact" rule). *See* N.Y. City 2009-1 (if lawyer sent correspondence to opposing counsel with a copy to opposing counsel's client, it would violate the no contact rule).

Reasons Not to Use Either "cc:" or "bcc:" When Copying e-mails to the Client

10. Although it is not deceptive for a lawyer to send to his or her client blind copies of communications with opposing counsel, there are other reasons why use of the either "cc:" or "bcc:" when e-mailing the client is not a best practice.

11. As noted above, "cc:" risks disclosing the client's e-mail address. It also could be deemed by opposing counsel to be an invitation to send communications to the inquirer's client. *But see* Rule 4.2, Cmt. [3] (Rule 4.2(a) applies even though the represented party initiates or consents to the communication).

12. Although sending the client a "bcc:" may initially avoid the problem of disclosing the client's email address, it raises other problems if the client mistakenly responds to the e-mail by hitting "reply all." For example, if the inquirer and opposing counsel are communicating about a possible settlement of litigation, the inquirer bccs his or her client, and the client hits "reply all" when commenting on the proposal, the client may inadvertently disclose to opposing counsel confidential information otherwise protected by Rule 1.6. *See Charm v. Kohn,* 27 Mass L. Rep. 421, 2010 (Mass. Super. Sept. 30, 2010) (stating that blind copying a client on lawyer's email to adversary "gave rise to the foreseeable risk" that client would respond without "tak[ing] careful note of the list of addressees to which he directed his reply").

CONCLUSION

13. A lawyer may blind copy a client on e-mail correspondence with opposing counsel, despite the objection of opposing counsel. Because a lawyer is the agent of the client, sending such a blind copy is not deceptive. However, there are practical reasons why the lawyer should consider forwarding the e-mail correspondence to the client rather than using "bcc".

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