PROGRAM MATERIALS
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Nobody Asked Me, But, My Thoughts on Legal Ethics, Practice Management

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Nobody Asked Me, But .' My Thoughts on Legal Ethics, Practice Management & Related Topics

Presented by:

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Today’s Program

- This program will a discussion and commentary about hot button topics relating to ethics and the ethical conditions relating to practice management

Today’s Program

- This program will highlight the underlying ethical considerations relating to matters that commonly arise when managing their practices

Today’s Goal

- Discuss the relevant Model Rules of Professional Conduct

Today’s Goal

- Explain how the Model Rules of Professional Conduct impact common ethical situations

So, Why Do I Care About the Model Rules?

- Every state's Rules of Professional Conduct are based on the Model Rules promulgated by the ABA

So, Why Do I Care About the Model Rules?

- They set forth the standard of conduct applicable to all attorneys – *not to firms*

So, Why Do I Care About the Model Rules?

- States may adopt the Model Rules as written, or adopt parts of the Rules, or revise them as necessary

So, Why Do I Care About the Model Rules?

- Always verify if your jurisdiction has adopted the relevant Model Rule(s)

What About the Name of the Program?

- Sportswriter Jimmy Cannon was known for his *New York Daily News* commentary on boxing and other sports
- His words flowed like literature
- Cannon often began his columns by saying, "Nobody Asked Me, But" and then offered opinions on random topics
- This is my attempt to honor Jimmy Cannon, albeit on the topics of legal ethics and practice management.

It’s time that lawyers paid more attention to how they use email

- We all take email for granted
- It is a part of our daily routine
- It can also be a massive annoyance, and at times a major distraction – in more ways than I can discuss
- I will focus on two aspects of email that we can control

It’s time that lawyers paid more attention to how they use email

- First, do not “Reply All” unless absolutely necessary
- In *Kill Reply All: A Modern Guide to Online Etiquette, from Social Media to Work to Love,* Victoria Turk highlights all the reasons that Reply All should be removed as an option in email programs

It’s time that lawyers paid more attention to how they use email

- Consider two examples.
- First, a bar association listserv sought a reply to a question whether the committee should endorse, oppose, or take no position on a resolution being considered by the parent organization
- The email contained specific instructions that recipients should not Reply All and should instead send their responses to a specific email address
- At least 20 people did not

It’s time that lawyers paid more attention to how they use email

- Because some participants chose to add their thoughts in addition to their vote, using Reply All turned the question into one for discussion, with multiple persons replying to all, with even more people replying to the Reply All
- From there, the email string literally metastasized, creating an avalanche of emails

It’s time that lawyers paid more attention to how they use email

- Had the members followed the and merely responded to the designated email address, the email string, which ended up having more than two dozen separate emails, would never have occurred

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- 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
- The use of CC, BCC, and "reply to all" in emails raises ethical issues

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Whether including a client's email address in the CC line may disclose confidential information about the representation in violation of Rule 1.6
- Whether opposing counsel may reply to all in a response to a distribution chain that includes opposing counsel's client
- 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

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- 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
- 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

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- 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

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Conclusion
- 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.

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- These questions implicate several of the Rules of Professional Conduct:
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality)
- Rule 4.2 (Communication with Person Represented by Counsel)
- Rule 4.4 (Respect for Rights of Third Persons)

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Other state and local bar associations have issued opinions on the same or related issues
- 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)
- Alaska (Opinion 2018-1, 1/18/18)

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- The opinions recognize several potential risks associated with including a client on an email communication sent to opposing counsel:
- the lawyer sending the email may disclose confidential information about the client
- opposing counsel may reply to all parties on the original distribution list including a represented party in violation of the no contact rule
- the client may respond to all, thereby disclosing confidential information and/or privileged information to opposing counsel.

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- The lawyer sending the email may disclose confidential information about the client

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Opposing counsel may reply to all parties on the original distribution list including a represented party in violation of the no contact rule

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- The client may respond to all, thereby disclosing confidential information and/or privileged information to opposing counsel

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Best Practices
- Forward a copy of communications separately to the client or use a secure client portal to store emails for a client's review

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Best Practices
- 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

Pa. Bar Formal Opinion 2020-100
Ethical Considerations Relating to Email Communication Involving Opposing Counsel and Clients

- Best Practices
- Provide adequate context and explanation to the client when sharing an email exchange among third parties.

It’s time that lawyers paid more attention to how they use email

- Second, stop attaching files to email
- All too often, attorneys disregard the fact that email is perhaps the least confidential form of communication
- Why?
- Not because they want to intentionally ignore their ethical obligation to protect confidential and sensitive data
- Because email is easy

It’s time that lawyers paid more attention to how they use email

- Attorneys do not understand how easy it is for email and attachments to become public
- As a result, they use email to send confidential information

It’s time that lawyers paid more attention to how they use email

- In her May/June 2021 “Hot Buttons” column in *Law Practice Magazine*, Catherine Sanders Reach reminds readers that
- “Sending attachments via email is problematic for a host of reasons, including the drain on productivity, the challenge of assuring that all attachments are received, the lack of security of email, and the fact that recipients could open the files and make changes.”

It’s time that lawyers paid more attention to how they use email

- In other words, why change when everyone knows how to use attachments?
- There are alternatives to attaching files to email
- Among them are sites such as ShareFile, Dropbox for Business, and more
- Microsoft 365, Adobe Acrobat DC, and Google Workspace offer alternatives that not only eliminate the need for attachments but also provide additional layers of security

It’s time that lawyers paid more attention to how they use email

- These options are not difficult
- Lawyers must learn techniques that enhance security and meet the requirements under the Rules of Professional Conduct.

Ohio fixed the “obvious” problem with remote work

- During the pandemic, it was not unusual for lawyers to work from a location where they were not licensed
- For example, a Pennsylvania-licensed attorney could have spent her quarantine at her Jersey shore home handling matters exclusively for Pennsylvania clients
- Technically, that lawyer was practicing law in New Jersey, even if not for New Jersey clients

Ohio fixed the “obvious” problem with remote work

- Everyone was doing it
- Was it OK?
- That was the real question, and the ABA and numerous Bar Associations issued ethics opinions concluding that such conduct was permissible
- That is, it was permissible even though the actual Rule of Professional Conduct did not address the situation

Ohio fixed the “obvious” problem with remote work

- The first state that recognized and addressed the omission in the Rules was Ohio
- Ohio amended its Rule of Professional Conduct 5.5 to include language specifically stating that it is permissible for a lawyer physically present in Ohio, but not licensed in Ohio, to provide legal services if

Ohio fixed the "obvious" problem with remote work

- (1) the service are authorized by the lawyer's licensing jurisdiction
- (2) the lawyer does not solicit or accept clients for representation in Ohio unless specifically authorized to do so, and
- (3) the lawyer does not state or hold herself out as licensed to practice in Ohio

Ohio fixed the “obvious” problem with remote work

- This amendment to the Rules addresses the underlying concerns logically and directly.
- Other jurisdictions should follow the Ohio example.

Thank you to the New Jersey Supreme Court

- Thank you to the Court for dispelling the myth that ignorance is a defense against claims of ethics violations

Thank you to the New Jersey Supreme Court

- In *In re Robertelli*, 2021 N.J. LEXIS 886 (Sep. 21, 2021), the Court made it clear that ignorance is no longer bliss for attorneys who assume that they have no ethical obligation to learn about social media
- Those days are gone for lawyers in New Jersey, as they should be for lawyers all over the country

Thank you to the New Jersey Supreme Court

- John Robertelli was accused of impermissible communication with the plaintiff on Facebook when his assistant "friended" the plaintiff without disclosing who she was or for whom she worked
- Robertelli claimed that, at the time (in 2007 and 2008), he was ignorant about how Facebook worked, and did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend"

Thank you to the New Jersey Supreme Court

- Rather, he believed that information posted on the internet, including Facebook, was "for the world to see"
- Robertelli also denied instructing his legal assistant to "friend" or otherwise contact the plaintiff in the case
- He recalled advising his assistant to monitor whether the plaintiff was posting information about the lawsuit on the internet
- He also claimed not to understand whether the assistant was communicating directly or indirectly with the plaintiff

Thank you to the New Jersey Supreme Court

- Robertelli's ignorance – and the lack of documented evidence to support or disprove the facts in dispute – led the New Jersey Supreme Court to decline to impose punishment

Thank you to the New Jersey Supreme Court

- The Court’s admonition is the message that matters to all attorneys

Thank you to the New Jersey Supreme Court

- "Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer
- "Today, social media is ubiquitous, a common form of communication among members of the public

Thank you to the New Jersey Supreme Court

- "Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance."
- *In re Robertelli*, 2021 N.J. LEXIS 886, at *12.

There’s still a need to remind lawyers about the obvious

- Imagine speaking with a client who did not understand you, not because he was not listening, but because he spoke a different language than you
- It should be obvious that lawyers must be able to communicate with clients and, if necessary, should have an interpreter present when there are language barriers
- Unfortunately, the obvious is not always so obvious

There’s still a need to remind lawyers about the obvious

- On October 6, 2021, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 500, “Language Access in the Client-Lawyer Relationship,” advising lawyers that they need to understand their clients and their clients need to understand them

There’s still a need to remind lawyers about the obvious

- The Opinion explains that when a client’s ability to receive or convey information is impaired because the lawyer and client do not share a common language, or because the client has a “non-cognitive physical condition, such as a hearing, speech, or vision disability,” a lawyer may have an obligation to arrange for an impartial interpreter or translator to explaining the legal concepts involved. The interpreter or translator must also agree to abide by the lawyer’s duty of confidentiality

There’s still a need to remind lawyers about the obvious

- The Opinion explains that lawyers may need to use other assistive or language-translation technologies, especially if language considerations affect the reciprocal exchange of information
- In short, ABA reminded attorneys that “a lawyer must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client’s communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning”

There’s still a need to remind lawyers about the obvious

- Sometimes, it is important to restate the obvious

Thank You!
Questions??

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'Nobody Asked Me, But …' My Thoughts on Legal Ethics, Practice Management

law.com/thelegalintelligencer/2021/10/21/nobody-asked-me-but-my-thoughts-on-legal-ethics-practice-management

Daniel J. Siegel of Law Offices of Daniel J. Siegel. Courtesy photo

Before becoming a lawyer, I dreamed of becoming a sportswriter, hopefully the beat writer covering the Phillies for The Daily News. To prepare myself, I read literally everything written by many of the great sportswriters to understand why they were the "best." Among the columnists I discovered was Jimmy Cannon, a true giant who was known for his New York Daily News commentary on boxing and other sports. His words flowed like literature.

Cannon often began his columns by saying, "Nobody Asked Me, But" and then offered opinions on random topics. Many have emulated Cannon's style. So here goes my attempt to honor Jimmy Cannon, albeit on the topics of legal ethics and practice management.

“In the words of the immortal Jimmy Cannon: Nobody asked me, but …”

It’s time that lawyers pay more attention to how they use email.

We all take email for granted. It is a part of our daily routine. But it can also be a massive annoyance, and at times a major distraction—in more ways than I can discuss here. So let me focus on two aspects of email that we can control.

First, do not “reply all” unless absolutely necessary. In “Kill Reply All: A Modern Guide to Online Etiquette, from Social Media to Work to Love,” author Victoria Turk highlights all the reasons that reply all should be removed as an option in email programs. That will not happen, of course, but if lawyers (and all email users) paid attention, it would help.

Consider two examples. Recently, a bar association listserv sought a reply to a question whether the committee should endorse, oppose, or take no position on a resolution being considered by the parent organization. The email contained specific instructions that recipients should not reply all and should instead send their responses to a specific email address. At least 20 people did not.

Because some participants chose to add their thoughts in addition to their vote, using reply all turned the question into one for discussion, with multiple persons replying to all, with even more people replying to the reply all. From there, the email string literally metastasized, creating an avalanche of emails. Clearly, had the members followed the instructions and merely responded to the designated email address, the email string, which ended up having more than two dozen separate emails, would never have occurred.

Second, stop attaching files to email. All too often, attorneys disregard the fact that email is perhaps the least confidential form of communication. Why? Not because they want to intentionally ignore their ethical obligation to protect confidential and sensitive data, but because email is easy, and they do not understand how easy it is for email and attachments to become public. As a result, they use email to send confidential information.

In her May/June 2021 “Hot Buttons” column in Law Practice Magazine, Catherine Sanders Reach reminds readers that “Sending attachments via email is problematic for a host of reasons, including the drain on productivity, the challenge of assuring that all attachments are received, the lack of security of email, and the fact that recipients could open the files and make changes.” Sanders Reach believes that “inertia” is why emailers fail to use other methods, including secure file sharing sites. In other words, why change when everyone knows how to use attachments?

There are alternatives, however, to merely attaching files to email. Among them are sites such as ShareFile, Dropbox for Business, and more. In addition, Microsoft 365, Adobe Acrobat DC, and Google Workspace offer alternatives that not only eliminate the need for attachments but also provide additional layers of security. These options are not difficult.

After all, we learned how to cope and adapt during the pandemic, so it should not be hard to use some new techniques that also enhance security and meet the requirements under the Rules of Professional Conduct.

Ohio fixed the "obvious" problem with remote work.

During the pandemic, it was not unusual for lawyers to work from a location where they were not licensed. For example, a Pennsylvania-licensed attorney could have spent her quarantine at her Jersey shore home handling matters exclusively for Pennsylvania clients. Technically, that lawyer was practicing law in New Jersey, even if not for New Jersey clients. A literal reading of the ethics rules would lead to the conclusion that the lawyer was also "guilty" of the unauthorized practice of law.

Everyone was doing it. Was it OK? That was the real question, and the ABA and numerous Bar Associations issued ethics opinions concluding that such conduct was permissible. That is, it was permissible even though the actual Rule of Professional Conduct did not address the situation.

The first state that recognized and addressed the omission in the rules was Ohio, which amended its Rule of Professional Conduct 5.5 to include language specifically stating that it is permissible for a lawyer physically present in Ohio, but not licensed in Ohio, to provide legal services if the service are authorized by the lawyer's licensing jurisdiction, the lawyer does not solicit or accept clients for representation in Ohio unless specifically authorized to do so, and the lawyer does not state or hold herself out as licensed to practice in Ohio.

This amendment to the rules addresses the underlying concerns logically and directly. Other jurisdictions, including Pennsylvania, should follow the Ohio example.

Thank you to the New Jersey Supreme Court.

Thank you to the court for dispelling the myth that ignorance is a defense against claims of ethics violations. In In re Robertelli, 2021 N.J. LEXIS 886 (Sep. 21, 2021), the court made it clear that ignorance is no longer bliss for attorneys who assume that they have no ethical obligation to learn about social media. Those days are gone for lawyers in New Jersey, as they have been for their Pennsylvania colleagues and—hopefully—lawyers all over the country.

John Robertelli's disciplinary action arose from a case in which he was defense counsel. Attorney Robertelli was accused of impermissible communication with the plaintiff on Facebook when his assistant "friended" the plaintiff without disclosing who she was or for whom she worked. Robertelli claimed that, at the time (in 2007 and 2008), he was ignorant about how Facebook worked, and did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend." Rather, he believed that information posted on the internet, including Facebook, was "for the world to see."

Robertelli also denied instructing his legal assistant to "friend" or otherwise contact the plaintiff in the case. Rather, he recalled advising his assistant to monitor whether the plaintiff was posting information about the lawsuit on the internet. Finally, he claimed not to understand whether the assistant was communicating directly or indirectly with the plaintiff.

Fortunately, Robertelli's ignorance—and the lack of documented evidence to support or disprove the facts in dispute—led the New Jersey Supreme Court to decline to impose punishment. However, the court's admonition is the message that matters to all attorneys.

The court said, "Attorneys should know that they may not communicate with a represented party about the subject of the representation—through social media or in any other manner—either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their nonlawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance." See In re Robertelli, 2021 N.J. LEXIS 886, at *12.

There's still a need to remind lawyers about the obvious.

Imagine speaking with a client who did not understand you, not because he was not listening, but because he spoke a different language than you. When this situation arises, it should be obvious that lawyers must be able to communicate with clients and, if necessary, should have an interpreter present when there are language barriers. Unfortunately, the obvious is not always so obvious.

In this instance, there is now guidance to remind lawyers that they need to be able to communicate with their clients. On Oct. 6, the American Bar Association standing committee on ethics and professional responsibility issued Formal Opinion 500, "Language Access in the Client-Lawyer Relationship," advising lawyers that they need to understand their clients and their clients need to understand them.

The opinion explains that when a client's ability to receive or convey information is impaired because the lawyer and client do not share a common language, or because the client has a "noncognitive physical condition, such as a hearing, speech, or vision disability," a lawyer may have an obligation to arrange for an impartial interpreter or translator to explaining the legal concepts involved. The interpreter or translator must also agree to abide by the lawyer's duty of confidentiality.

The opinion further explains that lawyers may need to use other assistive or language-translation technologies, especially if language considerations affect the reciprocal exchange of information. In short, the ABA reminded attorneys that "a lawyer must ensure that the

client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning."

Sometimes, it is important to restate the obvious.

Daniel J. Siegel, *principal of the Law Offices of Daniel J. Siegel and chair of the Pennsylvania Bar Association committee on legal ethics and professional responsibility, provides ethical guidance and Disciplinary Board representation for attorneys and law firms; he is the editor of "Fee Agreements in Pennsylvania" (6th Edition) and author of "Leaving a Law Practice: Practical and Ethical Issues for Lawyers and Law Firms" (Second Edition), published by the Pennsylvania Bar Institute. He can be reached at dan@danieljsiegel.com.*

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).

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

In the Matter of John J. Robertelli (D-126-19) (084373)

February 1, 2021 -- Decided September 21, 2021

ALBIN, J., writing for a unanimous Court.

The issue in this attorney disciplinary case is whether Respondent John Robertelli violated Rule of Professional Conduct (RPC) 4.2, which prohibits a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. That ethical prohibition applies to any form of communication with a represented party by the adversary lawyer or that lawyer's surrogate, whether in person, by telephone or email, or through social media. The Office of Attorney Ethics (OAE) brought disciplinary charges against Robertelli, asserting that he violated RPC 4.2 when his paralegal sent a Facebook message to, and was granted "friend" status by, Dennis Hernandez, who had filed an action against Robertelli's client. The charged violation occurred more than a decade ago, when the workings of a newly established social media platform -- Facebook.com -- were not widely known.

In November 2007, Robertelli represented the Borough of Oakland and an Oakland police sergeant in a personal-injury lawsuit filed by Hernandez. In preparing a defense, Robertelli requested that Valentina Cordoba, a paralegal, conduct internet research into Hernandez's academic and employment background, and any criminal history. As part of that research, Cordoba gained access to Hernandez's private Facebook page when Hernandez designated her as a "friend." At that time, Hernandez did not know that Cordoba was working for the law firm representing the parties he was suing.

Cordoba downloaded postings from Hernandez's Facebook page that included a video showing Hernandez wrestling. The defense believed that the wrestling episode may have occurred after Hernandez's accident. Robertelli forwarded to Hernandez's attorney, Michael Epstein, the Facebook postings downloaded by Cordoba. In a letter to Robertelli, Epstein accused him of violating RPC 4.2.

In May 2010, Hernandez filed a grievance with the District Ethics Committee. The Secretary of the Committee, with the concurrence of a non-lawyer public member, concluded that Hernandez's "grievance, even if proven, would not constitute unethical conduct," and therefore declined to docket the grievance for full review.

In July 2010, Epstein wrote to ask the OAE Director to investigate the "unethical conduct" of Robertelli. The OAE conducted an investigation and filed a complaint against Robertelli alleging that he violated several RPCs. At an April 2018 hearing before a Special Master, the testimony highlighted that Facebook in 2008 was unknown terrain to many attorneys.

Cordoba testified that she had a Facebook page, which did not identify her as a paralegal at Robertelli's firm. She monitored Hernandez's Facebook page, which at first was open to the public, and she reported to Robertelli about the public postings. But Hernandez's Facebook page later turned private, and she told Robertelli she no longer had access without sending a "friend" request. Cordoba claimed that Robertelli eventually gave her the green light to send Hernandez "a general message" and to proceed to monitor Hernandez's Facebook page. She believed, however, that despite her efforts to explain Facebook to Robertelli, he did not grasp the significance of a "friend" request. Cordoba, via Facebook, then forwarded Hernandez a message stating that he looked like one of her favorite hockey players, and Hernandez sent her a "friend" request.

Hernandez testified that his Facebook page was private -- and never public -- during the lawsuit and that Cordoba sent him a "friend" request, which he accepted. Because Hernandez deleted his Facebook page during the lawsuit and before he filed his ethics grievance, his Facebook records were not produced at the hearing to credit either Cordoba's or Hernandez's version of events.

Robertelli testified that in 2008 he had been practicing law for approximately eighteen years and did not know much about Facebook. He did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend." He believed that the information posted on the internet, including Facebook, was "for the world to see." He denied directing Cordoba to "friend" Hernandez or to contact or send a message to him. He recalled advising Cordoba to monitor whether Hernandez was placing information about the lawsuit on the internet. He said he had no understanding that Cordoba was communicating directly or indirectly with Hernandez.

The Special Master concluded that the OAE failed to prove by clear and convincing evidence that Robertelli violated the RPCs. The Special Master determined that Robertelli, "an attorney with an unblemished record and a reputation for integrity and professionalism," reasonably believed that his paralegal was merely exploring "publicly available information for material useful to his client" while his young paralegal, experienced in social networking, "was unaware of potentially applicable ethical strictures." In concluding that Robertelli "proceeded at all times in good faith," the Special Master dismissed in their entirety the charges in the disciplinary complaint.

Following a de novo review of the record, six members of the Disciplinary Review Board (DRB) determined that Robertelli violated the RPCs.

HELD: *After conducting a de novo review of the record and affording deference to the credibility findings of the Special Master, the Court concludes that the OAE has failed to establish by clear and convincing evidence that Robertelli violated the RPCs. The disciplinary charges must therefore be dismissed.

*Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance. The Court refers this issue and any related issues to the Advisory Committee on Professional Ethics for further study and for consideration of amendments to the RPCs.

1. As of early 2008, Robertelli did not know how Facebook functioned, did not know about its privacy settings, and did not know the language of Facebook, such as "friending." And no jurisdiction had issued a reported ethics opinion giving guidance on the issue before the Court -- whether sending a "friend" request to a represented client without the consent of the client's attorney constitutes a communication on the subject of the representation in violation of RPC 4.2. The absence of ethical guidance at that time evidently reflected that Facebook had yet to become the familiar social media platform that it is today in the legal community. Further, the Court gives due regard to the Special Master's credibility findings based on his careful observation of the witness testimony unfolding before his eyes. In the end, based on an independent review of the record, the Court finds that the OAE has not met its burden of proving the disciplinary charges against Robertelli by clear and convincing evidence. (pp. 26-32)

2. Robertelli may have had a good faith misunderstanding about the nature of Facebook in 2008, but there should be no lack of clarity today about the professional strictures guiding attorneys in the use of Facebook and other similar social media platforms. When represented Facebook users fix their privacy settings to restrict information to "friends," lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel. Both sending a "friend" request and enticing or cajoling the represented client to send one are prohibited forms of conduct under RPC 4.2, as other jurisdictions have determined under their own rules of court. (pp. 32-35)

3. Lawyers should now know where the ethical lines are drawn. Lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven. And the Court reminds the bar that attorneys are responsible for the conduct of the non-lawyers in their employ or under their direct supervision. Under RPC 5.3, attorneys must make reasonable efforts to ensure that their surrogates -- including investigators or paralegals -- do not

communicate with a represented client, without the consent of the client's attorney, to gain access to a private Facebook page or private information on a similar social media platform. (pp. 35-36)

4. The Court refers to the Advisory Committee on Professional Ethics, for further consideration, the issues raised in this opinion. After its review, the Committee shall advise the Court whether it recommends any additional social media guidelines or amendments to the RPCs consistent with this opinion. (p. 36)

The disciplinary charges against Respondent are DISMISSED.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in JUSTICE ALBIN's opinion.

SUPREME COURT OF NEW JERSEY

D-126 September Term 2019

084373

In the Matter of

John J. Robertelli,

an Attorney at Law

On an order to show cause why respondent should not be disbarred or otherwise disciplined.

Argued	Decided
February 1, 2021	September 21, 2021

Steven J. Zweig, Deputy Ethics Counsel, argued the cause on behalf of the Office of Attorney Ethics (Steven J. Zweig, on the briefs).

Michael S. Stein argued the cause on behalf of respondent (Pashman Stein Walder Hayden, attorneys; Michael S. Stein and Janie Byalik, on the briefs).

JUSTICE ALBIN delivered the opinion of the Court.

Our Rules of Professional Conduct (RPCs) generally prohibit a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. RPC 4.2. That ethical prohibition applies to any form of communication with a represented party by the adversary lawyer or that lawyer's surrogate, whether in person, by

telephone or email, or through social media. Although it is fair game for the adversary lawyer to gather information from the public realm, such as information that a party exposes to the public online, it is not ethical for the lawyer -- through a communication -- to coax, cajole, or charm an adverse represented party into revealing what that person has chosen to keep private.

The issue in this attorney disciplinary case is the application of that seemingly clear ethical rule to a time, more than a decade ago, when the workings of a newly established social media platform -- Facebook.com -- were not widely known. In 2008, Facebook -- then in its infancy -- had recently expanded its online constituency from university and high school students to the general public. A Facebook user could post information on a profile page open to the general public or, by adjusting the privacy settings, post information in a private domain accessible only to the universe of the user's "friends."

Respondent John Robertelli represented a public entity and public employee in a personal-injury action brought by Dennis Hernandez. During the course of internet research, Robertelli's paralegal forwarded a flattering message to Hernandez, and Hernandez unwittingly granted her "friend" status, giving her access to his personal private information.

As a result, the Office of Attorney Ethics (OAE) brought disciplinary charges against attorney Robertelli for a violation of RPC 4.2 and other RPCs. The matter proceeded before a Special Master, who heard three days of testimony in 2018. Robertelli testified that he had little knowledge or understanding of Facebook at the time and never knowingly authorized his paralegal to communicate with Hernandez to secure information that was not publicly available. The Special Master found that the conflicting testimony between Robertelli and his paralegal about the exact nature of their conversations a decade earlier was the product of the natural dimming of memories due to the passage of time. The Special Master, in particular, found that Robertelli in 2008 did not have an understanding of Facebook's privacy settings or Facebook-speak, such as "friending." The Special Master held that the OAE did not prove by clear and convincing evidence that Robertelli violated the RPCs and dismissed the charges.

The Disciplinary Review Board split, with six members voting to sustain the charges against Robertelli (four in favor of an admonition and two in favor of a censure) and three members voting to dismiss the charges.

After conducting a de novo review of the record and affording deference to the credibility findings of the Special Master, we conclude that the OAE has

failed to establish by clear and convincing evidence that Robertelli violated the RPCs. The disciplinary charges must therefore be dismissed.

We add the following. Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance. We refer this issue and any related issues to the Advisory Committee on Professional Ethics for further study and for consideration of amendments to our RPCs.

I.

A.

We rely on the record developed before the Special Master. We begin with the facts that are not in dispute.

In November 2007, Robertelli, a partner at the law firm of Rivkin Radler, LLP, represented the Borough of Oakland and an Oakland Police Department sergeant in a personal-injury lawsuit filed in Superior Court by

Dennis Hernandez. Hernandez claimed that while he was doing push-ups in the police station's parking lot, the sergeant's vehicle struck him, causing permanent physical injuries and the loss of an athletic scholarship.

In preparing a defense, Robertelli requested that Valentina Cordoba, a paralegal in the firm, conduct internet research into Hernandez's academic and employment background, and any criminal history. As part of that research, Cordoba gained access to Hernandez's private Facebook page when Hernandez designated her as a "friend." At that time, Hernandez did not know that Cordoba was working for the law firm representing the parties he was suing. Cordoba downloaded postings from Hernandez's Facebook page that included a video showing Hernandez wrestling with his brother. The defense believed that the wrestling episode may have occurred after Hernandez's accident.

With that information in hand, Gabriel Adamo, an associate at Rivkin Radler, deposed Hernandez. Afterwards, Robertelli forwarded to Hernandez's attorney, Michael Epstein, the Facebook postings downloaded by Cordoba. In a letter to Robertelli, Epstein accused him of violating RPC 4.2 by communicating with his client, through Facebook, without his consent about the subject of the representation. Hernandez would later testify that the wrestling video downloaded by Cordoba predated his accident and had been posted by a "friend."

The Superior Court judge assigned to the case barred the use of the Facebook postings because the information was disclosed after the end date for the completion of discovery but made no finding of an ethical violation, as urged by Epstein.

In May 2010, Hernandez filed a grievance with the District II-B Ethics Committee, alleging that Robertelli and Adamo violated the RPCs by having their paralegal directly contact him through Facebook without the consent of his counsel. The Secretary of the District Ethics Committee, with the concurrence of a non-lawyer public member, concluded that Hernandez's "grievance, even if proven, would not constitute unethical conduct," and therefore declined to docket the grievance for full review by the Committee. See R. 1:20-3(e)(3).

By letter, on July 30, 2010, Epstein asked the OAE Director to investigate the "unethical conduct" of both Robertelli and Adamo. Epstein claimed that, during a lawsuit and without his consent, the two attorneys "directly contacted" his client through their paralegal who -- without disclosing her position -- requested that the client "friend" her, allowing her to access his private Facebook page.

The OAE conducted an investigation and, in November 2011, filed a complaint against Robertelli and Adamo, alleging violations of RPC 4.2

(communicating with a person represented by counsel); RPC 5.1(b) and (c) (failure to supervise a subordinate lawyer -- charged only against Robertelli); RPC 5.3(a), (b), and (c) (failure to supervise a non-lawyer assistant); RPC 8.4(a) (violation of the RPCs by inducement or through the acts of another); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

In January 2012, Robertelli and Adamo answered the complaint, asserting that they acted in good faith and committed no unethical conduct. Robertelli admitted that he asked Cordoba "to perform a broad and general internet search regarding Hernandez" in defending the personal-injury action. But he explained that he did not "understand how Facebook worked" at the time and believed that "Cordoba was accessing information that was publicly available" by clicking "the 'friend' button." Robertelli apologized for any error committed through inadvertence and denied engaging in any knowing or purposeful misconduct.

Robertelli and Adamo then requested that the OAE withdraw its complaint in light of the District Ethics Committee's decision not to file charges. When the OAE refused to do so, Robertelli and Adamo filed an action in Superior Court seeking a declaration that the OAE Director lacked authority to review the District Ethics Committee's decision. See Robertelli v.

OAE, 224 N.J. 470, 475 (2016). The trial court dismissed the action because the New Jersey Supreme Court has exclusive jurisdiction over attorney disciplinary matters, and the Appellate Division affirmed. Id. at 476.

We held that, although the OAE Director does not have appellate authority to override a District Ethics Committee decision declining to docket a grievance, the Director does have the independent power, under our court rules, to investigate and bring disciplinary charges against an attorney -- and to prosecute those charges. Id. at 486-91. We added that "[w]e anticipate that the Director will use that power sparingly to address novel and serious allegations of unethical conduct." Id. at 490. We also noted that "[t]his matter presents a novel ethical issue" and that "[n]o reported case law in our State addresses the question." Id. at 487.

B.

In March 2017, this Court appointed Michael Kingman to serve as the Special Master in this case. During three consecutive days in April 2018, the Special Master heard testimony about the circumstances surrounding Cordoba's gaining access to Hernandez's Facebook page, about Robertelli's knowledge of Facebook, and about his conversations with and supervision of Cordoba a decade earlier. The passage of time challenged the memories of the

witnesses, and the Special Master attempted to make sense of the conflicting accounts.

A short primer on Facebook, its growth in the world of social media, and the public and private information made available by its users will be helpful in elucidating the issues before us.[1]

1.

Facebook is a social media platform on the internet that permits users to post and share information, including messages, articles, and other writings; photographs; and video recordings. Users can share information either with the general public or, by setting privacy restrictions, with a more limited audience, such as Facebook "friends." A Facebook "friend" is not a friend in the colloquial sense. Any person granted access to the more privately guarded information by the user is deemed a "friend" in the language of Facebook. A person becomes a Facebook "friend" either by sending the user a "friend" request that the user accepts by the click of a button, or by receiving a "friend" request from the user that the person accepts by the click of a button.

[1] "Social media" is defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." Social Media, Merriam-Webster, https://www.merriam-webster.com/dictionary/social%20media (last visited Aug. 4, 2021).

Information restricted to Facebook "friends" is not available to the general public.

Facebook was launched in 2004 to a limited scope of users -- college and university students and later high school students.[2] Not until the latter part of 2006 was Facebook membership opened to the general public.[3] In July 2007, Facebook had 30 million users worldwide;[4] in August 2008, 100 million users;[5] and as of June 2021, 2.9 billion users.[6]

In 2008, only fifteen percent of lawyers who responded to the American Bar Association's Legal Technology Survey reported personally maintaining a

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[2] Alexis C. Madrigal, Before It Conquered the World, Facebook Conquered Harvard, The Atlantic (Feb. 4, 2019), https://www.theatlantic.com/technology/archive/2019/02/and-then-there-was-thefacebookcom/582004.

[3] Our History, Facebook, https://about.facebook.com/company-info (last visited Aug. 4, 2021).

[4] Sarah Phillips, A Brief History of Facebook, The Guardian (July 25, 2007), https://www.theguardian.com/technology/2007/jul/25/media.newmedia.

[5] Associated Press, Number of Active Users at Facebook over the Years, yahoo!news (May 1, 2013), https://news.yahoo.com/number-active-users-facebook-over-230449748.html.

[6] Press Release, Facebook, Facebook Reports Second Quarter 2021 Results (July 28, 2021), https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Second-Quarter-2021-Results.

presence on social media.[7] In contrast, by 2020, seventy-seven percent of lawyers reported using social media for professional purposes.[8]

The testimony at the hearing before the Special Master highlighted that Facebook in 2008 was unknown terrain to many attorneys. In line with that assessment, Cordoba stated that "Facebook was in its infancy" in 2008, that Robertelli did not understand Facebook's "terminology" or the privacy settings for a Facebook page, and that his overall comprehension on the subject was "maybe a two" out of ten.

Robertelli testified that in 2008 he did not have a social media account and had a "[m]inimum" understanding of Facebook. His associate, Gabriel Adamo, similarly stated that he did not know "what it meant to be a friend on Facebook" and thought Facebook was another venue for information generally available on the internet. Even Hernandez's counsel, Michael Epstein, admitted that he was "relatively unfamiliar with Facebook at that time" and did not recall having a Facebook profile.

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[7] Reginald Davis, Getting Personal, A.B.A. J. (Aug. 2, 2009), https://www.abajournal.com/magazine/article/getting_personal.

[8] Allison C. Shields Johs, 2020 Websites & Marketing, A.B.A. (Nov. 9, 2020), https://www.americanbar.org/groups/law_practice/publications/techreport/2020/webmarketing.

With that background in mind, we turn to the critical testimony in this disciplinary matter.

2.

Cordoba testified that while she did general internet research on the Hernandez personal-injury case for Robertelli in 2008, she had a Facebook page -- the same one she had before she graduated from college in 2004. The page did not identify her as a paralegal at Rivkin Radler. As a Facebook user, she monitored Hernandez's Facebook page, which at first was open to the public and then turned private. She reported to Robertelli about the public postings. But when Hernandez's Facebook page turned private, she told Robertelli she no longer had access without sending Hernandez a "friend" request. She recalled Robertelli telling her to hold off sending the request until he checked with the insurance adjuster. But she was uncertain whether Robertelli understood the mechanics of Facebook, the privacy settings for a Facebook page, or the meaning of a "friend" request. Cordoba claimed that, after Robertelli checked with the adjuster, he gave her the green light to send Hernandez "a general message" and to proceed to monitor Hernandez's Facebook page. She believed, however, despite her efforts to explain Facebook to Robertelli, he did not grasp the significance of a "friend" request.

Cordoba, via Facebook, then forwarded Hernandez a message stating that he looked like one of her favorite hockey players. Hernandez responded with some flirtatious messages -- to which Cordoba did not reply -- and sent her a "friend" request, which she accepted. Cordoba then gained access to Hernandez's private Facebook page as one of his six-hundred-plus "friends."

Hernandez gave a different account from Cordoba's. Hernandez testified that his Facebook page was private -- and never public -- during the lawsuit. Hernandez stated that Cordoba sent him a "friend" request, which he accepted. Afterwards, according to Hernandez, he messaged Cordoba, asking her who she was, and she replied that he looked like her favorite hockey player. Because Hernandez deleted his Facebook page during the lawsuit and before he filed his ethics grievance, his Facebook records were not produced at the hearing to credit either Cordoba's or Hernandez's version of events.

Robertelli testified that in 2008 he had been practicing law for approximately eighteen years and was the attorney responsible for the defense in the Hernandez case. According to Robertelli, at the time that he asked Cordoba to conduct internet research, he did not know much about Facebook. He did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend." He believed that the information Hernandez posted, or others posted, on the internet, including Facebook, was "for the

world to see." He denied directing Cordoba to "friend" Hernandez or to contact or send a message to him. He recalled advising Cordoba to monitor whether Hernandez was placing information about the lawsuit on the internet. He also remembered that, during a brief conversation, Cordoba told him that Hernandez's Facebook "information is now in a different area that [she could] access by the click of a button." Cordoba described the website as "the equivalent of . . . posting something on a bulletin board"; she did not say that Hernandez's Facebook privacy settings were changed from public to private or that she had to send him a "friend" request. Robertelli admitted that he told Cordoba at first to wait until he spoke with Dawn Mulligan, head of claims and risk management of the Bergen County Municipal Joint Insurance Fund,[9] and then afterward to "[c]lick on the button and continue to monitor the site." But, he said, he had no understanding that Cordoba was communicating directly or indirectly with Hernandez.

Only after Robertelli released the information downloaded from Hernandez's Facebook page in discovery and Epstein charged him with violating the RPCs did Robertelli learn that Cordoba had directly contacted Hernandez. By then, Cordoba had joined another law firm in the same

[9] The Joint Insurance Fund retained Robertelli to represent the Borough of Oakland.

building as Rivkin Radler. In the building cafeteria, Robertelli encountered Cordoba, and the two conversed about the Hernandez case. At that point, for the first time, Cordoba told Robertelli that she had sent a message to Hernandez.

C.

After hearing three days of testimony and reviewing numerous exhibits, the Special Master issued a forty-eight-page report in which he concluded that the OAE failed to prove by clear and convincing evidence that Robertelli violated the RPCs as alleged in the complaint.[10] The Special Master made the following findings by clear and convincing evidence:

1. "[Robertelli] was ignorant as to the nature and extent of information available on the internet, and proceeded under the misimpression that" what Hernandez posted was available "for viewing by the world."

2. "[Robertelli] had no knowledge or understanding of social networking privacy settings or 'friend' requests."

3. Cordoba, a young paralegal, knowledgeable about Facebook from her days as a student, did not educate Robertelli about the new information-sharing

[10] The OAE dismissed the charges against Adamo, Robertelli's associate, at the conclusion of its case.

technology because -- through no fault of her own -- "she did not understand that to be part of her job."

4. Cordoba engaged in what she viewed as normal research practice, accessed information, and reported the results to Robertelli.

5. Robertelli viewed the material supplied by Cordoba as if it had been taken off a "bulletin board" on which it had been posted.

6. Robertelli believed that "people sometimes published information about themselves on the internet for the world at large to see, and that looking at that information was part of the due diligence required in handling a lawsuit."

7. Robertelli had "a few brief conversations" with Cordoba instructing her "to 'monitor' the Hernandez postings."

Given the novelty of Facebook, the Special Master also could not find by clear and convincing evidence that "[Robertelli] knew or should have known what . . . 'friending' meant," and concluded that the Facebook nomenclature "was in effect a foreign language to [Robertelli], as it would have been to most lawyers" at the time.

The Special Master made credibility findings as well. He expressed "serious doubts about the accuracy of much of the testimony at the hearing, particularly that of Cordoba," primarily because of the passage of time. He

noted that Cordoba's "uncertain recollection" needed to be refreshed at various times and concluded that "[h]er interpretation today of a few brief conversations with [Robertelli]" could "hardly be relied upon to meet" the clear-and-convincing-evidence standard.[11] Indeed, he emphasized that no "definitive conclusions" could be reasonably drawn "from fragments of a conversation partially recalled from ten years earlier."

The Special Master observed that Robertelli's instruction to Cordoba to put on hold the research until he checked with the insurance adjuster logically suggested that Robertelli needed to secure the insurer's financial commitment to cover such work. The Special Master also indicated that the failure of Hernandez's counsel -- the grievant -- to preserve his client's "Facebook settings and contents" hobbled the factfinding process. For example, the information, if not deleted, would have revealed whether Hernandez's Facebook page, at first, was open to the public and whether Hernandez or Cordoba initiated the "friend" request.

In the end, the Special Master determined, by clear and convincing evidence, that Robertelli, "an attorney with an unblemished record and a

[11] The Special Master gave Cordoba her due, stating that "she tried to be [truthful]" in her testimony during which "she was afflicted with laryngitis and a severe cold." We do not believe that the Special Master was suggesting that Cordoba was not credible because she was under the weather.

reputation for integrity and professionalism," reasonably believed that his paralegal was merely exploring "publicly available information for material useful to his client" while his young paralegal, experienced in social networking, "was unaware of potentially applicable ethical strictures." In concluding that Robertelli "proceeded at all times in good faith," the Special Master dismissed in their entirety the charges in the disciplinary complaint.

Last, the Special Master recommended that this Court adopt a rule "that attorneys may not directly or indirectly friend someone represented by counsel without the knowledge and consent of such counsel."

D.

Following a de novo review of the record, six members of the Disciplinary Review Board (DRB) determined that Robertelli violated three RPCs. They concluded that the "facts" supported the findings that (1) Robertelli directed Cordoba to "communicate[] with a party represented by counsel, about the litigation, in violation of RPC 4.2"; (2) Robertelli failed to make reasonable efforts to ensure that a nonlawyer under his supervision acted in accordance with his own professional obligations and additionally "'ratified' the misconduct by attempting to use the fruits of Cordoba's surveillance in the underlying litigation," in violation of RPC 5.3(a), (b), and (c); and (3) Cordoba's "misrepresentation by silence or omission" to gain

access to Hernandez's Facebook page is imputed to Robertelli, constituting a violation of RPC 8.4(c).[12]

Four of those six DRB members -- the plurality -- voted to impose an admonition, and the other two members, writing a separate opinion, voted to impose a censure. Three other DRB members, in two separate opinions, voted to dismiss all the disciplinary charges. The four opinions issued reflect the different story lines accepted by the DRB members.

1.

The plurality rejected what it viewed as the Special Master's finding that Cordoba was "less credible because she was sick during her testimony" or because she needed to have her memory refreshed with statements she made earlier. The plurality stated that "[t]his is the rare instance where we do not accept a credibility determination made by a trier of fact."

The plurality independently determined that "Cordoba's version" of her conversation with Robertelli concerning the Facebook research "is likely more credible than [his]." The plurality did not accept Robertelli's reasons for telling Cordoba to "hold off" doing further research. According to the plurality, it was "a stretch to believe that, as [Robertelli] recalls, Cordoba

[12] The DRB dismissed the RPC 5.1(b) and (c) and RPC 8.4(a) and (d) charges.

never used the words 'public' or 'private' to explain the change" in Hernandez's Facebook settings or that "the privacy component [was] so esoteric that an attorney cannot fathom what it means in the context of a nascent technology."

In short, in assessing credibility, the plurality rejected Robertelli's account and maintained that "[i]gnorance cannot be used as a shield."

2.

The two other members in favor of imposing discipline voted for a censure. In a dissenting opinion, they stated that "[Robertelli] failed to supervise his assistant when he knew, without question, that she was, at his instruction, trying to make contact with an adverse represented person." (emphasis added). They clearly did not find Robertelli credible in coming to their conclusion.

3.

Two DRB members, who voted to dismiss the disciplinary complaint, were unwilling to "second guess" the conclusions of the Special Master "who had the opportunity to observe the testimony and evaluate the credibility of the witnesses." Those two members gave great weight to three "undisputed" facts on which the Special Master rested his decision: Cordoba "did not explain to [Robertelli] the various privacy settings on Facebook or explain to him how

the settings on that account changed at some point from public to quasi-private"; Robertelli was "technologically unsophisticated," "never had a Facebook page," and primarily "communicated with his staff in person or by telephone"; and "Cordoba and [Robertelli] testified that [Robertelli] never directed Cordoba to contact Hernandez or send any kind of message to him." Those DRB members highlighted (1) "the conflicting testimony [and] the changed recollection of witnesses" over the course of the investigation, (2) "Hernandez's deletion of his Facebook page," and (3) "the flimsy, almost non-existent evidence that [Robertelli] had meaningful knowledge of the workings of an embryonic Facebook in 2008." In their view, the OAE failed to prove an RPC violation by clear and convincing evidence.

4.

Another DRB member who voted to dismiss the complaint took the position that Cordoba's communication to Hernandez "did not relate to the subject of the lawsuit" and, on that basis alone, concluded that Robertelli did not violate RPC 4.2. That member questioned whether the information on Hernandez's Facebook page -- shared with "600 other people with no confidential relationship to [him] or his counsel" -- was private. From that vantage point, the DRB member did not consider that a "potentially damaging video, placed in the public domain by a ['friend' of Hernandez], implicated an

attorney-client communication." He concluded that "the majority decision would allow RPC 4.2 and RPC 8.4(c) to function as a defensive weapon inhibiting the truth-seeking process."

E.

Robertelli filed a petition for review challenging the DRB majority's finding that he violated the RPCs and the DRB plurality's decision to impose an admonition. The OAE filed a cross-petition challenging the DRB plurality's imposition of an admonition.[13] We elected to review this matter on our own motion and issued an order to show cause "why [Robertelli] should not be disbarred or otherwise disciplined." See R. 1:20-16(b) ("The Court may, on its own motion, decide to review any determination of the Board where disbarment has not been recommended.").

II.

A.

Robertelli urges this Court to accept the credibility findings made by the Special Master and to dismiss the disciplinary charges that have cast a cloud over his professional reputation for over a decade. He claims that the DRB, in addition to improvidently casting aside the Special Master's credibility

[13] The OAE also cross-petitioned for review of the DRB's dismissal of the RPC 8.4(d) charge.

findings, did not give sufficient weight to Facebook's recent emergence on the social media scene in 2008, to Robertelli's unfamiliarity with the nature of Facebook and its terminology, and to the lack of ethical guidance on the issue before us. What may seem obvious to many today, Robertelli implores, should not be imputed to his limited understanding of social media in 2008.

B.

The OAE asks this Court to follow the DRB's decision to impose discipline on Robertelli for violating RPCs 4.2, 5.3, and 8.4(c) -- and, despite the DRB's dismissal of the RPC 8.4(d) charge, to find that Robertelli engaged in conduct prejudicial to the administration of justice by attempting to gain a litigation advantage through the use of the improperly obtained wrestling video. The OAE chides Robertelli for his lack of remorse and for blaming Hernandez for accepting Cordoba's "friend" request. The OAE reasons that Hernandez had no duty to investigate the identity of Cordoba but that Robertelli had an ethical obligation to supervise his paralegal, regardless of the novelty of Facebook, and not to communicate with a represented party. The OAE recommends the imposition of a reprimand.

III.

The ethical charges filed against Robertelli have drawn varied responses from the disciplinary authorities: the District Ethics Committee declined to

docket the charges; the Special Master dismissed the charges after hearing three days of testimony; and the DRB issued four opinions, one in favor of imposing an admonition, another in favor of imposing a censure, and two in favor of dismissing the charges. As the final body to review this more-than-decade-long case, we start at a familiar place -- our standard of review.

In reviewing an attorney disciplinary determination de novo, as required by Rule 1:20-16(c), we must independently examine the record to determine whether an ethical violation is supported by clear and convincing evidence. In re Pena, 162 N.J. 15, 17 (1999). The DRB is governed by the same standard of review. See R. 1:20-15(e)(3).

The record in this case was developed during three days of testimony before a special master who heard from multiple witnesses, particularly those who played key roles in the events that led to the OAE's filing of charges against Robertelli. Similar to our de novo review of a judicial disciplinary proceeding, here we must give "due" though "not controlling" deference to the Special Master's conclusions based on his "assessment of the demeanor and credibility of witnesses." See In re Subryan, 187 N.J. 139, 145 (2006) (quoting In re Disciplinary Procedures of Phillips, 117 N.J. 567, 579-80 (1990)); see also In re Alcantara, 144 N.J. 257, 264 (1995) (agreeing with the District Ethics Committee's determination that witnesses were credible and

noting "[t]he [District Ethics Committee] observed the witnesses' demeanor"); In re Norton, 128 N.J. 520, 535 (1992) ("We agree generally with the [District Ethics Committee's] analysis of the events, which is based primarily on its assessment of the witnesses' credibility."). However, when the credibility findings are not fairly supported by the record, we owe no deference and may reject those findings. See Subryan, 187 N.J. at 145.

The plurality and dissenting DRB opinions acknowledged the deference owed to the credibility findings of the Special Master but differed on whether deference should be afforded to those findings in this case.

Although we are the final triers of fact in a disciplinary matter, a special master's credibility findings are generally entitled to some level of deference. That is so because, as an appellate court, we are left to survey the landscape of a cold record. We recognize that a special master has "the opportunity to make first-hand credibility judgments about the witnesses who appear[ed] on the stand," see DYFS v. E.P., 196 N.J. 88, 104 (2008), and "to assess their believability" based on human factors indiscernible in a transcript: the level of certainty or uncertainty expressed in a vocal response, the degree of eye contact, whether an answer to a question is strained or easily forthcoming, and so many other indicia available only by actual observation of the witness, see Jastram v. Kruse, 197 N.J. 216, 230 (2008).

At every point in this disciplinary process -- before the Special Master, the DRB, and this Court -- the OAE has had the burden of proving by clear and convincing evidence that Robertelli committed a violation of the RPCs charged in the complaint. See In re Helmer, 237 N.J. 70, 88 (2019); R. 1:20-6(c)(2)(B), (C). To satisfy the clear-and-convincing standard, the evidence must produce in our minds "a firm belief or conviction" that the charges are true. Helmer, 237 N.J. at 88 (quoting In re Seaman, 133 N.J. 67, 74 (1993)). In other words, the evidence must be "so clear, direct and weighty and convincing as to enable [us] to come to a clear conviction, without hesitancy, of the precise facts in issue." Id. at 88-89 (quoting Seaman, 133 N.J. at 74). The "high standard" of proof in an attorney disciplinary action reflects the "serious consequences" that follow from a finding that an attorney violated the RPCs. In re Sears, 71 N.J. 175, 197-98 (1976).

We now apply those precepts to the case before us.

IV.

A.

Our thorough review of the record, giving due though not controlling deference to the credibility findings of the Special Master, leads us to the conclusion that the OAE has not sustained its burden of proving by clear and convincing evidence that Robertelli violated the RPCs.

1.

Certain facts are basically undisputed. Facebook is ubiquitous today, but it was not in 2008. Then, Facebook had recently emerged from college campuses onto a world stage, transforming itself from a youth medium to a communication/information medium for people of all ages. That swift transition explains the early generational divide in the understanding of that new social media platform. In 2008, Cordoba had recently graduated from college, where she had a Facebook page; on the other hand, Robertelli, then forty-six years old, had installed a computer on his office desk just two years earlier.

Robertelli was not tech savvy. He communicated mostly in person or by telephone. He had, at best, a primitive understanding of social media that led him to believe that Facebook was just another extension of the internet. Like many attorneys, he viewed the internet as akin to a public bulletin board or a public library, where information exposed to the world could be foraged, collected, and used to advance the interests of a client in litigation. And indeed, even in the realm of social media, such as Facebook, jurisdictions appear to universally hold that "[a] lawyer may view the public portion of a person's social media profile or view public posts even if such person is represented by another lawyer." N.Y. Bar Ass'n, Com. & Fed. Litig. Section,

Social Media Ethics Guidelines, No. 4.A (2019); see also, e.g., N.C. Formal Ethics Op. 2018-5 (2019) ("Lawyers may view the public portion of a person's social network presence."); Me. Ethics Op. 217 (2017) ("Merely accessing public portions of social media does not constitute a 'communication' with a represented party for the purposes of [the equivalent of RPC 4.2].").

At least, as of early 2008, Robertelli did not know how Facebook functioned, did not know about its privacy settings, and did not know the language of Facebook, such as "friending." No one disputed at the Special Master hearing that Facebook was a novelty to the bar in 2008. As of 2008, no jurisdiction had issued a reported ethics opinion giving guidance on the issue before this Court -- whether sending a "friend" request to a represented client without the consent of the client's attorney constitutes a communication on the subject of the representation in violation of RPC 4.2. The absence of ethical guidance at that time evidently reflected that Facebook had yet to become the familiar social media platform that it is today in the legal community. Many lawyers in 2008, like Robertelli, had a "[m]inimum" understanding of Facebook.

Robertelli's paralegal had retained her Facebook page from college and knew the language of that new social media platform. One of her job duties at Rivkin Radler was to conduct internet research, such as background checks

surveying a person's criminal, educational, and employment history, as she did in the case of Hernandez. It was at that point, when Cordoba used her personal Facebook page to research Hernandez's background, that recollections clashed at the Special Master hearing about what occurred a decade earlier.

We now turn to the disputed facts.

2.

At the hearing, Cordoba testified that, at first, Hernandez's Facebook page was open to the public; Hernandez testified that his Facebook page was always private. Cordoba stated that she forwarded Hernandez the you-look-like-my-favorite-hockey-player message, and then Hernandez sent the "friend" request; Hernandez stated that Cordoba sent him the "friend" request, and then forwarded the message. Hernandez deleted his Facebook page before the filing of the grievance, destroying an objective means of determining who had the better memory.

According to Cordoba, when Hernandez's Facebook page turned private, she consulted with Robertelli and told him her only means of access was to send a "friend" request. But Cordoba conceded that even though she attempted to give a "simple" explanation of Facebook's privacy settings, she did not believe Robertelli understood the significance of a "friend" request. The Special Master reasoned that Robertelli instructed Cordoba to hold off

proceeding further until he checked with the insurance adjuster because Dawn Mulligan of the Joint Insurance Fund had to authorize payment for investigatory services. That makes sense. It is unlikely that Robertelli sought ethical advice from the insurance adjuster.

Robertelli testified that, in explaining to him the change in Hernandez's Facebook page, Cordoba told him that Hernandez's Facebook information was in a different area of the internet, on the equivalent of a bulletin board but accessible by the "click of a button." In Robertelli's account, Cordoba never used the term "friend." He told her to click the button and to continue to monitor the site.

The Special Master observed the witnesses firsthand. He found that the passage of time had dulled their memories. The refreshing of Cordoba's memory was not done with contemporaneous notes but with memos of Cordoba's interviews conducted years after her brief conversations with Robertelli. We reject the suggestion by the DRB plurality, based on its focus on an isolated line in the Special Master's forty-eight-page report, that the Special Master found Cordoba's testimony unreliable because she had laryngitis at the hearing. The Special Master did not find Cordoba purposefully untruthful but rather found her struggling with an uncertain memory. The Special Master observed Robertelli on the stand -- an attorney

who had a spotless "reputation for integrity and professionalism" -- and concluded that Robertelli "reasonably . . . believed" that Cordoba was searching for "publicly available information for material useful to his client."

We give due regard to the Special Master's credibility findings based on his careful observation of the witness testimony unfolding before his eyes. In the end, based on our independent review of the record, the evidence is not "so clear, direct and weighty and convincing as to enable [us] to come to a clear conviction, without hesitancy, of the precise facts in issue," and therefore the OAE has not met its burden of producing in our minds "a firm belief or conviction" that Robertelli violated RPCs 4.2; 5.3; or 8.4(c) or (d). See Helmer, 237 N.J. at 88-89 (quoting Seaman, 133 N.J. at 74).

We additionally note that the evidence fell far short of establishing that Robertelli "engage[d] in conduct involving dishonesty, fraud, deceit or misrepresentation," RPC 8.4(c), or "engage[d] in conduct that is prejudicial to the administration of justice," RPC 8.4(d). When asserted as an independent basis for discipline, RPC 8.4(d) applies only "to particularly egregious conduct." Helmer, 237 N.J. at 83 (quoting In re Hinds, 90 N.J. 604, 632 (1982)). Although the better course might have been for Robertelli to accede that the information downloaded from Hernandez's Facebook page was inadmissible after he learned about the manner in which it was obtained, we

cannot fault him for litigating a matter that this Court stated "presents a novel ethical issue." See Robertelli, 224 N.J. at 487.

We find that the disciplinary charges against Robertelli have not been proven by clear and convincing evidence.

We now briefly review those charges and issue a few directives to remove all doubt, going forward, about a lawyer's professional obligations in the use of social media.

B.

RPC 4.2 provides that "[i]n 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." The purpose of RPC 4.2 is to deter lawyer overreaching and unfair gamesmanship -- "protecting a represented party from being taken advantage of by adverse counsel." Michels, N.J. Attorney Ethics 802 (2021) (quoting Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 82 (D.N.J. 1991), aff'd, 27 F.3d 556 (3d Cir. 1994)); see also Model Rules of Pro. Conduct r. 4.2 cmt. 1 (Am. Bar Ass'n 1983).

Robertelli may have had a good faith misunderstanding about the nature of Facebook in 2008, as the Special Master found; but there should be no lack

of clarity today about the professional strictures guiding attorneys in the use of Facebook and other similar social media platforms.

When represented Facebook users fix their privacy settings to restrict information to "friends," lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel. To be sure, a lawyer litigating a case who -- by whatever means, including through a surrogate -- sends a "friend" request to a represented client does so for one purpose only: to secure information about the subject of the representation, certainly not to strike up a new friendship. Enticing or cajoling the represented client through a message that is intended to elicit a "friend" request that opens the door to the represented client's private Facebook page is no different. Both are prohibited forms of conduct under RPC 4.2. When the communication is ethically proscribed, it makes no difference in what medium the message is communicated. The same rule applies to communications in-person or by letter, email, or telephone, or through social media, such as Facebook.

That is the universal view adopted by jurisdictions that have addressed the issue. See, e.g., N.Y. Bar Ass'n, Com. & Fed. Litig. Section, No. 4.C ("A lawyer shall not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express

consent has been furnished by the represented party's counsel."); N.C. Formal Ethics Op. 2018-5 ("[R]equesting access to the restricted portions of a represented person's social network presence is prohibited [by the equivalent of RPC 4.2] unless the lawyer obtains consent from the person's lawyer."); Me. Ethics Op. 217 ("[A]n attorney may not directly or indirectly access or use private portions of a represented party's social media, because the efforts to access and use the private information . . . are prohibited 'communications' with a represented party . . . ."); D.C. Ethics Op. 371 (2016) ("[R]equesting access to information protected by privacy settings, such as making a 'friend' request to a represented person, does constitute a communication that is covered by the [equivalent of RPC 4.2]."); Or. Formal Ethics Op. 2013-189 (Rev. 2016) (stating that lawyers may not request access to the social media of a represented party without the consent of the party's counsel); Colo. Formal Ethics Op. 127 (2015) ("[A] lawyer may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel."); W. Va. Ethics Op. 2015-02, at 10-11 (2015) ("[A]ttorneys may not contact a represented person through social media . . . nor may attorneys send a 'friend request' to represented persons.").

What attorneys know or reasonably should know about Facebook and other social media today is not a standard that we can impute to Robertelli in 2008 when Facebook was in its infancy. See In re Seelig, 180 N.J. 234, 257 (2004) ("When the totality of circumstances reveals that the attorney acted in good faith and the issue raised is novel, we should apply our ruling prospectively in the interests of fairness."). Although we find that Robertelli did not violate RPC 4.2 or the other RPCs cited in the complaint, given the novelty of Facebook in 2008 and for the reasons already stated, lawyers should now know where the ethical lines are drawn. Lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven.

We remind the bar that attorneys are responsible for the conduct of the non-lawyers in their employ or under their direct supervision. RPC 5.3 requires that every attorney "make reasonable efforts to ensure that the" conduct of those non-lawyers "is compatible with [the attorney's own] professional obligations" under the RPCs. RPC 5.3(a), (b). For example, an attorney will be held accountable for the conduct of a non-lawyer if the attorney "orders or ratifies the conduct" that would constitute an ethical violation if committed by the attorney or "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable

remedial action." RPC 5.3(c)(1), (2). In short, attorneys must make reasonable efforts to ensure that their surrogates -- including investigators or paralegals -- do not communicate with a represented client, without the consent of the client's attorney, to gain access to a private Facebook page or private information on a similar social media platform.

V.

In sum, we hold that the disciplinary charges set forth in the complaint against Robertelli have not been proven by clear and convincing evidence and must be dismissed. We refer to the Advisory Committee on Professional Ethics, for further consideration, the issues raised in this opinion. After its review, the Committee shall advise this Court whether it recommends any additional social media guidelines or amendments to the RPCs consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in JUSTICE ALBIN's opinion.

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-442
Issued: November 17, 2017

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Question 1: When an attorney (Lawyer A) sends an email to another lawyer (Lawyer B) and Lawyer A sends a copy of such communication to Lawyer A's client, should Lawyer A's action be regarded as giving Lawyer B consent to use the "reply all" function when replying to Lawyer A?

Answer: No

Authorities: SCR 3.530 (4.2), North Carolina State Bar Formal Ethics Opinion 7 (2013), Association of the Bar of the City of New York Formal Opinion 2009-1, Restatement of the Law Governing Lawyers, section 99, comment j.

Question 2: When Lawyer A sends an email to Lawyer B with copy of such email being sent to Lawyer A's client, does the act of sending the client a copy of the email reveal "information relating to the representation of the client?"

Answer: Yes

Authority: SCR 3.530 (1.6(a))

Question 3: What precautions should an attorney take in using the "reply all" button?

Answer: See opinion

Discussion

1) If a lawyer (Lawyer A) sends an email to another lawyer (Lawyer B), who is not affiliated with Lawyer A, and copies Lawyer A's client by using "cc," Lawyer B should not correspond directly with Lawyer A's client by use of the "reply all" key. A lawyer who, without consent, takes advantage of "reply all" to correspond directly with a represented party violates Rule 4.2.

Further, showing "cc" to a client on an email, without more, cannot reasonably be regarded as consent to communicate directly with the client. In North Carolina State Bar Formal Ethics Opinion 7 (2013), the Committee opined:

> 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.

In Formal Opinion 2009-1 the Association of The Bar of The City Of New York, Committee on Professional and Judicial Ethics opined that the no-contact rule (DR 7-104(A) (1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Further, prior consent to the communication means actual consent. The New York Bar advised that while consent may be inferred from the conduct of the represented person's lawyer, a lawyer communicating with a represented person without first securing the other lawyer's express consent runs the risk of violating the no-contact rule. (Emphasis added.) This Committee agrees with the opinions of North Carolina and New York and endorses their use for Kentucky lawyers.

2) Showing another lawyer that a copy of an email is being sent to a lawyer's client reveals the following information relating to the lawyer's representation: 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. Hence, it is best to avoid a problematic result by not sending and showing a copy of the sending lawyer's email to the sending lawyer's client. Of course, "cc"ing a client does not violate Rule 1.6, if the client expressly or impliedly consents to the limited disclosure of "information related to the representation."

3) To avoid the problems identified in (1) and (2), attorneys should either forward their emails to their client or use their system's blind carbon copy feature ("bcc"), after first assuring that the "reply all" feature is limited to those in the "cc" line. Sending a blind copy to the client ("bcc) or forwarding the email to the client protects a confidential communication (sending the copy to client), avoids inappropriate confusion, and forecloses an implied consent argument. If Lawyer A wants Lawyer B to know that Lawyer A's client has been informed of the communication, then Lawyer A may either so advise Lawyer B of such fact or, if deemed necessary, show that a copy of the email communication is being made to Lawyer A's client, while at the same time giving clear written notice to Lawyer B that Lawyer B is not authorized to respond or communicate with Lawyer A's client.

Avoiding use of "cc" also prevents the client to inadvertently communicate with opposing counsel by hitting the "reply all." key. A proposed (2017) amendment to comment 6 to Rule 1.7 would add "the risks and benefits of technology" to lawyers' obligations to maintain the requisite knowledge and skill. The "reply all" button presents a dangerous risk to the sending lawyer because the sender might inadvertently send an embarrassing or harmful email to unintended recipients. The web contains many examples of funny, embarrassing or harmful uses of "reply all." In addition to "think before you reply," the Wall Street Journal suggests:

> If the system allows customization of the toolbar. "Reply All" can be made more difficult to use accidentally by moving it away from the Reply button. Organizations can also install add-ons for Outlook which prompt people when they are using Reply All. Similar to the helpful, "Are you sure you want to delete this?" or the "is the attachment actually attached" pop-ups, this add-on wants confirmation before enabling Reply All, giving senders the chance to reconsider whether that's really their intention. (Let's Make it Harder to Use "Reply All," Wall Street Journal, November 13, 2016).

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

2012 Formal Ethics Opinion 7

Copying Represented Persons on Electronic Communications

Adopted: October 25, 2013

Opinion provides that consent from the lawyer for a represented person must be obtained before copying that person on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

Inquiry #1:

When Lawyer A sends an electronic communication, such as an email, to opposing counsel, Lawyer B, may Lawyer A "copy" Lawyer B's client on the electronic communication?

Opinion #1:

No, unless Lawyer B has consented to the communication. Rule 4.2(a), often called the "no contact rule," provides that, during the representation of 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 to do so by law or a court order." Copying the opposing party on a communication—whether electronic communication or conventional mail—to opposing counsel is a communication under Rule 4.2(a) and prohibited unless there is consent or other legal authorization.

Inquiry #2:

Would the answer change if Lawyer A is replying to an electronic communication from Lawyer B in which Lawyer B copied her own client? Does the fact that Lawyer B copied her own client on the electronic communication constitute implied consent to a "reply to all" responsive electronic communication from Lawyer A?

Opinion #2:

The fact that Lawyer B copies her own client on the electronic communication to which Lawyer A is replying, standing alone, does not permit Lawyer A to "reply all." While Rule 4.2(a) does not specifically provide that the consent of the other lawyer must be "expressly" given, the prudent practice is to obtain express consent. Whether consent may be "implied" by the circumstances requires an evaluation of all of the facts and circumstances surrounding the representation, the legal issues involved, and the prior communications between the lawyers and their clients.

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 express consent from opposing counsel. 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.

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. These factors need to be considered in conjunction with the purposes behind Rule 4.2. Comment [1] to Rule 4.2 provides:

[Rule 4.2] contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

After considering each of these factors, and the intent of Rule 4.2, Lawyer A must make a good faith determination whether Lawyer B has manifested implied consent to a "reply to all" responsive electronic communication from Lawyer A.

Caution should especially be taken if Lawyer B's *client* responds to a "group" electronic communication by using the "reply to all" function. Lawyer A may need to reevaluate the above factors before responding further. Under no circumstances may Lawyer A respond solely to Lawyer B's client.

Because of the ease with which "reply to all" electronic communications may be sent, the potential for interference with the attorney-client relationship, and the potential for inadvertent waiver by the client of the client-lawyer privilege, it is advisable that a lawyer sending an electronic communication, who wants to ensure that his client does not receive any electronic communication responses from the receiving lawyer or parties, should forward the electronic communication separately to his client, blind copy the client on the original

electronic communication, or expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining whether it is acceptable to “reply to all” when a represented party is copied on an electronic communication.

Formal Opinion 2009-01: The No-contact Rule and Communications Sent Simultaneously to Represented Persons and Their Lawyers

Committee Report

January 02, 2009

VIEW REPORT

TOPIC: The no-contact rule and communications sent simultaneously to represented persons and their counsel; implied consent to such communications.

DIGEST: The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.

CODE: DR 7-104

QUESTIONS: (1) When a lawyer sends a letter or an email directly to a person known to be represented by counsel, can the lawyer satisfy the prior consent requirement of DR 7-104(A)(1) by simultaneously sending a copy of the letter or email to the represented person's lawyer?

(2) In the context of an email chain involving lawyers and represented persons, does the prior consent requirement of DR 7-104(A)(1) require express consent for a "reply to all" communication or may consent be implied?

OPINION

I. Sending Simultaneous Correspondence to A Represented Person And Her Lawyer Without Prior Consent Violates the No-Contact Rule Unless Otherwise Authorized By Law

The "no-contact rule," DR 7-104 of the Code of Professional Responsibility (the "Code "), provides that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in

that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-104(A)(1).[1]

We have been asked whether simultaneously sending a letter or email to a represented person and her lawyer, by itself, satisfies the prior consent requirement. We believe this question is readily answered in the negative by both the text and purpose of the no-contact rule.

At the outset, it is clear that a letter or an email is a "communication" covered by DR 7-104(A)(1). As the New York State Bar Association has noted, "[t]he Code does not define the word 'communicate,' but the plain and ordinary meaning of the word – to 'impart,' 'convey,' 'inform,' 'transmit,' or 'make known,' Webster's Third New International Dictionary (Unabridged) 460 (1993); see Black's Law Dictionary 253 (5th ed. 1979) – all presuppose some form of transmission of information." N.Y. State 768 (2003).

The no-contact rule, by its terms, requires that a lawyer have the "prior consent" of a represented person's lawyer before communicating directly with that person. Simultaneously sending a letter or email to a represented person and her lawyer does not satisfy this "prior consent" requirement. Prior consent means just that – consent obtained in advance of the communication. A lawyer receiving a copy of a letter or email sent to her client has not, by virtue of receiving the copy, consented to the direct communication with her client.[2]

Our conclusion is supported by a recent case and prior ethics opinions. In AIU Ins. Co. v. The Robert Plan Corp., 17 Misc. 3d 1104(A), 851 N.Y.S.2d 56, 2007 WL 2811366, at *14 (Sup. Ct. N.Y. County 2007), the plaintiffs' lawyers sent a letter to the directors of the defendant corporation with a copy to the company's counsel. Under New York law, the directors of a corporate client are included in the definition of "party" for purposes of DR 7-104. See AIU Ins. Co., 2007 WL 2811366, at *14 (citing Niesig v. Team I, 76 N.Y.2d 363 (1990)). The court concluded that sending a letter to the directors, even with a copy sent to the company's counsel, violated DR 7-104 and enjoined plaintiffs' lawyers from any further contact with the directors.

In the same vein, the American Bar Association (the "ABA") has addressed the situation where a lawyer fears that opposing counsel has failed to relay a settlement offer to her client. The ABA concluded that sending the settlement offer directly to the represented party is improper, absent the other lawyer's consent or specific legal authority to do so. See ABA Formal Op. 92-362 (offering party's lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law), ABA Informal Op. 1348 (offering party's lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party's lawyer).

Our conclusion that the no-contact rule forbids sending simultaneous communications to client and counsel is bolstered by consideration of the rule's purpose. As the Court of Appeals explained in Niesig, DR 7-104(A)(1)

fundamentally embodies principles of fairness. “The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.” (Wright v Group Health Hosp., 103 Wash. 2d 192, 197, 691 P.2d 564, 567.) By preventing lawyers from deliberately dodging adversary counsel to reach – and exploit – the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions (see 1 Hazard & Hodes, Lawyering, at 434-435 [1989 Supp.]; Wolfram, Modern Legal Ethics § 11.6, at 613 [Practitioner's ed. 1986]; Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 686 [1979]).

Niesig, 76 N.Y.2d at 370; see also ABA Formal Op. 95-396 (“[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.”).

It could be argued that the purpose of DR 7-104(A)(1) is satisfied when a copy of a communication sent by counsel to a represented person also is sent to the represented person’s lawyer. Under that theory, the represented person would be adequately protected because her lawyer would be aware of the communication and could consult with her client before responding to it. We do not agree with this view. While it is true that sending a copy of the communication to counsel reduces the risk that the represented person will be subject to overreaching, the risk is not eliminated. In practical terms, there is no assurance that a letter or email sent simultaneously to a lawyer and her client will be received by them at the same time. For any number of reasons – the vagaries of the postal or computer system, the lawyer’s work or travel schedule, or delays in the distribution of mail at the lawyer’s office – the lawyer might not receive her copy of the communication until after the client has received it and made a direct uncounseled response. The risk is magnified with email communications, where a response by the client can be made with the touch of a button on a keyboard.

More fundamentally, permitting a lawyer to communicate directly with a represented person by letter or email, even if a copy is also sent to counsel, would undermine the role of the represented person’s lawyer as spokesperson, intermediary and buffer. Under DR 7-104(A)(1), a represented person is entitled to be insulated from any direct communications from opposing counsel, aside from direct communications otherwise authorized by law. All other communications relating to the subject matter of the representation, whether in person, by letter or via email, must proceed through the represented person’s lawyer absent prior consent.

II. “Prior Consent” To the Simultaneous Communication May Be Inferred From The Lawyer’s Participation In The Communication And Other Surrounding Facts and Circumstances

While the “prior consent” of a represented person’s lawyer is required for direct communications with the client (as set forth above), the question remains whether the consent must be express or may be inferred from the circumstances. In this age of instantaneous electronic communications, the issue of implied consent often presents itself in the context of group email communications involving multiple clients and their lawyers. For example, does the fact that a lawyer copies her own client on an email constitute implied consent to a “reply to all” responsive email from the recipient attorney?[3]

While there is a surprising dearth of authority addressing the issue of implied consent in the context of the no-contact rule, a comment to the Restatement of the Law Governing Lawyers sensibly explains that a lawyer “may communicate with a represented nonclient when that person’s lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.” Rest. (Third) of Law Governing Lawyers § 99 cmt. j.

We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to “reply to all” communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting.

Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a “reply to all” response from any one of the email’s recipients.

Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the "cc" cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to “reply to all” communications.

The critical question in any case is whether, based on objective indicia, the represented person's lawyer has manifested her consent to the "reply to all" communication. Accord ABCNY Formal Op. 2007-1 (setting forth objective indicia to determine whether in-house counsel is acting as a lawyer for purposes of DR 7-104(A)(1)). Using an objective test, express consent is preferable, but not invariably required, because actual consent may be inferred from counsel's conduct.

Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented person's lawyer, and it will have both subject matter and temporal limitations. An email sent by a lawyer to opposing counsel, with a copy to the client, would imply the lawyer's consent to a "reply to all" response limited to the subject matter of the initial email (unless otherwise clearly indicated). And the duration of the implied consent would last only for a reasonable period of time based on the particular circumstances. It bears emphasis that an attorney who has previously consented to a direct communication with her client, or who has not explicitly objected to it, can make clear at any time that she does not consent. Consent, whether express or implied, can be revoked at any time by a clear statement to that effect.

The implied consent endorsed here is limited to those situations where a lawyer has initiated contact with other counsel and has done something to manifest consent to a response from counsel addressed to the initiating lawyer's client. This situation is to be distinguished from that presented in ABCNY Formal Op. 2005-4, where we were unwilling to recognize implied consent because the lawyer had not engaged in any conduct from which consent could be implied. In that opinion, we evaluated whether a lawyer was permitted to speak directly with a non-lawyer insurance adjuster where the insurance adjuster represented that counsel had consented to the communication. We noted that the other lawyer could not rely on the insurance adjuster's representation and that consent could not be implied in that situation. We reasoned:

[T]he plain language of DR 7-104(A)(1) requires that opposing counsel receive notice and provide actual consent before an attorney may participate in such communications with a non-lawyer representative. We further conclude that the opposing counsel's consent cannot be inferred from the circumstances, and that the consent must be conveyed in some form by opposing counsel to the attorney.

* * *

Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.

ABCNY Formal Op. 2005-4.

In the foregoing opinion, the Committee found no adequate indication of consent where the allegedly consenting lawyer was not a party to the communication in question and did nothing from which consent could be inferred. The type of implied consent recognized here, by contrast, presupposes that the lawyer is a party to the email exchange and has manifested consent to the direct communication.

A cautionary note is in order. An attorney who relies on "implied consent" to satisfy DR 7-104(A)(1) runs the risk that the represented person's lawyer has not consented to the direct communication. To avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent. However, the absence of express consent does not necessarily establish a violation of DR 7-104(A)(1) if the represented person's lawyer otherwise has manifested her consent to the communication.

We are mindful that the ease and convenience of email communications (particularly "reply to all" emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequences of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication.

CONCLUSION

We conclude that sending a letter or email to a represented person, and simultaneously sending a copy of the communication to counsel, is impermissible under DR 7-104(A)(1) unless the represented person's lawyer has provided prior consent to the communication or the communication is otherwise authorized by law.

We further conclude that express consent to such simultaneous communication, while preferred, is not always required. A lawyer's prior consent may be inferred where the represented person's lawyer has taken some action manifesting her consent. The scope of the implied consent will be determined by subject matter and temporal considerations, based on what a reasonable lawyer would understand was authorized by the represented person's lawyer. The safest course always is to obtain express prior consent.

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1. The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct ("the Rules"), which will become effective and replace the Code on April 1, 2009. Under the new Rules, DR 7-104(A)(1) of the Code has been adopted almost verbatim as Rule 4.2(a).
2. This opinion applies equally to simultaneous communications (i) addressed to the lawyer and "cc'd" to the client, (ii) addressed to the client and "cc'd" to the lawyer, and (iii) addressed to both lawyer and client.

3. An attorney who sends an email to another attorney can eliminate the possibility of being found to have provided such implied consent by simply removing the client as a "cc" on the email – the sending attorney can instead use the "bcc" or blind copy feature to send the email to the client or can forward to the client a copy of the email sent to the other lawyer.

Author(s): Professional Ethics Committee

Subject Area(s): Ethics

AMENDMENTS TO THE OHIO RULES OF PROFESSIONAL CONDUCT AND THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

The following amendments to the Ohio Rules of Professional Conduct (Prof. Cond. R. 5.5) and the Supreme Court Rules for the Government of the Bar of Ohio (Gov. Bar R. I, Section 19 and Gov. Bar R. XII, Section 2) were adopted by the Supreme Court of Ohio. The history of the amendments is as follows:

March 23, 2021	Publication for public comment
August 3, 2021	Final adoption by conference
September 1, 2021	Effective date of amendments

Key to Adopted Amendments:

1. Unaltered language appears in regular type. Example: text

2. Language that has been deleted appears in strikethrough. Example: ~~text~~

3. New language that has been added appears in underline. Example: <u>text</u>

OHIO RULES OF PROFESSIONAL CONDUCT

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW; REMOTE PRACTICE OF LAW

[Existing language unaffected by the amendments is omitted to conserve space]

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6;

(4) the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction, provided the lawyer does not do any of the following:

(i) solicit ~~business~~ or accept clients for representation within this jurisdiction or appear before Ohio tribunals, except as otherwise authorized by rule or law;

(ii) state, imply, or hold himself or herself out as an Ohio lawyer or as being admitted to practice law in Ohio;

(iii) violate the provisions of Rules 5.4, 7.1, and 7.5.

(e) A lawyer who is practicing pursuant to division (d)(2) or (4) of this rule and the lawyer's law firm shall indicate the jurisdictional limitations of the lawyer. If any Ohio presence is indicated on any lawyer or law firm materials available for public view, such as the lawyer's letterhead, business cards, website, advertising materials, fee agreement, or office signage, the lawyer and the law firm should affirmatively state the lawyer is not admitted to practice law in Ohio. See also Rule 7.1 and 7.5.

Comment

[Existing language unaffected by the amendments is omitted to conserve space]

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other

systematic and continuous presence in this jurisdiction for the practice of law of this jurisdiction. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of divisions (d)(1) ~~and (d)(2)~~ through (d)(4), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[Existing language unaffected by the amendments is omitted to conserve space]

[15] Division (d) identifies ~~three~~ four circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) through (d)~~(3)~~(4), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Lawyers practicing remotely in Ohio must determine whether additional safeguards are necessary to comply with their duties of confidentiality, competence, and supervision, including, without limitation, their use of technology to facilitate working remotely. These measures may include ensuring secure transmission of information to the lawyer's remote computer; procedures to securely store and back up confidential information; mitigation of an inadvertent disclosure of confidential information; and security of remote forms of communication to minimize risk of interference or breach.

[Existing language unaffected by the amendments is omitted to conserve space]

[22] Division (d)(4) allows an attorney admitted in another United States jurisdiction to practice the law of that jurisdiction while working remotely from Ohio. A lawyer practicing remotely will not be found to have engaged in the unauthorized practice of law in Ohio based solely on the lawyer's physical presence in Ohio, though the lawyer could through other conduct violate the rules governing the unauthorized practice of law. A lawyer practicing remotely in Ohio must continue to comply with the rules of the lawyer's home jurisdiction regarding client trust accounts, and any client property consisting of funds should be handled as if the lawyer were located in the lawyer's home jurisdiction.

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

[Existing language unaffected by the amendments is omitted to conserve space]

Form of Citation, Effective Date, Application

[Existing language unaffected by the amendments is omitted to conserve space]

(q) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5 and Comments [4], [5], [15], [16], and [22] of Prof. Cond. R. 5.5 effective September 1, 2021.

SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

RULE I. ADMISSION TO THE PRACTICE OF LAW

[Existing language unaffected by the amendments is omitted to conserve space]

Section 19. Practice Pending Admission during the Admission to the Practice of Law Process.

(A)(1) An applicant who has completed and filed with the Office of Bar Admissions one of the following applications for the admission to the practice of law may file with the Office an Application to Practice Pending Admission during the admission process pursuant to division (A)(4) of this section:

[Existing language unaffected by the amendments is omitted to conserve space]

(d) Submits within ninety days of providing Ohio legal services ~~in Ohio~~ a complete application for admission to practice law in accordance with this rule and on forms furnished by the Office of Bar Admissions. An applicant who submits a completed application after the ninety days may petition the Office of Bar Admissions to waive this provision for good cause;

(e) Reasonably expects to fulfill all of the requirements for admission to the practice of law pursuant to this rule;

(f) Associates with an active Ohio lawyer who is admitted to practice in Ohio, is in good standing, and has agreed to associate with the applicant~~, unless the applicant files an affidavit on a form furnished by the Office of Bar Admissions affirming that during the application process the applicant will only practice the law of the jurisdiction in which the applicant is already admitted~~;

[Existing language unaffected by the amendments is omitted to conserve space]

(D) The authority of an applicant to practice law pursuant to this section shall terminate immediately upon the occurrence of any of the following:

(1) The time period authorized by division (A)(2) of this section has expired and no extension has been granted;

(2) The applicant withdraws the applicant's application for admission to the practice of law;

(3) The Application for Admission to the Practice of Law without Examination is disapproved, the Application to Transfer UBE Score is denied, or the applicant fails the Ohio bar examination;

(4) ~~If required pursuant to division (A)(2)(f) of this section, the~~ The applicant fails to remain associated with an active Ohio attorney in good standing pursuant to division (A)(2)(f) of this section.

[Effective: February 28, 1972; amended effective October 30, 1972; November 27, 1972; March 19, 1973; November 12, 1973; March 1, 1974; July 8, 1974; April 26, 1976; January 24, 1977; March 9, 1977; August 1, 1977; January 1, 1982; March 9, 1983; July 1, 1983; May 7, 1984; May 28, 1984; December 31, 1984; April 1, 1987; May 6, 1987; January 1, 1989; July 1, 1989; January 1, 1991; February 1, 1991; October 1, 1991; February 1, 1992; May 1, 1992; July 1, 1992; August 1, 1992; January 1, 1993; September 15, 1993; January 1, 1995; May 1, 1997; August 3, 1998; June 1, 2000; October 1, 2000; February 1, 2003; October 1, 2003; February 1, 2007; May 1, 2007; October 1, 2007; January 1, 2008; February 1, 2009; August 1, 2010; January 1, 2013; January 1, 2014, July 1, 2014; January 1, 2015; January 1, 2017; July 1, 2017; September 2, 2019; June 1, 2020; March 2, 2021; September 1, 2021.]

RULE XII. PRO HAC VICE ADMISSION

[Existing language unaffected by the amendments is omitted to conserve space]

Section 2. Requirements for Permission to Appear Pro Hac Vice

(A) A tribunal of this state may grant permission to appear pro hac vice to an attorney who is admitted to practice in the highest court of a state, commonwealth, territory, or possession of the United States or the District of Columbia, or who is admitted to practice in the courts of a foreign state and is in good standing to appear pro hac vice in a proceeding.

(1) An attorney is eligible to be granted permission to appear pro hac vice pursuant to this rule if any of the following apply:

(a) The attorney neither resides in nor is regularly employed at an office in this state;

(b) The attorney is registered for corporate status in this state pursuant to Gov. Bar R. VI, Section 3;

(c) The attorney resides in this state but lawfully practices from offices in one or more other states, including lawful remote practice pursuant to Prof.Cond.R. 5.5(d)(4);

(d) The attorney maintains an office or other systematic and continuous presence in this state pursuant to Prof.Cond.R. 5.5(d)(2) or (d)(4);

(e) The attorney has permanently relocated to this state in the last 120 days and is currently an applicant pending admission under Gov. Bar R. I.

[Existing language unaffected by the amendments is omitted to conserve space]

[Effective: January 1, 2011; January 1, 2013; January 1, 2014; July 1, 2016; January 1, 2017; July 1, 2017; July 1, 2019, September 1, 2021.]

RULE XX. TITLE AND EFFECTIVE DATES

[Existing language unaffected by the amendments is omitted to conserve space]

Section 2. Effective Dates.

[Existing language unaffected by the amendments is omitted to conserve space]

(**[Insert division letter]**) The amendments to Gov. Bar R. X, Section 19 and Gov. Bar R. XII, Section 2, adopted by the Supreme Court on August 3, 2021, shall take effect on September 1, 2021.

NEW YORK STATE BAR ASSOCIATION
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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*.

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[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".

(28-15)

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.

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).