"Enemy by E-Mail"

BUSINESS LAW TODAY, 2002

Even as the Internet created a whole new arena for businesses to fail, the proliferation of e-mail as a means of business communication created a wide world of ways for lawyers to foul up a deal. This article offers several examples of problems that e-mail communications can create, together with a simple solution adapted from the rules of lawyer ethics.

Many features that are unique to e-mail have encouraged its wider and wider use by lawyers and their clients to negotiate and document business transactions. E-mail is nearly instantaneous; it is much easier to send one than to mail or fax a letter, and, in most cases, is cheaper. Though instant, e-mail does not have to be simultaneous like a telephone conversation, and therefore can help to overcome time differences between different parts of the United States and around the world. An especially useful feature is that e-mail programs offer both a 'cc' and a 'bcc' whereby clients, co-counsel, and other interested parties may be copied at no extra cost or effort. And, since business executives began using it for their communications years ago, their lawyers have now begun to follow suit.

The powerful features of e-mail thus enable and spur all parties to a given transaction to share information and document drafts freely and openly. However, not unlike J.R.R. Tolkein's Ring of Power, e-mail can be either a blessing or a curse depending upon the manner in which it is wielded.

Even in simple communications with one's own client, let alone the typical adversarial negotiation, the promiscuous nature of e-mail can cause it to become a forum for the display of cowardice, backstabbing, bravery, and the entire gamut of human foibles. Let us suppose, for example, that a salesman with one's corporate client is working on a major licensing arrangement for the company, and the pressure is on to book the revenue before end-of-quarter. The salesman demanded your services to negotiate a licensing arrangement four weeks ago in mid-August. Three days afterwards, you e-mailed him a bullet list of questions to answer in order that you could prepare the first draft of the license. The salesman failed to respond to your e-mail prior to leaving on a three-week, laptop-free ice climbing tour of the Peruvian Andes.

Upon returning just two weeks before quarter's end, the salesman, barely recovering his wits after a bout of altitude sickness, panics and fires off an e-mail to you, cc'ing CEO, CFO & several other salesmen with whom you work, demanding to know where his first draft is.

Here, bravery and the "Reply to All" button can come in handy. Since your responsiveness has been challenged publicly, it will be appropriate to remind your client publicly that he had failed to respond to your query of three weeks before, nor to any of your reminders since. As long as your response is couched in temperate language, the public nature of your response will be deemed by all to be an appropriate defense of your work.

The broadcast capabilities of e-mail are not always benign however, especially in an adversarial situation. Let us now suppose that your client, ABC Co., is a business on your coast that is selling one of its divisions to XYZ Co., a buyer on the other coast. The CFO of ABC Co. has asked you to represent ABC Co. in the purchase. The planned closing will be preceded by intense, thorough, and drawn out due diligence, negotiation of the asset purchase agreement, and of all other documents that are instrumental to the sale.

XYZ Co. is represented by competent, counsel in its home state. For speed, and due to the time difference, everyone agrees to use e-mail for most communications, and to send drafts back and forth via attachment for review and comment. Cc and bcc e-mails proliferate accordingly.

You are halfway to closing when the following occurs:

- In sending an e-mail to opposing counsel, you "cc" ABC Co. for the dual purpose of keeping ABC Co. informed of your progress, and to obtain ABC Co.'s feedback.

- Opposing counsel replies using the "Reply to All." Option in his e-mail program.

One of the following scenarios may then ensue:

1. Opposing counsel's response happens to include a lawyerly complaint about your (a) syntax, (b) lack of response to an earlier e-mail, (c) spelling or (d) all of the above. Had ABC Co. not been included in the exchange, you would have simply

ignored opposing counsel's shot. Knowing that ABC Co. has seen it, you include in your response a defense of your work and throw in a couple of similar barbs, cc'ing ABC Co. so that he will see them. Opposing counsel responds in kind.

Result: As complaints and barbs fly back and forth freely, all for the benefit of ABC Co. and XYZ Co., and the detriment of concluding the acquisition, The executives of ABC Co. and XYZ Co. both conclude that the two of you are thin-skinned SOBs, who, like other lawyers they have known, cannot communicate civilly long enough to conclude a deal. You're both fired, and the parties conclude the acquisition with a handshake and a check.

2. Opposing counsel's response is straightforward, but ABC Co. reads it before you do and then calls you about it. After you recover from your initial embarrassment, you read opposing counsel's e-mail and respond gamely by e-mailing opposing counsel and XYZ Co. with your reply along with everyone else. Pretty soon, everyone is e-mailing everyone else at the same time. When other matters intrude on your time, ABC Co. starts asking opposing counsel for his reply directly. You call ABC Co. and tell him that opposing counsel is not to be trusted, as ABC Co. could inadvertently waive the lawyer client privilege, and that ABC Co. shouldn't respond to opposing counsel before ABC Co. has consulted you first.

   Result: ABC Co. wonders what you're hiding -- opposing counsel seems like a nice person…. ABC Co. thinks maybe opposing counsel knows things about the XYZ Co. that would be useful to ABC Co.. ABC Co. starts to resent you for denying access to that knowledge. You, in turn, develop whiplash from running to your computer whenever you hear the tone indicating that an e-mail has arrived, and the beginnings of carpal tunnel syndrome from attempting to respond to opposing counsel's e-mails before anyone else does.

3. You receive and respond to opposing counsel's straightforward response timely using the "Reply to All" button. However, ABC Co. also "Replies to All" without checking with you first. ABC

Co.'s response answers a question that opposing counsel raised about the sales figures for ABC Co.'s division. Generously, ABC Co. has included sales figures for a period before the one that was requested, either by opposing counsel or in due diligence. They are much higher than in more recent years, showing a downward sales trend that XYZ Co. was unaware of.

Result: XYZ Co., thanks his lucky stars that he has learned negative information that hadn't been asked for in the first place, and drops his offering price.

4. ABC Co. replies to opposing counsel directly, not cc'ing you. During the ensuing exchange, ABC Co. and opposing counsel quickly finalize the sale, leaving you out entirely. ABC Co. is happy knowing XYZ Co. is paying "his" lawyer fees for a sale that seems to move more smoothly without your "interference."

   Result: ABC Co. calls you six months latter asking your assistance in enforcing payment terms that he waved through in the final round of negotiations and are unsecured by the XYZ Co.'s assets.

The author has encountered variations, both major and minor, on the above situations repeatedly in the course of the last six years -- the period during which it has become popular to conduct negotiations via e-mail. These problems have occurred in situations ranging from the lengthy negotiation of complicated transactions such as venture financings or acquisitions, down to the negotiation of relatively simple licensing arrangements or commercial leases.

In each of these situations, problems arose only where parties allowed a lack of formality encouraged by the immediacy of e-mail to blur the distinctions among the roles of client, lawyer, opposing party and opposing counsel. Typically, the less sophisticated client will specifically request that all parties be included in all communications. For the benefit of both client and yourself, such requests should be resisted at all costs. Of course, these same clients will, in almost the same breath, express fears and suspicions concerning the opposing party in private that run diametrically against the interests of the client.

The means of avoiding these problems is really a simple one, and lies in the hands of every licensed lawyer. At the first sign that opposing counsel has either contacted one's client directly or accepted a communication from one's client without permission, the vigilant lawyer will immediately remind opposing counsel of the rule of lawyer ethics which states that opposing counsel may not communicate with your client without your permission.

> "In 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 or is authorized by law to do so (ABA Model Rules of Professional Conduct, Rule 4.2)."

Even though a version of such a rule is in force in virtually every jurisdiction, it is a surprising fact that many lawyers, perhaps acting under some notion of "representing the deal," will blow the rule off when the logging on to their e-mail, even if they would never dream of contacting one's client outside of one's presence in person or via telephone: When reminded that there is such a rule, however, it has been the author's experience all but the most belligerent of opposing counsel will immediately cease contacting one's client, or accepting contacts from one's client. It is thus important to take this action as early as possible rather than later in the deal, when feelings may already have been hurt and egos trampled upon.

In the rare instances that opposing counsel persists in the unethical conduct, one may send opposing counsel (via e-mail attachment if necessary) a draft of a letter of complaint to the local Bar disciplinary body. It is then almost guaranteed that the communications problems will cease, and the deal will get done without further interference. In the course of having sent four or five of such drafts, the author has never had actually to send one in to its proposed target.

A variant of the situation number Three above can also occur in sending a client a "bcc." As a general rule, a "cc" should be used only when one wishes to invite the primary recipient of the e-mail to contact the person being cc'ed or vice versa. Conversely, the 'bcc' is useful where, though one still wishes to make the 'bcc' aware of the

communication, it would be counterproductive for that person to be invited into directly into the discussion.

Interpreted properly, the fact that the e-mail is a "bcc" should tell the recipient that his response, comment, or advice would be welcomed by the sender, but that he is not to contact the recipient directly. The 'bcc' is thus very useful as a means to keep a client informed of the progress of a negotiation, and of soliciting his comments and concerns though with the understanding that any such feedback is to flow through the sender, and not directly to the recipient.

Unfortunately, though the "bcc" of a mailed or faxed letter clearly identifies itself as such, Microsoft Outlook Express, by far the most widely used e-mail program, fails to do so. The program shows: (a) the recipient's e-mail address in a line labeled "To," and (b) the addresses of any "cc's" as such. However, Outlook Express fails to identify the "bcc" recipient in an equivalent line (seen, of course, only by the recipient).

Unless he has been alerted to recognize a 'bcc,' the 'bcc'ed client may therefore still unwittingly hit "Reply To All," thrusting himself into an exchange where he is not wanted. Opposing counsel will wonder why he has been contacted, since there would have been no such indication in your e-mail. This situation can usually be dealt with by a gentle admonition to the client and perhaps an occasional reminder along the way.

The person that has mastered the foregoing techniques concerning the effective use of e-mail is not immune from committing the final, big mistake: that of overuse. E-mail communications, apart from the 'bcc' and promiscuity problems discussed above, carry with them a number of limitations, including:

- they do not convey or allow one to perceive emotion;
- though nearly instantaneous, they are not simultaneous, and may be lost or discarded without being read; and
- persons that are not good at generating documents (i.e., who write poorly or carelessly) can be difficult to understand.

I have known companies, especially within the software industry, where the use of e-mail has actually become too prevalent -- to the point

where an executive or employee will refuse to pick up the telephone, and will use voicemail solely for the purpose of screening calls (and almost never to set up a personal meeting). As a result all "conversations" with these companies takes place via e-mail, and misunderstandings or communications blockages may occur due to its overuse.

It is thus vital to guard against these problems by bearing in mind that e-mail is best used as a supplement to other forms of communication is not a substitute for all of them. If someone has not responded to your e-mail, or responds incomprehensibly, pick up the phone and call him!

Beware the 'cc' vs. 'bcc' conundrum. Like many other aspects of practice online, the use of e-mail is amenable to influence of tried and true rules of behavior borrowed from "bricks and mortar" reality, in particular, the rules of lawyer ethics. Remember that e-mail is not a panacea: call or visit anyone that fails to respond to your e-mail.

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