Ethical Obligations re Emails from Opposing Party

Opposing counsel insists on cc'ing his client on every single email. We all know it is bad form. However, his client is now replying to these emails.

I emailed opposing counsel and asked him to please stop cc'ing his client and ask his client to stop emailing me. He insists he will continue to cc his client, which is going to cause a problem.

If his client's response includes attorney client privileged information, what is my obligation? I know if it is produced inadvertently, then I am supposed to destroy it and not use it. But, at this point, it seems like it would be knowing since opposing counsel is setting up a system where it is likely to happen.

Thoughts?

You could make that argument. It might depend on whether stupidity can be a factor in "inadvertently". I think I would just add his client to my email block list.

Duke Drouillard, Nebraska

I would inform opposing attorney that, as he is cc'ing his client, any and all responses by his client will not be considered privileged.

Further, said emails and can and will be used against the client. I would also say that since he has been both been warned and asked to warn his client, that, from this point forward, you will not accept any statements of inadvertent mistake, it will be considered deliberate.

Frank Kautz, Massachusetts

P.S. Oh, and be careful of blocking the client's email address, if you do you may miss something from the attorney.

In Arizona, ethics counsel constantly tells (yes tells) attorneys not to carbon copy (cc) clients on emails to opposing counsel.

If the lawyer insists on doing so, there is nothing you can do except:

1. When you reply, exclude the client; and 2. You have complied with the ethical rule by asking the attorney to stop cc'ing his client.

Under the ethical rules, attorneys have a duty of confidentiality in addition to the attorney-client privilege. So, if confidential information is disclosed and depending upon the information and circumstances it could lead to a waiver of privilege.

A related matter under most ethical rules is that a lawyer (you Jonathan) cannot communicate with a person who is represented unless opposing counsel consents. The question is whether opposing counsel is consenting to you communicating with his client.

You should review ethics opinions in your state to determine how your Bar views such issues or call your Bar's hotline (if there is one). It might be wise to obtain clarity from opposing counsel that he is waiving privilege for you to communicate with his client and provide the ethical rule.

If you have additional questions, email me off-list.

Jay Calhoun, Arizona

The question is when inadvertence becomes a waiver. I would say after your first warning and his insistence of continuing to cc his client.

VY L, Location Unknown

Well, let's hope the client is dumb enough to cc you on the reply, and you are smart enough to only respond to the lawyer.

Robert "Robby" W. Hughes, Jr., Georgia

I'm with Frank on this one. You've warned counsel. Counsel's client continues to e-mail you things that maybe you shouldn't know. There has to be a point at which opposing counsel and/or the opposing party is waiving privilege.

Our Ethics rules don't really give us that leeway, though, so you may be stuck e-mailing counsel each time it happens and ignoring the e-mails.

4.2 talks about communications with represented parties (you can't)

4.4 talks about inadvertent communications (you're supposed to notify them and not read it)

Warn him again that any future communications from his client to you will not be treated as "inadvertent" and suggest that perhaps he BCC his client on these e-mails instead.

Corrine Bielejeski, California

Unless there's a rule that requires you to communicate with OC by email, I'd block them both and make him send letters in the mail, or by fax, until he agrees to stop copying his client. You shouldn't have to be hypervigilant with this one lawyer.

Or, start a new thread every time you communicate with him so he will have to manually forward your emails to his client and manually add the client back on emails to you.

Marilou Auer, retired legal clerk/secretary, Virginia

I do not see any ethical issue.

If useful information is disclosed to you by the other party, use it.

OC approved communication with the client. If OC thinks privileged information is disclosed during his approved arrangement, let him try to cram the disclosure back into by the bottle.

My experience in Los Angeles county state court (some of the busiest courts in the USA) is that attorneys, witnesses, and judges all regularly lie.

Without sanction. Notions of ethics in this context are quaint.

Jason Gage, California

You risk disqualification if you use the information so disclosed. 42 Cal.4th 807, 812, 819. You can bring this issue to the court 's attention. I'd file a motion in limine, now, citing Rule 4.4, Mitsubishi, Supra, and ask that the court rule that all such communications are not "inadvertent" and not subject to Rules 4.2, 4.4. You may lose, but it will help you. Judge Weil once said there was no rule against bringing an early motion in limine. This is not legal advice.

Roger M. Rosen, California

At least on first glance, Mitsubishi concerned the dissemination of inadvertently produced attorney notes on the case. Privileged work product.

This hypothetical involves a litigant directly communicating with opposing counsel. Not privileged. After being told not to. Extra not privileged.

And I disagree that a judge would be happy to receive a motion in limine far in advance of trial regarding hypothetical evidence that will probably never exist.
Jason Gage

We have the same prohibition on receipt of attorney-client privileged communications, inadvertent or not. Rule 4.2, 4.4. Upon initial review, if the receiving attorney believes the communication is privileged, he is supposed to not review further and to return to the adverse attorney and inquire -- did you mean to send this to me?. It does not matter if it is attorney notes or communications between opposing attorney and his client.

Same rule, same potential risk of disqualification. The reasoning of *Mitsubishi *might apply depending upon the circumstances: If you read privileged documents inadvertently sent to you, rather than returning them, you can be disqualified."]. I do not state that *Mitsuishi* controls but it should be looked at by Original Poster [you might be disqualified, see this case] and cited by Original Poster and distinguished on the "inadvertent" question in his motion in limine.

Original Poster could bring a motion in limine "Judge, please rule that I can use any communication sent to me by email by either opposing counsel and his client because they keep sending to me directly after I have warned them not to do so, so these communications are no longer confidential, and sending to me is no longer "inadvertent."

The judge will inquire why opposing counsel keeps doing this and warn him and he will lose credibility and maybe Jonathan will get to use some of the communications.

Of course, as between: (1) seeking guidance from the court *or* (2) simply using the communications and taking risks in doing so, Original Poster knows the facts and circumstances and the judge he is dealing with better than we do.

I like the approach of a motion in limine because even if Original Poster loses, he comes out ahead in the eyes of the court, on the appearance of being concerned about ethical conduct and his respect for his legal scholarship, whereas his opposing counsel loses points in the eyes of the court.

Roger Rosen

First, I would check your ethical rules and ethics opinions in your state on what exactly constitutes "inadvertent" disclosure of confidential or privileged information. NJ has a fairly broad rule for inadvertent disclosures which require an attorney to immediately notify the adversary upon receipt and destroy the document in question. A number of out-of-state attorneys have gotten into trouble here because they tried to take advantage of a communication that was truly inadvertent.

Second, I would consider responding to one of these emails and state something along the lines of "Please be aware that your communications are being shared with my firm since I am copied on this email As such they are not protected by attorney-client privilege since I represent an adverse party. If you wish to preserve attorney

client privilege please refrain from copying me on future emails between counsel and client." Both the adverse lawyer and client will be much harder pressed to argue that any future disclosure was inadvertent if they receive such communication.

William E. Denver, New Jersey
