



# LEGAL CORNER

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## Potential Pitfalls Of Email

***A recent decision from a Massachusetts Superior Court highlights one of the potential problems which may come about as the result of using email as a method of communication. As a practical matter, we all know that in present day business, the forms of electronic communication are the preferred method by most business entities. However, this case highlights that if one is careless, it can have negative repercussions.***



The matter centered on a lawsuit which was proceeding through the Superior Court in Massachusetts. An attorney, who represented one of the defendants in the litigation, was sending an email to the plaintiff's counsel (his adversary) with a cc to a co-counsel and a bcc to his client. After review of the email, the client intended to respond solely to his attorney but inadvertently used the "Reply to All" key which transmitted his response to the opposing attorney even though the client clearly intended to limit his remarks to his own attorney.

When the attorney for the client became aware that this had occurred, he requested that the opposing attorney delete the email. The opposing attorney declined to do so. No further action was taken then by the attorney whose client had sent the reply until such time as the opposing attorney submitted the email response as an exhibit to a motion. At that point, the attorney, whose client had inadvertently sent the response to the other side, tried to have the message struck on the basis that it was protected by the attorney-client privilege.

The Judge noted that what will determine whether the attorney-client privilege was waived is whether that circumstance of inadvertently using the wrong function could "give rise to the foreseeable risk that the client would respond exactly as he did", then that would weigh against him. In addition, the attorney had delayed seeking the Court's intervention until

there was an attempted use of the email. Nonetheless, the Court allowed the motion to strike by finding that the attorney-client had made "reasonable (although not maximal) steps to preserve the confidentiality of the particular communication at issue". The Court, however, warned that they would not be so accommodating in any future event. There was also a warning issued by the Court in general that the use "Reply to All" is risky. So is bcc. Further, carelessness may compel a finding of waiver.

This is a case which has a message for clients not only in construction, but in all other areas, as well as for their attorneys. Be very careful of using the bcc function and be particularly careful with respect to utilizing the "Reply to All" function. The suggested course of practice is for one to forward any emails that they are sending opposing to counsel and prefacing them with a notation that it is attorney-client privileged material. This is a practice that clients, as well as their attorneys, should pay particular attention to.

Should the situation arise in a future action, the result may not be one of forgiveness. If the email or particular communication has devastating potential admissions against the client's interest, it could constitute a substantial detriment to the success of the legal action. Thus, it highlights the importance of careful use of emails in such communications to prevent a careless inadvertent disclosure which could have serious repercussions. ■