

YOU'VE GOT MAIL

(But It's Not Yours)

An e-mail arrived the other day. It was from one of three opposing counsel in one of my car accident cases.

In this e-mail, Attorney #1 asked #2 and #3 if they had read my most recent disclosure statement regarding my expert witnesses. If so, what did they think? Should they hire more experts to rebut mine? Attorney #1 also wrote about a witness he found and the affidavit he prepared for this witness to sign. Did the others agree that this witness was good for their case?

Why would Attorney #1 send this to me? I wondered. Puzzled, I looked at the top of the screen. Yep. There was my mailbox address. But it was obvious this message was not intended for me.

I vaguely remembered some rule about returning a document received via snail mail by mistake. Did that rule apply to e-mail? Or was this situation more like overhearing a conversation? He didn't actually send the affidavit or any document for that matter. Either way, I made a note to request the affidavit.

As I sat wondering what to do, I received Attorney #2's prompt reply. Though older and wiser, even Attorney #2 apparently did not notice my name on the e-mail. They had not figured out I was part of their dialogue.

Most of us communicate with opposing counsel by e-mail. It puts the message in writing and saves time. Especially with multiple attorneys, you can talk to everyone at once. But it is not hard to see how an e-mail can go awry. How many times a week do we send an e-mail to someone by pulling up one they sent to get their address, type our message, and hit send? When you are busy and in a hurry, it is easy not to notice the old e-mail we just used also went to someone else originally. Now that person has your message as well.

It is an e-mail dilemma. On the one hand, the sender is responsible for looking before sending. On the other, blaming the sender does not solve the problem of what to do when you receive an e-mail you know was not meant for you.

Though there is no ethics rule regarding errant e-mail, ER

4.4(b) seems applicable to this sticky situation. As columnist David Dodge wrote last month, ER 4.4(b) deals with inadvertently disclosed documents.¹ Because an e-mail can be printed, it can be considered a "document." The first order of business under 4.4(b) is to alert the sending attorney.

Looking back, my reasoning at the time was more basic. That is, what goes around comes around. And, if you have to resort to reading your opponent's misdirected e-mail, you have bigger problems with your practice than you think.

So I called Attorney #1.

"I thought you should know I got your e-mail."

Embarrassed silence.

"No way." He sounded panicked. "I didn't send you anything."


I heard typing. He had to be checking his "Send" messages.

I responded, "I really did get your e-mail about my expert disclosure. Thought you probably missed that I was being copied. Would you let the others know. ... And will you send me a copy of that affidavit?"

He said he would and hung up quickly. A breach had occurred, and he was off to the get to the bottom of it.

My conscience cleared, I could only smile when, a short time later, I saw Attorney #3's response in my inbox. As I said, reading their e-mail will not be necessary.

A few weeks later I saw Attorney #1 and couldn't resist a little teasing by expressing my disappointment at no longer being included on the e-mails. He did not see the humor of the situation.

That's the other lesson. Don't put something in an e-mail you do not want accidentally shared with your opposing counsel. 

endnotes

1. *Inadvertent Disclosure Revisited*, ARIZ. ATT'Y, Sept. 2006, at 8.

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