The Email Deluge In Transactional Legal Work

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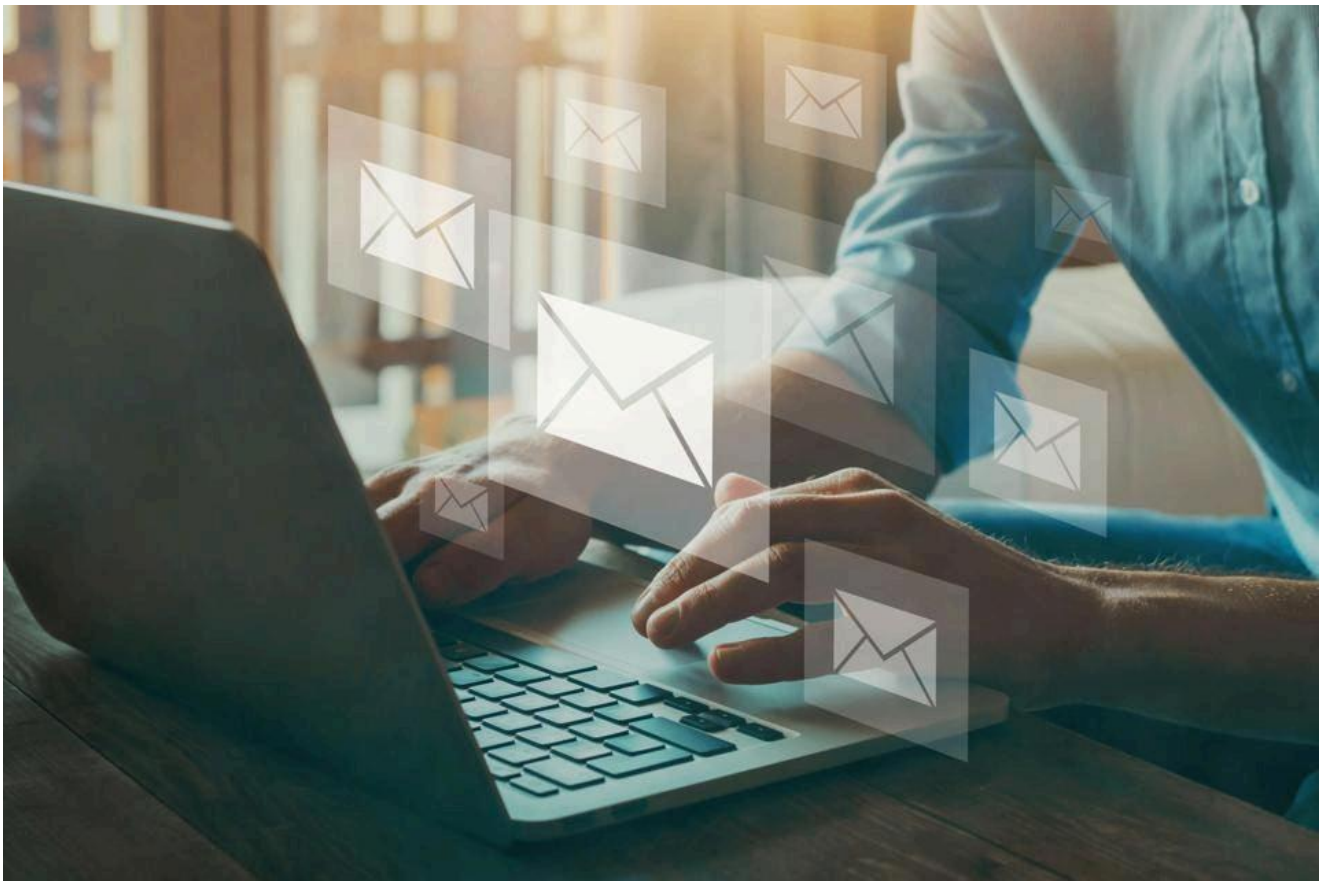

Including the opposite party's clients in the email chain can have legal ramifications.
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Every modern commercial real estate transaction, or other business transaction, takes place largely through email. If it's a major or complicated transaction, it will involve dozens of email recipients and senders – business people, lawyers, brokers, title companies, other service providers, and so on. Each email will beget a stream of additional emails as each recipient replies, adds a little something to the discussion, and then sends their response to everyone. The bloated disclosures and caveats automatically added to the end of each new email response don't help. It all becomes overwhelming.

As one reaction to these massive email strings, in many cases lawyers seem to be leaving their clients out of the email loop. Instead, the strings of ever-expanding emails just circulate among the lawyers and other service providers. When some issue requires involvement of the clients, the lawyers take it up separately with their clients without dragging the clients into every communication within the larger group.

In other words, in these cases part of the lawyer's job consists of protecting the clients from email. The lawyers deal with all the emails and just bring the clients in when necessary – and not necessarily directly into all the communications. If a business issue needs an answer, the lawyers go handle it and spare the clients all the emails.

Some clients like that approach. Others want to see all the emails so they know what's going on. Either way, lawyers and their clients ought to have a conversation about all this early in the life of a client relationship or a particular business transaction.

When today's massive email circulation lists include both clients and their counsel, that can raise an issue of legal ethics. The ethical rules governing lawyers declare that once a client has hired a lawyer, the lawyer acting for any other party cannot communicate directly with the represented party. Instead, the lawyers are just supposed to talk to other lawyers, unless those other lawyers (not their clients) have consented otherwise. It is a paternalistic rule that treats clients as unsophisticated children. It may make sense in personal injury litigation or employment discrimination cases, but it often doesn't make sense in sophisticated commercial transactions. There, the clients are just as sophisticated as their counsel, and know just as well how to protect themselves. Nevertheless, the rule applies even in that context.

When a lawyer working on a major commercial transaction presses the "reply all" button to respond to an email with a long list of recipients, that often means the lawyer will communicate directly with clients on the other side of the transaction, because those clients are part of the distribution list for the email. Does that violate the ethical rule against communicating directly with the other lawyer's client? In some states, the answer may be "yes," and the lawyer isn't supposed to do it. So if the lawyer wants to "reply all" to an email, the lawyer needs to remove from the distribution any client represented by some other lawyer.

The American Bar Association recently issued a formal ethics ruling that took a more practical approach. According to the ABA, when a lawyer sends out any email to another lawyer, and includes their own client in the distribution, that implies the lawyer has consented to a "reply all" that includes the client. It seems rather obvious. It wasn't obvious, though, to the ethics officials in some states, who frowned on the practice. Any lawyer in one of those states probably shouldn't rely on the ABA ethics opinion. Instead, at the outset of a transaction all the lawyers should either consent (or not) to including their clients in email distribution lists – assuming the clients want to be included.

At some point, a better system for collaboration should replace email, but it hasn't happened yet. Email remains the collaboration system (if it can be called a system) of choice. Software entrepreneurs have come up with products that seek to better control and organize the flow of information within and between teams of people working together. In our own experience

testing several of those products, we found that they merely replaced an endless disorganized accretion of email with an endless accretion of disorganized piles of information in some other format. It wasn't any better than email. It might have been worse.

Until something definitively better comes along, the business world seems to be stuck with email, including broad distribution lists and endless email threads in major commercial transactions.