To Cc or Bcc, that is the question – email, etiquette and ethics

"Bcc" or Blind Carbon Copy has a reputation. Many of us avoid it or have never really turned our mind to the differences between email "address" boxes.

In case you are in the latter category:

If you send an email to multiple recipients and use "Bcc" rather than "Cc" for all or some the secondary addressees:

- the primary recipients of the email do not see that it has been forwarded to the "Bcc" address;
- a "Bcc" email address is not visible to the entire group, usually (N.B. there are some email platforms that on occasion fail to strip the email addresses from "BCC's"); but if a "Bcc" recipient hits "reply all" everyone on the original "To" and "Cc" list gets the reply, contrary to the oddly persistent urban myth that only the original sender gets it; and
- in most cases, a working assumption is that persons on the "To" list are expected to respond to the email, "Cc's" or "Bcc's" are being copied in "for information only".

BCC has a place in solicitor/client conversation, but comes with some risks.

When to use "Bcc" vs "Cc"?

There is no doubt that for mass marketing or large group emails, failing to use Bcc is an appalling breach of email etiquette. It may also violate your confidentiality obligations. The fact that you have represented a client may often be confidential, and sending out a "client newsletter" showing their email address will reveal the relationship, expose their email address to spam harvesting software or even place your client's safety at risk by disclosing their workplace or other location.

Should I "Cc" the opposing party when I send correspondence to their solicitor?

No. This is never appropriate unless the opposing solicitor has consented.[1] We may not contact a represented party unless very specific conditions are satisfied.[2] Where we believe those conditions are satisfied and are communicating directly with the client, it is appropriate to provide their lawyer a copy at the same time, but this is a very different thing to routinely sending the client material intended for their lawyer.

What if the solicitor is "Cc'ing" their own client in on email sent to me. Can we "Reply All"?

No. The fact that a solicitor is "Cc'ing" outgoing communication to their own client does not make it a three way conversation and is not an invitation to breach the "No Contact" rule by sending an email reply you know will go to a represented client directly. It is rare that we should use the "Reply All" feature to communicate with the other side, even if there are multiple stakeholders in the counterparty.

Solicitors should also be mindful of limited scope representations.[3] Where a practitioner is only representing the client for a specific issue, it is not appropriate for the opponent practitioner to "Cc" the practitioner in if it is outside the scope of their representation.

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[1] *Australian Solicitors Conduct Rules 2012* ('ASCR'), rule 33.1.1; See, for example: *ABA Formal Opinion 92-362; <http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/>.*
[2] *Australian Solicitors Conduct Rules 2012*, rule 33.
[3] *Guidance Statement No. 7 - limited scope representation in dispute resolution*, 8 June 2017.

Should I be "Cc'ing" or "Bcc'ing" my client outgoing email correspondence?

This seems to be an efficient way of keeping our client informed but it is better to avoid doing so. Forwarding an email from your "sent" box, while an additional step, avoids the problems associated with sending it to all recipients at the same time. The key issue is a client accidentally replying to all of the recipients rather than their own lawyer exclusively. This always looks bad, in some cases it could be disastrous if the client communicates directly with an opponent.

There is also the practical issue that correspondence intended for a professional audience may not be helpful to the client without interpretation. Without explanation, your best intentions in keeping the client informed may instead convince them that your time and their money is not resulting in progress.

The "other side" has chosen to "Cc" their client into correspondence with me, and their client accidentally sent a response "Reply All". I have an obligation to bring this material to my client's attention, right?

No. Prima facie, this is an inadvertent communication and the recipient must stop reading, delete the email and inform the solicitor on the other side of the error.[4]

If the client was attempting to communicate only with their own solicitor, the information is likely still privileged[5] and deliberately reading it can be professional misconduct.[6]

If you think there may be an argument concerning waiver, quarantine the information, do not distribute it further and seek advice.

Do we breach collegiate obligations by forwarding, "Cc'ing" or "Bcc'ing" a colleague's email correspondence to our client?

No. A solicitor may not communicate "off the record" with an opposing representative. The opposing solicitor cannot keep material from their client even if motivated by the client's interests.[7] In some cases it may be possible to delay disclosure in order that a client can focus on the issues that require immediate attention, but that would be rare and temporary.We cannot deal with a colleague on the basis that the information conveyed to them will go no further.

A solicitor might reasonably expect that a frank discussion with their counterpart will be conveyed to the opposing client only in substance without a word by word recitation, but there can be no realistic expectation that written communication will not be forwarded.[8]

I "Cc'd" my client an email. They raised no objection. Does that means they approve the contents?

That is risky. There is no hard and fast rule, but the general presumption is that emails sent "Cc/Bcc" are not sent for your input or response. If your intention is that the client read and consider the material, that should be expressly stated and the whole email forwarded to them separately.

Do I have to read and consider the whole of an email chain?

Most people would be of the view that only the final message in an email chain should be read. Further, you may have difficulty claiming a perusal fee for re-reading emails that you have previously read.

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[4] See ASCR, rule 31.
[5] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Market Pty Ltd* [2013] HCA 46.
[6] *Legal Services Commissioner v Harb* [2017] NSWCATOD 9.
[7] *McKaskell v Benseman* (1989) 3 NZLR 75 per Jeffries J at 87.
[8] See New York State Bar Association ethics Opinion 1076 (12/8/15) on Cc & Bcc forwarding of email to one's client.

Unfortunately, from a risk perspective it is not impossible that a client may intend you to read the whole chain as background. It does not hurt to make it clear (in writing) at the commencement of the retainer that you will only read the last message in email chains unless you are asked to consider the whole of the material

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