

Stop CC-ing Your Clients on Emails to Opposing Counsel

by Keith A. Call

What Does “CC” Mean in an Email?

(If you were born before 1975 and don’t like love stories, you can skip this section.)

You may have wondered what the “cc” field on your email means. “CC” refers to “carbon copy,” a method of making copies of letters and other papers before the proliferation of copy machines and personal computers. In order to make multiple copies of a document, a writer could insert a thin paper coated with a mixture of wax and pigment between two sheets of paper. Then, using a pen or typewriter on the top sheet of paper, the carbon paper would make an imprint of the original writing on the second sheet of paper – a “carbon copy.” With a strong hand or typewriter, more than one sheet of carbon paper could be used between more than two sheets of paper to make more than one copy.

Carbon paper was originally invented to help blind people write through the use of a metal stylus or machine instead of a quill. In the early 1800s, an Italian by the name of Pellegrino Turri fell in love with a young woman, the Countess Carolina Fantoni. The Countess had become blind “in the flower of her youth and beauty.” To help his lover correspond in private, Turri invented a typewriting machine that used a form of carbon paper. These lovers’ use of a typewriter and carbon paper did not become prevalent for another sixty-five years. *See* Kevin Laurence, “The Exciting History of Carbon Paper!,” <http://www.kevinlaurence.net/essays/cc.php>.

Though carbon paper is no longer prevalent, it has left its mark in our modern world with the use of “cc” on most email platforms.

ABA Formal Ethics Opinion 503

Late last year, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion about the use of “cc” on emails and other electronic communications. ABA Comm. on Ethics & Pro. Resp., Formal Op. 503 (2022). This

opinion provides a warning to any lawyer who includes their client as a “cc” recipient of electronic communications (such as email). The ABA’s key opinion is: “[L]awyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel’s ‘reply all’ to the communication.”

In other words, if you send an email or other electronic communication to your opposing counsel and include your client as a “cc” recipient of the email, you consent to opposing counsel communicating directly with your client using the “reply all” function.

The opinion is based on Model Rule of Professional Conduct 4.2, “Communication with Person Represented by Counsel.” Utah’s version of Rule 4.2 substantially differs from the ABA Model Rule, but not as it relates to Opinion 503. Utah’s version of Rule 4.2(a) states, in relevant part: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the matter, *unless the lawyer has the consent of the legal professional.*”

The ABA opinion reasons that a lawyer may consent to direct communications by opposing counsel, that such consent may be implied, and that implied consent is provided when the lawyer copies the client on a group message.

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This conclusion... flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context, and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response.

Op. 503 at 3.

The opinion offers a couple of workarounds. First, the presumption of implied consent does not apply if the sending lawyer communicates to the opposing lawyer that they do not consent to direct communications with the client. This communication should be prominent, preferably in writing, such as at the beginning of the email or in a separate email. Op. 503 at 4.

A far better approach, in my opinion, is to simply not "cc" your client in the first place. As Opinion 503 points out (perhaps obviously), the sending lawyer can easily choose to exclude their client from the original email. "Thus, the better practice is not to copy the client on an email or text to [opposing] counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client." Op. 503, at 3–4. It is also a best practice to separately forward electronic communications to your client to minimize the risk that your client will mistakenly "reply to all," and thereby disclose information to "all" that was only intended for their lawyer.

ABA opinions may not be binding on lawyers practicing in Utah, but they are at least persuasive. If you have a practice of copying your client on electronic communications to opposing counsel, now is a good time to change that practice!

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