TEXAS LAWYER

Cringe-worthy: 8 Tips to Prevent Embarrassing E-Mails

Seasoned trial lawyers know the scenario well. A senior executive returns from her deposition, where opposing counsel grilled her on a barrage of internal emails that came from every corner of the company. The emails were sarcastic and snide in tone, full of baseless opinions, and disparaging to the company, its personnel and its policies. The emails should be a sideshow to the substantive claims at issue, but her lawyers know they will be front and center at trial. How can companies and their attorneys prevent this litigation pitfall?

The issue is unlikely to go away. If anything, as email continues to proliferate in Americans' professional and personal lives, its role and importance in litigation will continue to grow. Each person generates an annual volume of electronic documents the equivalent to 75,000 pages, according to the August 2010 edition of EDDE Journal, the American Bar Association's ediscovery publication. The growing mountain of electronic data means an increasing risk for smoking-gun evidence, which can gut claims and key defenses.

Often litigants don't understand until it's too late how a careless email can embarrass them and hurt their prospects in court. In most instances, lawyers lack good grounds for refusing to turn over such evidence, no matter how humiliating. The best strategy, then, is to sensitize clients to the risk of inappropriate emails before the possibility of disclosure in litigation arises.

Start by disabusing clients of potential misconceptions about email and the discovery process. For example, strangers to litigation may not know that all emails, including their own, are subject to discovery. Knowledge of the risk of disclosure itself will promote prudence and good judgment.

Employees also need to know that forensics experts can recover almost anything done on a computer; it's just a question of cost. The fact that an employee deleted an email and then deleted the deleted-items folder does not mean that an aggressive litigant with deep pockets cannot recover it.

Clients also should know that courts take email discovery seriously and expect litigants to do the same. In a leading case, *Rimkus Consulting Group, Inc. v. Cammarata* (2010) the U.S. District Court for the Southern District of Texas found that a duty to preserve emails arose when a party "has notice that the evidence is relevant to litigation or … should have known that the evidence may be relevant to future litigation." Thus, once aware that emails may be relevant to future litigation, employers must ensure their preservation.

Any company interested in developing better email practices—a need driven home to the hypothetical senior executive just returning from her deposition—would do well to review its own internal emails. Most embarrassing emails occur because employees forget that their potential audience could extend beyond the intended recipient.

Email authors also forget thatwork email isn't about them but about the company's business. An often too-relaxed work environment, where cavalier and witty email exchanges have become the norm, can foster these

oversights.

Best Practices

Here are some do's and don'ts that might have prevented our executive's grueling day of examination.

• *Do write clearly and avoid ambiguities.* The rules that apply to effective writing in general also apply to emails. Be concise and choose words carefully. Make sure that loose, vague language does not convey unintended messages. These rules apply with special force to emails, since people write them in real-time, and therefore courts and juries often consider themhighly credible.

• *Do use email for conveying factual information*. Emails tend to be brief and informal, which makes them ideal for communicating factual details, like who, what, when and where. On the other hand, they are less well suited for offering opinions on sensitive issues, particularly when the author offers them off-the-cuff and without detail.

• *Avoid informality in emails.* What seems funny today in an email may not seem funny in a deposition or to a jury. For example, poking fun at a colleague or business competitor on the basis of physical characteristics could strike a neutral observer as insulting or crude.

• *Beware of colorful language.* Sometimes a graphic analogy is a useful way to drive home a point. However, an email is the wrong venue for literary flourishes, swearing, exaggeration, or attempts at humor and sarcasm. Writing that a terminated employee won't be rehired even if she "comes begging on her knees" or punctuating your frustration with profanity is not only unnecessary but also likely to become Exhibit A for the jury in a later lawsuit.

• *Don't expect any privacy.* Remind clients that they shouldn't expect any right of privacy for emails stored on company-owned computers. In litigation the company likely will perform a broad sweep of the email database and provide opposing counsel with all emails, including those with embarrassing disclosures related to work conflict, domestic strife or extralegal problems.

• *Don't appear to hide anything.* When a manager emails his employee to say they should discuss a sensitive issue in person, the jury is left to conclude that the author had something to hide. Remind clients not to use email to communicate that someone should discuss a particular topic face-to-face.

• *Perform a reality check*. Before pressing "send," imagine the local newspaper publishing the email and national blogs picking it up. If publicly disseminating the email would cause embarrassment, then don't send it. Pick up the phone.

•*Consider attachments.* All of these rules apply to attachments, as well. Remember: The opposing side can discover anything attached to an email.

To be sure, following these rules won't eliminate embarrassing emails altogether. Mistakes are part of human nature. But by encouraging employees to think and to keep in mind the potential larger audience their emails are addressing, someone's deposition or day in trial might be made just a bit better.

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