Vol. 49, No. 5, April 2005

YOUNG LAWYERS DIVISION NEWSLETTER • ILLINOIS STATE BAR ASSOCIATION

YOUNG LAWYERS DIVISION UPCOMING EVENTS

Upcoming Law Ed events and seminars for young lawyers.
To register, call 217/525-1760.

APRIL

15—The Lawyer's Workshop
Holiday Inn, Collinsville

15—Nonprofit Health Care Organizations: Responding to New Challenges
ISBA Regional Office, Chicago

22—Update on Legal Developments for the General Practitioner
Holiday Inn, Collinsville

21-22—Presenting Psychological and Neuropsychological Evidence in Personal Injury and Medical Malpractice Cases
Co-sponsored by ISBA and the ABA
ABA offices, Chicago

22—Civil Litigation: Update and Overview of Civil Practice and Procedure
The Conference Center – UBS Tower, Chicago

28—Publishing Contracts for New Authors and New Publishers
Hotel Allegro, Chicago

29—Insurance Coverage Disputes: The Basics of Litigating a Declaratory Judgment Action
ISBA Regional Office, Chicago

MAY

5—Out at Work: Cutting Edge Issues for Employers and Employees
ISBA Regional Office, Chicago

6—Civil Litigation: Update and Overview of Civil Practice and Procedure
Radisson Hotel, Bloomington

6—Hanging Out Your Shingle (Without Hanging Yourself) For New – Or Would-Be – Solo Or Small Firm Lawyers
Holiday Inn, Collinsville

13—Drafting, Negotiating and Enforcing Non-Competition Provisions in Agreements
ISBA Regional Office, Chicago

CALENDAR

The seven deadly sins of business e-mail

By Eric M. Rosenberg, President, LitigationProofing, LLC

Why do so many of us and our clients do stupid things when it comes to business e-mail? For some inexplicable reason, it often seems that the basic rules of good behavior and common sense—not to mention assessment of legality and possible liability—are on hiatus when attorneys and their clients sit down in front of their computer screens and log on to business e-mail.

Since its inception, e-mail has been hailed justifiably as a productivity tool. But why should it also be productive for the prosecutor or plaintiff as a source of evidence? What can we do as lawyers to stop the creation and dissemination of troublesome electronic communications?

Most likely, your clients have begun to address exactly that issue with the establishment and enforcement of enterprise electronic communication policies. Whether your law firm has itself taken this step or not, as an attorney you can help your clients reduce litigation exposure by recommending and reviewing their electronic communications policies and practices.

While many considerations go into creating an effective policy, start with a few basic ground rules and consider the following seven deadly sins of business e-mail:

1. Using company e-mail for personal use.

Personal e-mails are typically the most informal mode of communication, perhaps more so than personal phone calls at work because the latter are subject to being overheard by office neighbors, assistants or supervisors. When it comes to personal e-mail, many writers just "let loose" with their feelings. Writers also forego everything they know about grammar, spelling and punctuation. They use cartoons/emoticons, attach pictures for illustration, and often involve multiple recipients in something resembling an online chat. Since employees generally wouldn't even dream of putting such content on their company letterhead, why should it be acceptable for these communications to be sent on a company's electronic letterhead—i.e., its e-mail system?

Permitting anything other than truly exigent personal use of the company e-mail system promotes sloppiness in composition of business e-mail, as writers tend to infuse their business writings with the informalities and lack of care found in their personal writings. Personal use (including betting pools, chain letters and pornographic content) can also implicate firms in improper personal behavior.

Some of the most problematic corporate e-mails of the last few years—consider the recent Boeing CEO's e-communication to a female employee, or the Citicorp analyst's e-mail to a personal friend about upgrading his rating of AT&T in order to get his twins into a competitive Manhattan nursery school—simply had no business being written on a company system.

2. Not considering how it would look in the newspaper.

Even when written for legitimate business purposes, many e-mails are suffused with content that was never intended for *The Wall Street Journal* or even the *Sun-Times* or *Tribune*. But that is exactly where business e-mails sometimes end up published.

> About 92 percent of Enron's e-mail database was made public by the Federal Energy Regulatory Commission and it revealed some interesting—and frightening—information: According to Audotrieve, 8 percent of the e-mails contained personal information about individuals, such as medications that were used by Enron employees, while another 4 percent contained things like offensive racial comments and pornography." (*Network World Fusion*, "Lessons from Enron e-mail database" Dec. 2, 2004)

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The seven deadly sins of business e-mail

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The only safe rule of composition is to write your electronic communication as if it too might make the media.

3. Exaggerating, joking, losing your temper, boasting, guaranteeing, leaking sensitive information, carrying on a debate, or spreading rumors.

What might sound witty in the author's head may read as offensive to the recipient or a third party, intended or otherwise. E-mail does not convey tone of voice, even when helped along by smiley faces and other illustrative tricks. The particular species of joke know as "gallows humor" has too often found its way into evidence of bad intent in civil and criminal trials. Likewise, any content that is not a true fact can be presented as supposed fact in litigation, leaving the writer with the difficult task of explaining why the exaggeration, sarcasm, or boast was included only for attention-getting effect.

The key to remember is that e-mail operates as a window to the writer's mind and that juries, judges and arbitrators have been known to give extra weight to content when it comes from e-mail because it is seen as a particularly frank medium.

4. Failing to heed copyright laws.

When a published item is saved electronically, perhaps in a neat PDF file, it feels like it's already yours. But the act of forwarding it, even internally within a company, implicates possible violation of copyright law. Company librarians can acquire certain clearinghouse rights and should be consulted before distribution of protected intellectual property.

5. Assuming "delete" effectively erases the e-mail trail.

Notwithstanding the lessons of case after case, too many business people fail to regard their e-communications as permanent acts. In fact, through technical means, supposedly deleted e-mails often can be recovered. "As e-mail travels through the network, it leaves bits, and sometimes entire copies of itself, that aren't affected when the Delete button is hit. And that doesn't even take into account the e-mail remnants left on users' hard drives or the periodic backups made of the server contents." (*Computer World*, "Enron Bankruptcy Case Highlights E-Mail's Lasting Trail," Jan. 21 2002).

For certain businesses, such as broker-dealers, retention for substantial periods is required as a matter of law. Moreover, once an investigation or litigation is reasonably anticipated, deletion of electronic communications is forbidden. For all these reasons, business people must understand that their writings are permanent for all practical purposes, and by coming to that understanding, writers may indeed be more painstaking in the creation of these documents.

6. Failing to double-check *Reply, To, CC, BCC, Lists.*

Addressing an e-mail without conscious thought and examination of the list of addressees before pressing "send" is like driving a car while talking on the cell phone. You risk making mistakes without any recollection of doing so. It's easy to slip when navigating down an address list. The "auto-fill" function on many e-mail systems could mean that John Smyth will receive what was intended for John Smith, or that John Smith will receive what was intended for Carol Smith. Using "Reply to All" is an invitation to disaster, particularly if you were a "BCC" recipient. Forwarding to new recipients without a full review of the entire preceding e-mail thread also invites embarrassment or worse.

7. Ignoring incoming e-mail that requires corrective action.

If a business person receives a problematic e-mail, e.g., a communication that discloses or constitutes a possible compliance breach or that should not have been addressed to him or her, deleting it is not the same as not having received it. Particularly with the increased emphasis in new laws such as Sarbanes-Oxley on accountability and problem elevation, inaction will not suffice. It is usually inadvisable to solve this problem by forwarding the "remarkable" e-mail to someone else. Frequently the best next step should involve an oral consultation with inside or outside counsel and the maximum possible preservation of corporate attorney-client and work product privileges relating to that consultation and later corrective action. ■

Eric M. Rosenberg is the president and founder of LitigationProofing, LLC. As a litigator with 30 years of experience, including 20 years as a manager of litigation at Merrill Lynch, Rosenberg provides training and consulting to financial services firms, other corporations, and law firms on crucial litigation issues concerning electronic communications, attorney-client privilege and document retention. For more information, please visit www.litigationproofing.com.

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