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Stopping the Seven Deadly Sins of Business E-mail

One of the greatest engines of business efficiency, electronic communications, has also become the most fertile source of litigation expense and difficulty. While some frustrated business leaders eschew e-mail in their own dealings and may wish to disconnect the company system, that is not a realistic response to the e-mail dilemma.

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Published: 11/1/2005

On the other hand, human resources professionals can assist management by leading the effort to foster smarter electronic communications behavior in their company workforce. Most likely, your employer has begun to address this pressing issue with the establishment and enforcement of enterprise electronic communications policies. Whether your firm has taken this step or not, as an HR professional you can help your company reduce litigation exposure by recommending and reviewing its electronic communications policies and practices. Many considerations go into the creation of an effective policy.

To start with a few basic ground rules, consider the following seven deadly sins of business e-mail:

1. Assuming "delete" effectively erases the e-mail trail. Despite the lessons of case after case, too many business people still believe that e-mail communications are untouchable because they're not permanent. In fact, through technical means supposedly deleted e-mails often can be recovered. The act of erasing an e-mail is not analogous to recording over an audio or video tape, and depending upon the nature of the hardware, software and skill of the forensic examiner, restoration is relatively easy. The typical sender of e-mail would be surprised at how many copies are replicated at various steps in its transmission, and we all know that we have no control over the dissemination and replication of our writing once it is on its way to a recipient.

As a matter of disaster planning and business continuity, most businesses make back-up copies of the contents of their computer systems, including electronic communications, which may be saved for months or even years. For certain businesses, such as broker-dealers and investment advisors, retention of archived electronic communications for periods of up to five years is required as a matter of law. Moreover, once an investigation or litigation is reasonably anticipated, deletion of relevant electronic communications is forbidden. For all these reasons, it's critical that business people understand that for all practical purposes their writings are permanent. By coming to that understanding, writers may indeed be more conscientious in the creation of these documents.

In addition, some inventive communication systems designed to increase productivity now inadvertently create litigation nightmares because of the persistence of the electronic record. For example, certain systems now allow employees to pick up their incoming voicemails as an audio attachment to an e-mail sent by the system to the employee's address. This means that each voicemail is saved with the same degree of permanence as the e-mail transmitting it. Imagine the expense of having to transcribe and analyze such voicemails years later when they are sought in litigation document discovery. Because of the potential permanence of any technological improvement, it is important that HR and

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legal departments are involved before the implementation of such new system is complete.

2. Using company e-mail for personal use. With our predilection for time-shifting and multitasking, e-mails have become the most popular means for busy people to communicate informally with friends and family, even at work. Indeed, unlike personal phone calls, e-mail cannot be overheard by colleagues, and it does not send a smoke signal to others that office work is not being accomplished. Yet the content of a personal e-mail is distinctly different from a responsible business communication. Writers of personal e-mail tap at the keyboard with relatively little forethought or restraint. Grammar, spelling and punctuation go out the window. Photos, cartoons, emoticons and stream of consciousness are typical. Since responsible employees would never dream of putting such content on company letterhead, companies should not tolerate it when employees broadcast these communications on the 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.

Informal anonymous surveying by this author of employee behavior has even demonstrated that a significant number of employees choose to use company e-mail systems to write and receive personal e-mail that they would not like to display to other family or friends who have access to home-based e-mail systems. Yet some of the most problematic corporate e-mails—consider the recent Boeing CEO's e-communication to a female employee, or the typical complaint to a friend about a co-worker's behavior—simply have no business being written on a company system.

Most e-mail policies make clear to employees that even their personal e-mails when written on a company system are the property of the company and are subject to company review and surveillance. In certain state and international jurisdictions it is important to publish this reminder and to have its receipt acknowledged by the employee.

Having appropriately warned the employees, it is advisable to consider implementing a serious surveillance program. A number of vendors now promote customized applications that will enable a firm to embargo certain clearly troublesome e-mails before they are transmitted or to follow-up later on e-mail that appear in retrospective review to have violated established standards. To implement such a program requires a financial investment and a commitment of compliance personnel, but the dividends it can pay in terms of avoided problems can be substantial. Moreover, as the word spreads to employees that serious surveillance has been established, the frequency of haphazard and thoughtless electronic communications should be diminished.

3. Not considering how it would look in the public media. Even when written for legitimate business purposes, many e-mails are riddled with content never intended for newspapers or television. But that is exactly where business e-mails sometimes end up published. There is an endless supply of mechanisms by which one employee's internal or external communication can become fodder for the press. These include document discovery in litigation, freedom of information act requests in government, misaddressing, misdelivery and unexpected forwardings, and hacking.

"About 92% 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% of the e-mails contained personal information about individuals, such as medications that were used by Enron employees, while another 4% contained things like offensive racial comments and pornography." (*Network World Fusion*, "Lessons from Enron e-mail database" Dec. 2, 2004)

The only safe rule of writing e-mails is this: write it as if you expect to see it appear in its entirety on the front page of the Wall Street Journal or read on the evening news.

4. Exaggerating, joking, losing your temper, boasting, guaranteeing, leaking sensitive information, carrying on a debate, or spreading rumors. Remember, not everyone's humor is the same. E-mail does not convey tone of voice, even when helped

along by smiley faces and other illustrative tricks. 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 know to give extra weight to content when it comes from e-mail because it is seen as an especially frank medium.

One common species of joke known as "gallows humor," our tendency to joke about particularly difficult business problems, has too often found its way into evidence of bad intent in civil and criminal trials. For example, in a recent federal criminal trial in Houston, the jury was required to decide whether an improper oral guarantee had been given in a purchase transaction, thus rendering the transaction a loan rather than a real purchase. The prosecutor made very effective use in his arguments to the jury of certain defendants' after-the-fact lighthearted e-mail exchange in which the word "guarantee" was used as part of the joking banter.

HR professionals have also repeatedly seen the misuse of supposed humor in electronic communications at the expense of an individual or directed at an ethnic or religious group or raising a gender issue. These e-mails are simply explosive. It takes unceasing reminders and demonstrations of the career- altering effect of these writings to put a stop to them.

Equally disturbing from a legal perspective is the tendency of electronic writers to exaggerate in order to get their messages through the electronic clutter on the recipients' machines. If the writer would not have put the same subject heading or warnings of impending doom in a memo or letter to the recipient, those words certainly should not appear in an electronic communication. Indeed, to get attention to a problem the writer genuinely believes to be serious, it is far more effective to communicate by old-fashioned hard-copy document, or by oral or written communication to company counsel or compliance personnel.

Likewise, the ease by which subjects may be casually debated through the repeated exchange of "send" buttons leads to unnecessary litigation risk. These debates tend to be less thoughtful and considered than careful memos or group meetings held to explore the pros and cons of a business decision. With the speed of light but the permanence of a backed-up hard drive, they can turn one person's idle speculation or propagation of a rumor into widely distributed mistaken statements of supposed fact.

5. Failing to heed copyright laws. When a published item is saved electronically, such as in a PDF file, you might think it's truly yours. But, the mere act of forwarding it, even internally within a company, could be a possible violation of copyright law. Company librarians can acquire certain clearinghouse rights and should be consulted before distribution of protected intellectual property. Particularly for businesses that develop and market their own intellectual property, such as firms in the entertainment industry, it is particularly unsuitable to be seen to be violating someone else's intellectual property rights.

6. Failing to double-check *Reply, To, CC, BCC, Lists*. You'd be surprised how many problems are created by employees who address an e-mail without examining the list of addressees. Doing so is quite a bit like driving a car while talking on the cell phone. You risk making mistakes without having any recollection of your actions. Be particularly mindful of the "auto-fill" function on many e-mail systems. You might be sending something to John Smyth that was meant for John Smith. Alternatively, John Smith might receive what was intended for Carol Smith. Moreover, using "Reply to All" is a bad idea, particularly if you were a "BCC" recipient. Forwarding to new recipients without a full review of the entire preceding e-mail thread also invites problems.

7. Ignoring incoming e-mail that requires corrective action. Particularly with the increased emphasis in new laws such as Sarbanes-Oxley on accountability and problem elevation, doing nothing with respect to a problematic incoming e-mail is not a viable option. Moreover, it is usually inadvisable to solve this problem by forwarding the problematic e-mail to someone else within the company. Typically, it's a much better idea to talk to inside or outside legal counsel about appropriate handling of the problem. That

step can also allow for the maximum possible preservation of corporate attorney-client and work product privileges relating to the consultation and later corrective action.

About the author...

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, and frequent speaker to industry groups, Rosenberg provides training and consulting to financial services firms, other business enterprises, 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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