

LITIGATION ADVISOR

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Six Simple Steps to Prevent E-Mail From Coming Back to Bite You

By STEVEN COOPER AND GREGORY HANSEN

Pre-trial discovery of e-mails may represent the most significant change in litigation in the last decade. The litigation landscape is littered with cases where “smoking gun” e-mails have come to light during discovery. Weekly, investigations and decisions are turning on e-mails. In a highly publicized trial, a federal judge in New York recently overruled efforts to exclude e-mails that he termed “explosive.” With employees now sending billions of e-mails a day, the number of verdicts turning on damaging e-mails will undoubtedly continue to increase.

Why are e-mails potentially so “explosive?” The answer is simple: people are careless with them. *First*, e-mails are written rapidly, often with little review or contemplation. This results in haphazard and often jovial statements which before a jury may be interpreted in a way adverse to the author’s interests or intent. *Second*, e-mails often contain extraneous information or attachments of prior communications which may open a Pandora’s box of discovery in areas not previously contemplated. *Third*, e-mails often contain pejorative language, which at trial can make a witness squirm. *Finally*, sloppy e-mail communications may result in waiver of applicable privileges when a privileged e-mail is sent to persons outside the company, or even to employees within the company that do not need to know about the privileged communication.

The following guidelines for your company’s employees may help eliminate or minimize the damage from haphazard e-mails.

1. *Reflect on your e-mails*

Whereas people tend to write, reflect on and redraft mailed correspondence, the same does not hold true with e-mails. People operate under the misperception that e-mails are private, informal communications. This leads people to be careless regarding the content of e-mails, and the parties to whom the message is sent. In litigation, however, e-mail messages receive the same treatment as all other communications—they are picked over word by word, and used to cross-examine the authors/recipients about those words. Worse, they may be viewed as legal admissions.

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securities litigation corner

Judge Shira Scheindlin of the United States District Court for the Southern District of New York has denied a motion to dismiss the numerous complaints filed against various underwriters and issuers in the IPO litigation. Judge Scheindlin found sufficient for pleading purposes the allegations that the underwriters manipulated the market and created an artificial demand for the stock in the companies which they took public by requiring the customers that received the stock at IPO to buy more shares in the after-market and to kick back a portion of their IPO profits to the underwriters. Moreover, she sustained the complaints which alleged that the issuers acted with intent to defraud when they used their inflated stock values to sell additional shares of stock or to engage in mergers or acquisitions using the stock. Judge Scheindlin granted portions of the motions to dismiss where the plaintiffs had profited on their sales of the stocks at issue. *In re Initial Public Offering Securities Litigation.*

E-mails should be carefully reviewed by the author to ensure that they do not contain any damaging language or privileged materials. E-mails should be reviewed for any language capable of alternative interpretation. When reviewing an e-mail, consider how a third party could interpret the message. Avoid using vague language and remember that people who may eventually review an e-mail do not have equal knowledge concerning the subject matter discussed, or may be hostile. Never send e-mails that contain pejorative or disparaging remarks as these reflect poorly on the author.

Check to ensure that an e-mail is being sent only to those parties that should receive the message. This requires a review of the “to:,” “cc:” and “bcc:” lists. Reflect on each and every person to whom a message is being sent to determine whether they actually should receive a copy of the e-mail. In so doing, people should err on the side of including fewer recipients, rather than more. Remember, a message may always be re-sent to someone who needs it, but a message can rarely be “un-sent.”

Drafting e-mails carefully and pausing and reflecting on their contents before pushing “send” can spare a party major problems should a related litigation arise. In short, never put anything into an e-mail that you would not want read to a jury.

2. Remember that e-mail is very difficult to “delete”

Employees must be reminded of the difficulties of deleting and removing

e-mails from a computer system. People tend to be careless with e-mails because they believe that the message is easily erasable by simply pressing delete. However, e-mails and other forms of electronic information usually remain on a computer system. When an individual presses the delete button, the e-mail is typically sent into a “deleted items” or “trash” folder. When that folder is erased or emptied the e-mail is not immediately removed from the computer. Instead, the computer marks that portion of the computer’s memory as available. The e-mail remains on the system until the computer needs the memory which it has marked as available. Only when the space is needed is the original message “deleted” by being overwritten with new data.

Even after an e-mail has been overwritten, the e-mail may still be obtained. Copies of messages may be available due to the forwarding and reply features of e-mail. For example, a person may send an e-mail to another who forwards it to a third person. Even after the first two people’s systems have completely purged the document, the third person may still have a copy. Additionally, advances in technology have made it possible for computer forensic experts to recover deleted information even after it has been overwritten.

3. Break the Chain

Avoid chain e-mails by creating new messages rather than forwarding or replying to messages that have been received. When employees receive an e-mail, they typically have the option of forwarding it along with their comments. When a message is forwarded, all of the previous messages in the chain are forwarded along with it. Employees, however, should not forward e-mails as a matter of course. Instead, encourage them to create a new message and send it without any chain of previous e-mails.

When haphazardly forwarding messages, a party may inadvertently waive privileges adhering to messages contained within an e-mail chain. Generally, the

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antitrust/unfair competition corner

The Supreme Court just handed down a decision with major implications on federal dilution. The Court ruled that to obtain injunctive relief under the Federal Trademark Dilution Act (“FTDA”), a party must prove actual harm, rather than a mere likelihood of harm. The Supreme Court, in a unanimous decision based on the text of the FTDA, acknowledged that there will be difficulties of proof for plaintiffs attempting to demonstrate “actual dilution.” Fortunately for plaintiffs, the court declined to adopt the requirement of economic harm espoused by the defendants. *Moseley, et al. d/b/a Victor’s Little Secretary v. V. Secret Catalogue, Inc., et al.*

attorney/client privilege protects against disclosure of communications between clients and their legal counsel, when the communication is seeking or giving legal advice. However, the privilege is lost when the communication is distributed to a person outside of the attorney/client relationship. E-mail chains may also contain many messages, some of which have little relationship to others in the chain, resulting in the mistaken and unrequested disclosure of damaging information, or information leading to more discovery. Finally, forwarding a chain of e-mails creates an extra copy of each and every e-mail in the chain, complicating the task of permanently eliminating e-mails.

4. Break the addiction

Avoid using e-mail whenever possible where substantive or sensitive matters are involved. Yes, e-mails are extraordinarily useful, and employees communicate almost exclusively through this medium. Consequently, nearly every such communication is electronically stored and may be discoverable in subsequent litigation. Employees should be instructed to avoid using e-mail when alternatives are available. Employees should be especially on guard when a privileged or sensitive matter is at issue. Employees should never be reprimanded via e-mail. Phone or face-to-face conversations will avoid written communications that can be used in future litigation.

5. Carefully label all messages

E-mail messages contain a subject field where people may include a description of the subject matter of the e-mail. However, this is an under-utilized or hastily completed part of e-mails which tends to give little guidance as to the e-mail's subject. Employees should carefully note the subject matter of every e-mail they send. In so doing, people should be specific and avoid simply putting a client or matter name in the subject field. Subject lines should also indicate whether the contents of the message are subject to any privileges.

Including a complete and accurate

subject will lower the costs and burden associated with electronic production in litigation by initially categorizing e-mails. A properly written subject line will also alert recipients as to any privileges applicable to the contents.

6. Adopt a Document Retention Policy

Companies should implement a document retention policy whereby the company saves electronic data on its computer system for only a prescribed period of time. Courts have recognized that regularly discarding data pursuant to a reasonable retention policy is allowed, in the absence of pending or expected litigation or an intent to cover up adverse information. Once implemented, it is vital that the policy be strictly followed, by every employee and for every piece of information.

In determining the validity of a retention policy, courts typically consider three factors: 1) whether the policy is reasonable considering the facts and circumstances surrounding the destroyed documents; 2) whether the policy was adopted in good faith; and 3) whether lawsuits or complaints have been filed which would indicate the importance of a particular document. Additionally, there are numerous statutory and regulatory requirements pursuant to which a company must retain certain information, notwithstanding company policy. A company should consult with legal counsel in drafting and implementing such a policy.

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real estate corner

New York's Appellate Court Rules That a Bankrupt Tenant May be Evicted.

An appellate court in Manhattan unanimously overruled a prior decision and ruled that a landlord may seek to evict a bankrupt tenant for nonpayment of rent. Although a discharge in bankruptcy absolved the tenant from personal liability for the rent arrears, the landlord may bring a summary proceeding to recover possession of the apartment, provided that the landlord disclaims any entitlement to a money judgment. The appellate court said that its ruling to the contrary in another case (that there was no valid basis to serve a demand for rent arrears that had been discharged in bankruptcy) should no longer be followed. *Dulac v. Dabrowski*.

Conclusion

Cases will continue to be decided on the unintended and preventable damaging messages conveyed in e-mails.

Companies setting guidelines over such communications will undoubtedly safeguard themselves from unnecessary liability in the future. ■

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products liability corner

In a victory for the shrinking number of solvent defendants in asbestos litigation in state court, Manhattan Supreme Court Justice Helen Freedman has ruled that the apportionment of liability among defendants should include companies that have filed for bankruptcy. Justice Freedman's ruling, which departs from an interpretation of Article 16 of New York's Civil Practice Law and Rules pronounced a decade ago by the U.S. Court of Appeals for the Second Circuit, will in many instances reduce the exposure of solvent defendants for payment of a plaintiff's damages. Anderson Kill successfully represented the interests of several of its asbestos clients in this action. *Anthony and Constance Tancredi v. A. C. & S. Inc., et al.*

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