

Email Habits for the Wise: Tips to Avoid Turning Email into a Smoking Gun Exhibit

The worldwide population sends and receives billions of emails each day. With increasing hacks and malware attacks, organizations today for good reason focus much of their risk management efforts on shielding against external threats. However, inappropriate email use by an organization's own employees can be equally destructive when the organization is involved in litigation or arbitration. Emails and associated information ['metadata'] are usually discoverable and often admissible into evidence so that experienced trial attorneys spend hours, deposing corporate representatives and employees using simple nuances and unforeseen admissions from email strings. The following recommendations provide a healthy framework to avoid your, or your colleagues' and employees', email becoming a smoking-gun exhibit in litigation.

1. If you believe you are too smart to send stupid emails, then back the truck up and re-load.

The author C.S. Lewis described pride or self-conceit as "The Great Sin." The narcissist with a .pst file produced in discovery is a gold mine for a litigator looking for evidence. Start with some self-examination. To avoid sending stupid emails, (i) routinely pause to scrutinize your own approach when drafting and sending emails to avoid falling into lazy and destructive habits, and (ii) approach every email you draft with humility. Most of the stupid emails that become smoking gun exhibits begin with a lack of humility that leads to carelessness. For example, do you use profanity (or hyperbole) in your emails? Consider whether your use of profanity or hyperbole might reflect conceit or recklessness.

2. Treat every email as a public record without any expectation of privacy.

The lack of an email's tangible presence misleads most users into a false sense of privacy. However, in litigation, emails often become the record that the parties, attorneys, judges, and jury refer to for chronicling the relevant events of the case. Forensic data recovery efforts have evolved to the point where it is folly to assume that any email is ever actually gone for good. Emails thought to be insignificant at the time written can become pivotal later. **Before sending an email, assume that you are publishing it irretrievably to the public.** Blind-copy recipients will be revealed during litigation. Even emails nominally protected by attorney-client or other privilege, and not waived, are routinely examined by judges to determine whether privilege applies.

3. Slow down. Email deserves the same caution exercised with formal correspondence.

In litigation, email will be treated no differently than formal hard copy correspondence. When responding to complaints, reporting errors, or discussing emotionally-charged issues, such as poor employee performance, exercise even greater caution and restraint. The quicker the email, the more likely you will be careless and respond based upon emotion instead of reason. Even positive emotions or celebration – e.g. 'we have crushed competitors or adversaries' or cavalier contempt for legal consequences – can later become harmful exhibits. The more important or emotional the issue, the more time and attention you need to dedicate to the email before sending it... or deciding not to.

4. Is a telephone call more appropriate?

Consider whether simply picking up the phone would be just as effective. Every effort should be made to discuss disputes or employee performance problems by telephone or in person instead of reducing them to writing in an informal manner, where it is all too easy to lapse into damaging, extraneous comments reflecting personal feelings. The parties must produce every email on the issue in litigation. Emails may not always reflect context. People are also often more emotionally reckless about what they say in emails than they might be on the phone or in person.

5. Never delete emails associated with any possible dispute or error.

When you learn about a dispute or error, do not delete any emails associated with it, even accidentally. Most jurisdictions allow or require courts to make adverse inferences or impose sanctions on parties that delete or destroy evidence. Litigation hold letters received when a dispute arises and electronically stored information practices create additional issues that warrant separate discussion.

6. Develop, distribute AND ENFORCE a company email policy.

The foregoing guidelines should be followed by all members of your company regarding their work email accounts. We recommend developing and disseminating a company email policy so that all personnel are aware of requirements regarding use of business email in an appropriate manner. If such policy is developed, it is imperative that it be fully enforced. A policy that is often ignored is far worse than no policy.

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