



THINK BEFORE YOU TYPE

BY JACK GARSON

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A note of caution before you click send

Admit it. You probably didn't think twice before you sent your last email. But the widespread nature and ease in creating these communications poses tremendous risks. Many assume emails will never be seen by third parties. Others count on a legal right to keep these messages confidential. Yet all too often, these messages are not privileged or the privilege is lost and the emails become crippling evidence in litigation.

Digging up damage

There are plenty of legally damaging – and thoroughly embarrassing – business emails that have seen the light of day and often have been used as evidence in court. In fact, emails were reportedly instrumental in convicting both Martha Stewart in her insider stock trading case and numerous employees in the Enron scandal.

The recent financial crisis produced countless damaging emails. One employee of a company charged with the important task of rating financial products responded to another employee's concern about a poorly created financial product by stating, "It could be structured by cows and we would rate it." Another employee of the same company, remarking on the dangerous financial products being sold, said, "Let's hope we are all wealthy and retired by the time this house of cards falters." At another financial services company, one employee – worried about the poor quality debt securities owned by his company – asked of another employee, "OK, still have this vomit?"

In one case from the 1990s, female employees favorably settled a sexual harassment lawsuit against Chevron on the strength of emails circulated by male employees. Notably, one of the emails was titled "25 Reasons Why Beer Is Better Than Women." Chevron paid \$2.2 million in the settlement.

In a Massachusetts class-action suit about the dangers of a popular diet drug, a drug company executive's email was disclosed: "Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?" This is hardly the type of email that garners jury sympathy.

In the aftermath of the BP oil rig crisis, plaintiffs suing everyone in sight scoured email records for damaging evidence. One email, from a BP geologist to a colleague, apparently remarking on concrete work performed by Haliburton at the rig site, stated, “Thanks for the sh*tty cement job.” Haliburton was successful in convincing the judge to exclude this email from evidence introduced in court against Haliburton – but not because the email was confidential as a result of the attorney client privilege.

So what is the attorney-client privilege, and how does it protect certain emails and other company communications?

Attorney client privilege

In a very general sense, the attorney client privilege applies to confidential communications between a client and attorney in which the client seeks or receives legal assistance. Where the privilege applies, the client has the right to prevent disclosure of the privileged information in court. Numerous requirements apply in order to preserve this privilege. Notably, the privileged communications may not be disclosed beyond a “need to know” group. For businesses, this group is often referred to as the “control group,” meaning company executives who make decisions about the subject of the communication. This group may also include outside experts whose advice is critical to the legal decision-making.

In addition, the communication must primarily be designed to seek or provide legal guidance or assistance. It is not sufficient, as some mistakenly believe, to merely copy your attorney on an email in order to make it privileged. Likewise, where advice or assistance is sought from in-house counsel, the nature of the communication must be predominantly legal, as opposed to business, in nature.

There are other requirements and a surprising degree of variation among different states and courts in how these requirements are applied. Ask your lawyer for guidance.

Minimizing danger

Emails can create a variety of problems for any business, from violating anti-spam laws to infringing on the copyrights of others to evidencing certain crimes. Despite the virtual permanence of emails and similar messages, you can do certain things to minimize the danger.

Document retention policy: It is advisable to periodically purge emails from business records pursuant to a carefully prepared company policy. But caution is advised.

First, numerous requirements apply. Notably, you can’t destroy potentially damaging emails pertinent to a lawsuit or investigation of which you are actually aware. The unfortunate case of Frank Quattrone illustrates this danger. In 2004, Mr. Quattrone, a star investment banker of the 1990s tech boom, was convicted of obstructing justice and witness tampering. This conviction was based largely on two emails he sent to colleagues in 2000. One of Mr. Quattrone’s colleagues suggested that Mr. Quattrone remind

his colleagues to “catch up on file cleanup.” The colleague later sent an email to numerous company employees with instructions on “file cleaning.” Mr. Quattrone responded to these emails with two of his own, one of which stated: “Having been a key witness in a securities litigation case in South Texas . . . I strongly advise you to follow these procedures.” Because Quattrone was already aware his company was being investigated, his emails were interpreted as a call to destroy potentially damaging information. Quattrone was convicted and sentenced to 18 months in prison and two years of probation.

Second, deleting emails usually just does not work. Absent extraordinary measures, most emails can be recovered from computer systems. Also, in many instances, emails have been forwarded to others who still retain copies.

Common sense: Aside from carefully crafting and then legally implementing a document retention policy, there are practical and legal precautions you can observe to minimize the dangers. Don’t unnecessarily copy people on emails. Similarly, when you are counting on the attorney client privilege, only send the message to those people who need to be involved in making the legal decisions. Even with these precautions, write as if others will see your message. Assume your emails will be splashed across CNN’s homepage.

Even better, walk down the hall or pick up the phone! Yes, go old school and talk it out. See? No paper trail.

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