Think Twice Before You Hit The Send Button! Practical Considerations In The Use Of Email

Janice Mac Avoy, Ivan Espinoza-Madrigal and Sherita Walton





Janice Mac Avoy is a litigation partner in the New York office of Fried Frank Harris Shriver & Jacobson. **Ivan Espinoza-Madrigal** is an associate with the firm. **Sherita Walton** is a former associate. **Steven Starr,** a summer associate with the firm, also contributed to the preparation of this article.

Don't send an email unless you would be happy to see it on the front page of a newspaper—or all over the Internet.

EMAIL IS an essential tool in today's legal and business world. Email is highly versatile and its unique features enable us to communicate with clients and colleagues far more efficiently than via other means of communication. This same versatility, however, can create a host of problems. When using email, lawyers may be impulsive when they should be cautious, particularly when the content of an email relates to sensitive matters such as client confidences or litigation strategy. Careless email use can lessen workplace efficiency, damage work relationships, compromise client confidences, and sometimes end promising careers. This article will address some of the potential dangers, and what you can do about them.

EMAIL IS MORE LIKELY THAN VERBAL COMMUNICATION TO LEAD TO MISCOMMUNICATION • There is significant potential for miscommunication and misinterpretation when using email. When speaking in person or on the telephone, body language and tone provide context for a speaker's words so that the listener can discern what the speaker intends to convey. Words on a computer screen, however, are deprived of

social and emotional background, making it difficult to discern the sender's intention.

Indeed, recent studies by social scientists have found that email use actually increases the likelihood of conflict and miscommunication. *See, e.g.,* Kristin Byron, Syracuse University Academy of Management Review (forthcoming publication). Jokes, sarcasm and other context-dependent communications are often misinterpreted when sent via email—even when accompanied by those annoying "emoticons." When reading email, people tend to be more emotionally sensitive than they would be in face-to-face communication; they often project their own emotions onto the blank screen when faced with the lack of non-verbal cues. This problem is exacerbated when email participants do not know each other personally or when third parties read email. People have a more negative perception of written statements in email than when those same statements are made in person. Indeed, email readers perceive positive content as neutral, neutral content as negative, and negative content as devastating. Daniel Goleman, *Email is Easy to Write (and to Misread),* N.Y. Times, Oct. 7, 2007.

EMAIL CAN BE EASILY MISDIRECTED • Not only is the content of email easily misinterpreted, but email also increases the risk that your communication will be received by someone other than the intended recipient. Addressee accuracy is a major issue and carelessness in addressing emails can have serious consequences. For example, in January 2008, a Philadelphia lawyer accidentally emailed confidential information about settlement discussions between client Eli Lilly & Co. and the federal government to a New York Times reporter. The lawyer mistakenly thought she was sending the email to her co-counsel who had the same last name as the Times reporter. Shortly after receiving the errant email, the Times printed a story about those confidential negotiations. Debra Cassens Weiss, *Did Lawyer's Email Goof Land $1B Settlement on NYT's Front Page?* ABA J., Feb. 6, 2008.

Another notorious example of carelessness in addressing email involves the Mayor of Tonganoxie, Kansas. The Mayor was forwarded a "joke" email announcing a new holiday: "National Female Breast Appreciation Day," which, the email continued, "beats the [expletive] out of Martin Luther King Day!" The Mayor meant to forward the email to friends but accidentally included a Lawrence, Kansas television reporter in the distribution list. *Mayor Apologizes for Risqué Email,* Lawrence Journal-World, Sept. 11, 2007. These embarrassing mishaps and the risk of potential liability can be avoided by carefully reviewing the list of recipients before sending an email.

Careless use of the "reply all" function can also disseminate information to an unintended audience. For example, in February 2008, a New York lawyer representing State Farm Insurance accidentally sent an internal email to news reporters. The lawyer's message, a response to a press release, was intended only for other State Farm lawyers, but was transmitted to numerous reporters because the lawyer used the "reply all" feature. Posting of Ashby Jones to Wall Street Journal Law Blog, http://blogs.wsj.com/law/ (Feb. 20, 2008, 15:15 EST). More recently, in May 2008, Countrywide CEO Angelo Mozilo inadvertently replied to an email message from a distressed debtor desperately seeking a Countrywide employee who could discuss a home mortgage restructuring. In his reply, Mr. Mozilo wrote, "This is unbelievable. Most of these letters now have the same wording. Obviously they are being counseled by some other person or by the Internet. Disgusting." Mr. Mozilo's email was widely circulated on the Internet and in the news media, causing embarrassment to him and to Countrywide. Gretchen Morgenson, *Silence of the Lenders: Is Anyone Listening?* N.Y. Times, July 13, 2008.

Don't Assume That The Recipient Won't Forward It

Of course, the most insidious—and most easily forgotten—way that email can land in the inbox of unintended recipients is when the intended recipient forwards the email to someone else. For example, in 2006 an attorney in Boston emailed a prospective employer to decline a position she had previously accepted. When the employer pointed out her lack of professionalism, the attorney responded that a "real lawyer" would have put the contract in writing. The employer responded that the legal community in Boston is small and that she should avoid alienating more experienced attorneys. The lawyer's response? "Bla bla bla." The email chain was eventually forwarded to various media outlets, including the Boston Globe, the International Herald Tribune, and ABC News' "Nightline." *The "Bla Bla Bla" Heard 'Round the World* (ABC television broadcast, Feb. 18, 2006).

LEGAL PROBLEMS ASSOCIATED WITH CARELESS EMAIL USE • We all know that substantive legal problems can arise from careless email use. A recent study by Proofpoint Inc. found that 34 percent of surveyed companies with 20,000 or more employees reported that employee email had been subpoenaed in the last 12 months. *Outbound Email and Data Loss Prevention in Today's Enterprise ii* (2008), http://www.proofpoint.com/id/outbound/index.php. The high percentage of companies whose emails are subpoenaed underscores the importance of establishing a comprehensive email policy and training employees to use email properly.

Sensitive information that is carelessly included in emails can lead to liability. In fact, Lawyers' USA reported that "smoking gun" emails played a central role in four of the top 10 largest verdicts of 2005. The Illinois Trial Practice Weblog, http://www.illinoistrialpractice.com (Mar. 13, 2007). More recently, in June 2008, federal agents arrested two Bear Stearns executives on an indictment that relied heavily on email exchanges between the two executives. The executives wrote emails expressing concerns over the deteriorating status of their subprime mortgage backed securities, noting that the subprime market looked "pretty dam ugly" and suggesting that they close the funds to withdrawals. On a conference call a few days later, however, the two executives allegedly told investors that the funds were in good shape. Landon Thomas, Jr., *Prosecutors Build Bear Stearns Case on Emails,* N.Y. Times, June 20, 2008.

And in July 2008, the SEC—relying heavily on recovered emails—issued a report alleging that the major ratings firms flouted conflict of interest guidelines and engaged in other suspect practices that contributed to the subprime mortgage crisis. The report quoted one analyst who, referring to subprime backed investments that were given allegedly undeserved top ratings, wrote "Let's hope we are all wealthy and retired by the time this house of cards falters." Another analyst wrote an email in which he violated guidelines by considering how the firm's business would be affected by issuing a lackluster rating. Michael M. Grynbaum, *Study Finds Flawed Practices at Ratings Firms,* N.Y. Times, July 9, 2008.

PROFESSIONAL RESPONSIBILITY AND EMAIL USE • The Model Code of Professional Responsibility obligates a lawyer to "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing…confidences or secrets of a client." Model Code of Prof'l Responsibility DR 4-101(D) (1980). State bar associations have applied this rule to emails that contain client confidences. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004) ("[w]hen a lawyer sends a document by email, as with any other type of communication, a lawyer must exercise reasonable care to ensure that he or she does not inad-

vertently disclose his or her client's information"). This standard of care obviously includes carefully checking the addressees prior to sending an email and ensuring that privileged information is not inadvertently sent to a third party.

Inadvertent Email Disclosure And Attorney-Client Privilege

Attorneys must take precautions when corresponding with private clients who are using their work computers and email accounts. Courts have found that under certain circumstances an employer may use this correspondence against the employee in litigation even though it would ordinarily be protected under the attorney-client privilege. *See In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005) (holding that the attorney-client privilege is waived when the employer (1) has a policy banning personal use; (2) the policy provides for the monitoring of employee emails; (3) the employee has notice of the policy; and (4) third parties have a right of access to the computer and emails); *see also Scott v. Beth Israel Med. Ctr.*, 17 Misc.3d 934 (N.Y. Sup. Ct. 2007); *but see Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008) (holding that an employer may not be able to rely on its formal computer and Internet usage policies if these policies are not uniformly enforced). Even email sent on office computers using Web-based browsers such as Yahoo! or Gmail may lose its privileged status. *See* Jonathan D. Glater, *A Company Computer and Questions About Email Privacy*, N.Y. Times, June 27, 2008 (describing a lawsuit in which plaintiff claims that his former employer violated the attorney-client privilege by reading email correspondence between plaintiff and his private attorney that was sent and received on an office computer via plaintiff's personal Yahoo! account).

PROTECTING YOUR PRACTICE AND YOUR CLIENTS FROM THE DANGERS OF CARELESS EMAIL USE • So how can we, as lawyers, protect ourselves, our firms, and our clients from the dangers of careless email use? Here are 10 practical suggestions to help minimize common email errors.

1. Take Steps To Protect Confidential Information

Use password protections or encryption for sensitive documents, especially when working in an unsecured environment such as an Internet café. Some bar associations require lawyers to use reasonable care to prevent the disclosure of metadata (data hidden in documents that is generated during the course of creating and editing those documents) containing client confidences or secrets when transmitting documents via email. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004). Therefore, every law office should run a metadata cleaning program on all email attachments sent to outside addresses.

2. Preserve Client Privilege In Emails

Do not assume that your emails are privileged. In most jurisdictions, communications are only privileged to the extent that they convey legal advice or reveal client confidences. Most of our emails do neither and could, therefore, be discoverable. All emails with privileged information should indicate in the subject line and body of the email that their content is privileged and confidential. Including a pro forma notice at the bottom of the email may also constitute a precaution against inadvertent disclosure, so there is value in appending these statements to emails. Some courts, however, have found that the pro forma notice alone is not sufficient to preserve attorney-client privilege. *See Scott*, supra, 17 Misc.3d at 943 (finding waiver of privilege where emails from attorney were sent to client's work email account in spite of the presence of a pro forma confidentiality notice in the emails). Therefore, care must always be taken when sending emails in order to maintain their privileged status.

Appending a confidentiality statement at the end of the email may not "cover you" if you carelessly jeopardize the attorney-client privilege.

3. Treat Every Email Like A Substantive Memo To The Client

Email is fast and easy, and we work in a culture where clients often expect immediate responses to emails. Although it is tempting to fire off quick replies to client inquiries, it is important to realize that substantive emails are memos, and every substantive email should be treated with the same care and judgment you would exercise in drafting a formal memorandum:

Although it is tempting to fire off quick replies to client inquiries, it is important to realize that substantive emails are memos, and every substantive email should be treated with the same care and judgment you would exercise in drafting a formal memorandum.

- Be direct, clear, and concise;
- If you don't have all the facts or are making factual assumptions, say so. Otherwise, the email may be misinterpreted, particularly if re-read at a later time;
- If your analyses and conclusions are preliminary, say so; and
- Avoid listing or discussing all the countervailing arguments to the position you are advocating, unless you carefully set forth a detailed explanation of all of the relevant factors and considerations.

4. Review All Of Your Emails Before Sending Them

As with any formal memorandum, before sending a substantive email, the best practice is to print and review the message:

- Grammatical and typographical errors are no more acceptable in emails than they are in formal written materials;
- Consider whether other lawyers working on the matter should also review the email before it is sent to the client. The email can lock you into a position or might be inconsistent with advice that others in your firm have given the client;
- When responding to a client inquiry, consult with other lawyers in your firm who were also cc'd before replying to ensure that they agree with the content of your email and that they haven't already responded to the client;
- Type the content of your email first before addressing it, so that you do not accidentally hit "send" before you have finished carefully reviewing the email for tone and grammar;
- Avoid the careless use of the "spell check" function. Many legal terms and most proper names are not included in the spell check dictionary and an inadvertent acceptance of spell check changes can significantly change the meaning of the word and lead to embarrassment; and
- Even if your email deals with non-substantive or administrative matters, take care to ensure that your message is clear, concise, and free of typographical errors.

5. Think About The Timing Of Your Email

Although many lawyers neurotically check their Blackberrys for new messages, not everyone does so. Help your recipient understand the urgency of your message by using a descriptive subject line for your message that quickly conveys the topic of your communication (and allows the user to more easily retrieve the message later if it has been filed in a subject matter folder). For urgent messages, include the word "urgent" in the subject line and follow up with a telephone call.

Don't assume that a client's email requires an immediate response. Many mistakes occur because we rush our responses in trying to be responsive to clients. However, rushed responses often ignore

critical facts or leave out critical assumptions that are important to our answers. It is often better to let an email sit for some time after you have drafted it to make sure it is appropriate. No one will remember that you responded instantaneously. Everyone will remember if you respond inappropriately.

6. Maintain An Accurate Record In Email

Because emails are often produced in the course of discovery, it is essential to create an accurate record in email correspondence. An accurate email record can be maintained by observing the following three rules:

- First, avoid writing a substantive email until you have all of the relevant facts. A premature email could leave the impression that its content consists of the entire matter, thereby creating an inaccurate factual record;
- Second, take steps to correct mistakes in the content of a substantive email. There is a presumption that what you are writing in an email is accurate. If you subsequently learn that you made a mistake in an email, first orally communicate the mistake and then send a follow-up email to update or correct the record; and
- Third, never include damaging or self-incriminating information about a client or yourself in an email.

It is often better to let an email sit for some time after you have drafted it to make sure it is appropriate. No one will remember that you responded instantaneously. Everyone will remember if you respond inappropriately.

7. Consider Whether A Phone Call Would Be More Appropriate

Given the greater likelihood of miscommunication in email (particularly if reviewed by a third party), consider discussing sensitive or complicated issues with the client over the telephone rather than in an email. A telephone conversation ensures that the client fully understands the point you are trying to make and avoids misunderstandings. If it is important to keep a written record, consider a memorandum to the file memorializing the telephone conversation, rather than an incomplete email to the client.

8. Take Care Regarding Your Recipient

Before hitting the send button:

- Always confirm that you are sending the email to the correct person. Take particular care if you have relied on the "check names" icon in Outlook to complete an email address. Outlook's treatment of similar names can have disastrous consequences;
- If you have media personnel in your contacts, consider transferring those contacts to your assistant so they cannot be accidentally accessed from your Outlook account (like the unfortunate lawyer for Eli Lilly);
- Think twice before using the "cc" function of your email program. This feature should only be used when it is appropriate or necessary to notify someone of the content of an email exchange. By limiting your use of the "cc" function you avoid overloading co-workers with unnecessary emails and minimize the risk of improperly addressing messages;
- Be careful with the "bcc" function as well. The "bcc" recipient may inadvertently "reply all," showing the recipient that you have bcc'd someone, to your embarrassment. As an alternative, consider simply forwarding the sent email; and
- When replying to an email, the best practice is to include the original email to avoid confusion about your message. Be especially wary of the "reply all" feature because most people don't want to or need to see your reply. In your response, you may also inadvertently include in-

formation intended only for the original sender, not all of the cc's.

9. Maintain Appropriate Record Retention Practices With Email

Email is formal client correspondence, so be sure to:

- Ensure that all substantive email communication with clients is maintained in the client correspondence file, either by printing out hard copies or creating a permanent email folder for client correspondence;
- Establish a protocol for ensuring that emails are maintained for the client file. For example, if multiple attorneys are working on a matter, assign one person on the matter to be in charge of ensuring that all appropriate emails are maintained in the file or create a public folder in which all client email can be stored; and
- Consider deleting internal emails with drafts of documents that are not forwarded to the client.

10. Use Good Email Etiquette

Here are some pointers for good email etiquette:

- Address the email to the recipient with a salutation such as "Dear Jane:" It is not only polite, it reminds you that email, like letters or memoranda, is a formal means of correspondence and is a good way to focus yourself on the audience for the email;
- Avoid sending jokes and "heat of the moment" emails unless you are certain that they are appropriate. Jokes about clients to other attorneys in the firm can later be discoverable and, taken out of context, they can be damaging;
- Don't write anything in an email that you wouldn't feel comfortable seeing in The New York Times. We give clients this advice, but frequently fail to follow it ourselves. Just remember how easy it is to accidentally send an email to the wrong recipient or have the intended recipient forward it to an unintended party;
- Do not use ALL CAPS! It is the email equivalent of shouting;
- Do not use emoticons, and avoid using slang, jargon and abbreviations unless clearly appropriate, based on your recipient and the content and context of your message. Such informality may not only be misunderstood by the recipient, it also lulls the sender into a false sense that email is a conversation. It is not. It is a permanent (in most cases) written record; and
- Be mindful of the amount of email each of us receives every day, and don't send unnecessary emails.

CONCLUSION • Email is a powerful tool but can also be a serious threat for lawyers and their clients. Careful observance of basic standards of email conduct, however, can establish a professional email culture at the office and avoid serious mishaps and potential liability. Practitioners should always keep the following advice in mind when using email for client work:

- Email is as much a part of the record as a formal memorandum and facts and legal opinions discussed in an email must be accurate;
- Lawyers are ethically obligated to exercise reasonable care when communicating client confidences via email;
- Inadvertent disclosure by email may waive the privileged status of the transmitted information and documents; and
- After an email is sent it cannot be controlled, retrieved or deleted.

Lawyers can benefit greatly from the convenience and versatility of email communication. Use email carelessly, however, and one day you may be surprised to read your own email on the front page of The New York Times.