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LOOSE E-MAILS SINK LITIGATION

How to protect your company when the fingers do the talking.

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WHEREVER THERE IS E-MAIL, THE potential for trouble exists, and with the proliferation of handheld digital devices, e-mail is everywhere. Employees today e-mail as if they were speaking on the telephone or chatting by the watercooler, and they e-mail things that they would never include in a traditional business letter or interoffice memorandum. Yet e-mail has a permanency and an ease and breadth of distribution that exceeds that of traditional paper communications. These factors combine to make e-mail one of the first targets of opposing counsel, and their discovery requests and subpoenas invariably reflect this fact.

Amazing as it may seem, some companies' employees still behave as if their e-mails were just between them and their correspondents. Here are some examples of why your employees need to think before they type. This past May, a high-profile case provided a dramatic example of how seemingly innocuous and/or confidential e-mails can be used in litigation with devastating consequences. Former hedge fund titan Arthur Samberg had to pay nearly $28 million to settle insider trading allegations. The case was going nowhere for several years when, in an unlikely twist, the divorce of a former Microsoft Corporation employee gave the Securities and Exchange Commission the break it needed. The employee's soon-to-be ex-wife uncovered e-mails from their home computer that proved to be the critical link the SEC needed for a successful investigation.

As this case demonstrates, lawsuits

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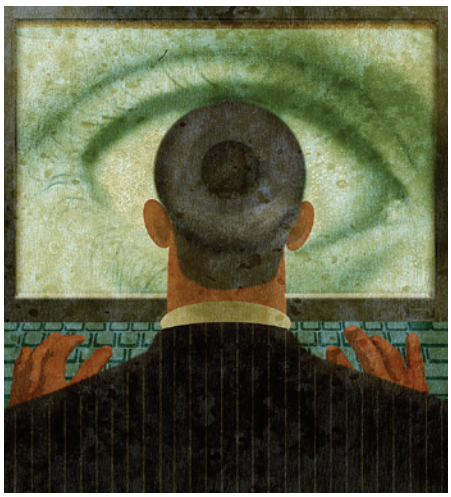

and government investigations can turn into trouble fast and with little warning, especially when "E-Trouble" happens. We coined the term E-Trouble a few years ago to refer to e-mails sent by a company's employees that are produced in discovery or pursuant to a subpoena and then used against that company. E-Trouble can be devastating, as judges, juries, and government investigators will look at employees' e-mails as the true story of what really happened, often discounting or disregarding after-the-fact testimony or explanations that are inconsistent with, or even simply not supported by, e-mail from the time of the events at issue.

So how can you avoid E-Trouble? Begin by teaching your employees our five tips on avoiding the slings and arrows of outrageous e-mails.

1. DO NOT E-MAIL INSIDE JOKES OR NICKNAMES.

Employees *should not* e-mail inside jokes and/or use derogatory nicknames referring to competitors, customers, clients, coworkers, regulators, vendors, suppliers, contractors, consultants, or anyone with whom the company conducts business. Judges, juries, and government investigators do not appreciate such wit.

A couple of real-life examples from recent litigation: A male project manager, in internal company e-mails, repeatedly referred to a female senior executive of another company as "Tinkerbell" because, according to the manager, she acted as if all problems could be solved by positive thinking or "sprinkling a little fairy dust" on the issue. These e-mails, which were produced in discovery to the opposing party, created a strong impression of a condescending and sexist attitude. After the manager was questioned ad nauseam at his deposition about his "Tinkerbell" e-mails, he could not be called as a witness at trial, despite his role in the matters at issue.

A partner set his company e-mail software so that when he received an e-mail that had been sent by or copied to another particular partner, that other partner's name appeared in the e-mail "From" or "CC" box as "ShitForBrains." When the partners commenced litigation against each other, the opposing party did not have to wait until discovery to learn this. When replying to an e-mail that had been copied to his partner, the author carelessly hit "Reply All," sending his reply e-mail, with the crude, derogatory nickname included, to his partner and others at the company. Of course, the e-mail made its way to the attorneys for the opposing party, who used it effectively to portray a crude, hateful individual.

2. USE COMPANY E-MAIL ACCOUNTS APPROPRIATELY.

Employees *should not* use company e-mail accounts in any manner that could hurt the image of the company in the eyes of judges, juries, or government investigators. E-mail must *always* reflect favorably upon the company and the way it does business.

A few real-life examples, from one company, in recent litigation: An employee used his company e-mail account to distribute widely within the company a joke featuring a photo of a scantily clad woman and the series of lines: "Makeup Job $60. Boob Job $6,000. Forgetting to Tuck in Your Nuts . . . Priceless." The e-mail circulating this crude joke carried the company's standard caption: "FOR OFFICIAL USE ONLY."

Another employee used his company e-mail account, which included his impressive-sounding job title, to communicate with women through an online dating service. "I am not your typical pocket-pen-wearing, tape-on-the-glasses engineer. I'm more on the board table side. . . . I'm known as 'Wild Thing' in the industry."

Yet another employee used his company e-mail account to distribute the lascivious video "Men's version of The Antique Road Show." The attorney for the opposing party argued in court that these e-mails showed that the company "fostered a culture of uncouth, unprofessional, and unfocused project management" that contributed to the problems at issue in the litigation.

3. DO NOT E-MAIL WHEN ANGRY.

If employees are upset or angry about something that occurred on the job, they *should not* e-mail about it until they have a cool head.

A real-life example: A company executive e-mailed to a manager of a subcontractor: "I am not surprised of [sic] your ignorance of our subcontract agreement. It [your ignorance] is not as bad as your performance on this job. Have your attorney point it [out] to you."

At trial, the attorney for the opposing party used this e-mail to portray its author as bullheaded, unreasonable, and putting the project on the fast track to costly litigation.

4. DO NOT E-MAIL POTENTIAL AMMUNITION FOR OPPOSING COUNSEL.

This one may seem obvious, but you'd be surprised how many people haven't gotten the hang of it. Employees should think before typing and sending e-mail. Employees *should not* send e-mails that could be used against the company by an attorney for an adverse party or agency.

A couple of real-life examples from recent litigation: A company executive e-mailed his colleagues: "Call me nuts, but . . . this is war and we need to annihilate the enemy, not just irritate him. I say . . . let's hope for [opposing party] to file a lawsuit . . . [Our] strategy is perfect if that happens. If [opposing party] gets rattled in the national news by this, he will look guilty if he does nothing, and if he sues, it's game over. [We have] a plan that will turn his lights out instantly. It's checkmate. Let's play to win and win big-time. I want . . . to have two Ferraris by Christmas. . . . COOL!!" The attorneys for the opposing party obtained this e-mail and featured it in the litigation. Game over.

During a dispute with a contractor as to whether certain costs were owed, a company had taken the position that the contract made no provision for payment of such costs. Upon receiving an e-mail from the contractor quoting language in the contract arguably providing for payment of such costs, a company executive forwarded it to his colleagues with this message: "As usual, we have been made to look stupid." The author's company in fact had a legitimate position with respect to the interpretation of the contract, but the e-mail would have hindered the company's assertion of that position in litigation. Fortunately, the litigation settled before this e-mail was produced in discovery.

5. AVOID INCLUDING THE DIRTY DOZEN IN E-MAIL.

While it's not exhaustive, the list below includes phrases that opposing counsel may look for in the discovery process. These should be avoided at all costs:

(1) "It was only verbal."
(2) "I made sure that nothing was in writing."
(3) "I really shouldn't put this in writing."
(4) "I don't want to discuss this in e-mail."
(5) "Delete this e-mail immediately."
(6) "Don't tell them."
(7) "They will never find out."
(8) "I could get into trouble for telling you this, but . . . "
(9) "I can spin it so that . . . "
(10) "I don't think I am supposed to know this, but . . . "
(11) "Don't ask. You don't want to know."
(12) "Is this actually legal?"

With all the cases of supposedly private e-mails getting into the wrong hands and wreaking havoc, you need to make certain that your employees and colleagues aren't typing their way into trouble—not just for themselves, but for the company as a whole. Given the seriousness of E-Trouble, it is imperative to educate your employees, sensitize them to the perils of E-Trouble, and instill in them safe e-mail habits, thus avoiding E-Trouble before it ever happens.

"It's checkmate. I want . . . to have two Ferraris by Christmas. . . . COOL!!" THE ATTORNEYS FOR THE OPPOSING PARTY obtained this e-mail and featured it in the litigation. Game over.

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