Best Practices for Electronic Communications

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Litigation discovery increasingly focuses on electronic messaging. Here are some tips on how best to communicate inside and outside your company in today's world of e-mail, texts, instant messages, tweets, Facebook postings, and LinkedIn messages.

☑ **Never send an electronic message that you would not feel comfortable seeing on the front page of the newspaper or blown up on a big screen in a courtroom.**
Litigation today focuses on all types of electronic messaging. Stray phrases can be taken out of context to distort your position, attack your integrity, and criticize your company's reputation. Every electronic message that you write, and every document you attach to them, is subject to discovery—which means it can be seen by the other side, and then blown up in the courtroom.

☑ **Electronic messages are never deleted and are not "informal."**
E-mails never go away; they can always be found in some electronic archive or backup tape. And while e-mails or texts may feel like a more "informal" form of communication than a letter or a memo (particularly when sent from your BlackBerry or iPhone), they don't appear that way when printed and blown up for use in court. So treat every electronic message as carefully as you would a formal letter. If you have any doubt about whether to send an electronic message, don't! Instead of sending an e-mail, pick up the phone, find them in person, or send a non-substantive e-mail arranging a time to talk. And while talking on the phone is fine, if leaving a voicemail message, be just as careful as you would in an e-mail, because voicemails are also saved and discoverable.

☑ **Instant messages are not always "instant" or ephemeral.**
Such messaging can be stored, and often is, on corporate servers if sent from an employee's desk through the corporate computer network. Companies in regulated industries, such as financial services and health care, are required to log the contents of all instant messages sent through the corporate computer networks, whether through the company's instant messaging or personal instant messaging through a web-based account, such as Gmail or AOL. The contents of such instant messaging conversations can end up as discoverable if such messages contain discussion of relevant search terms.

☑ **Remember, it won't seem funny in court.**
A common misconception of electronic messages is that statements in them that are colorful, offbeat, silly, sarcastic, or a misguided attempt at humor can be explained away. They can't. But they can be blown up really big on a giant screen in front of you and the entire courtroom. And a really smart person whose job it is to make you look bad can force you to try to answer direct, yes or no questions about it—questions intended to distort what you were trying to communicate. And there is little you can do to prevent this from happening.

☑ **Limit recipients and be careful with the "reply all" and automated address completion functions.**
Only send your message to those who need to see it. Don't use "reply to all" when it isn't necessary. Be careful with the automated address completion function—it can and will play tricks on you. It is very easy to inadvertently send an e-mail to another person with the same first name, or to the wrong address. Before you hit send, make sure you are sending it to the correct people at the correct addresses.

☑ **Avoid intermingling litigation and nonlitigation subject matter.**
If you need to send an e-mail about a contract or other business issue that you know is the subject of ongoing or expected litigation, please try to limit the e-mail to that issue only. All e-mails and other documents relating to the subject matter of litigation will have to be produced in discovery, so by including other topics in those e-mails, you may end up unnecessarily giving your adversary information about other aspects of your business that are not subject to discovery. This can be prevented by avoiding the intermingling of litigation and nonlitigation matters in your e-mail communications.

☑ **Take steps to preserve attorney-client privilege.**
The attorney-client privilege protects oral or written communications, including e-mails or other electronic messages, between an attorney (whether in-house or from an outside law firm) and a client relating to *legal* advice, either seeking that advice, communicating that advice, or providing information to assist in the rendering of that advice. The attorney work product doctrine protects documents that are prepared by or for an attorney for use in an ongoing or specifically anticipated litigation. It is very important that you keep the following things in mind about communications with counsel and the preservation of the privilege.

1. **You *cannot* make a communication privileged simply by copying an attorney on the e-mail.** If the e-mail or other message doesn't request legal advice, or provide information an attorney requested to assist in the rendering of legal advice or for use in the litigation, then the communication is not privileged. Cc'ing counsel on the e-mail will not magically make it privileged, or make it any less subject to discovery. Quite the opposite, like the *Boy Who Cried Wolf*, unnecessarily copying counsel on nonprivileged messages will make it harder to protect communications that actually are privileged.

2. **Limit recipients of privileged communications.** If you need to request legal advice, or are providing information to counsel to assist counsel in providing legal advice, please send your e-mail directly to counsel, and minimize other recipients (direct or cc) to those who truly need to know. Similarly, when you receive an e-mail from counsel providing legal advice or seeking information, never forward that e-mail outside the company. Within the company, only forward it to those who need to know the advice, and include a cover note indicating that the e-mail contains privileged legal advice that should be kept confidential.

3. **Leave nothing implicit.** Even though it may seem obvious that you are sending a message to the company's attorney to request legal advice on behalf of the company, the formality of saying it is important. So in the first paragraph of your e-mail, state that you are sending the e-mail to request legal advice, or to provide information the attorney requested to assist him or her in rendering legal advice to the company.

4. **Discussions of legal strategy.** It is best to avoid sending e-mails or other messages to your co-workers discussing legal strategy or ongoing litigation. But if you do need to send such an message, then make sure to copy counsel on the e-mail, and state in the first paragraph that you are sending the e-mail to assist in the litigation.

5. **Separate business and legal communications.** Whenever possible, avoid including both business and legal issues in the same message. Such mixing of topics may open up the communication to a finding, down the road, where the portion concerning business issues was "predominant," and therefore the entire communication would not be privileged. Similarly, do not pose a legal question or bring up a legal topic as a reply to another e-mail or string of e-mails that may not have concerned that issue in the first place. Always start a *new message chain*, for communications concerning legal issues. That way, in the future, communications regarding the legal topic can be easily segregated, and any ambiguity about whether the privilege applies can be removed.

☑ **Pause before you hit send.**
We all know how easy it is to send an e-mail, a text message, or a tweet from our desk, BlackBerry, or iPhone. It seems like a quick and informal way to communicate. And it is, until your message is printed out and blown up for use in court. Because of the way electronic messages can be used in today's litigation environment, it is *vital* that you limit such communication as much as possible, and that you carefully review every message before it goes out. Before hitting send, make sure it is a message you truly need to send, that you have the right recipients, that you have taken the steps necessary to preserve any privilege that might apply to the communication, and that you would be comfortable with the content of the message being broadcast to the world.

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