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Legal Issues Affecting Business E-mails

By Douglas C. Northup and Ronald J. Stolkin

The rising tide of e-mail communications raises ongoing challenges for business as it attempts to wrestle with ensuring that these communications do not create legal headaches down the road. Most of us at one time or another have hit "Send" too soon and have flinched at the idea that an e-mail went out – poorly written, intemperate in tone, confusing, or downright incorrect.

When counseling and training employees of business clients, we remind our clients to ask themselves: "Would I be comfortable two years from now being cross-examined in federal court in front of a jury about the content of this e-mail I am about to send?" If the answer is anything other than an unqualified "yes," it is not an e-mail that should be sent.

In civil or criminal litigation, e-mails are considered "documents." The burden rests on the business to be able to produce these documents in their original electronic form, and a log of such documents in litigation where they may be relevant. Failure to do so equates to failure to produce any other document in litigation. In other words, not good.

Interestingly, voice messages may also be considered "documents." Many businesses have telephone systems that automatically convert voice messages to an electronic.wav file and send the recipient the file in an e-mail message. The same evidence preservation rules govern these messages as other electronic documents.

Employers have struggled with employees using office e-mail to send and receive e-mails of a personal nature. It is extremely important that an e-mail communication policy be consistently presented and enforced so employees understand and appreciate the policy. An electronic communications policy is an absolute must, serving as a first line of defense in litigation or forestalling the possibility of litigation. This policy should be included in the personnel manual or employee handbook and should be signed by each employee acknowledging that they have received and understand the policy.

From a general employment and litigation perspective, electronic communication policies should include the following:

- To eliminate any expectation of privacy on the part of employees, language should include that the systems' hardware, software, electronic mail, messages composed, sent or received and other electronic-related items are the property of the company, not of the employee.
- The use of e-mail and computer systems is solely for the conduct of the company's business.

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- The e-mail and computer systems are not to be used to create, transmit or receive any offensive or disruptive messages.
- The e-mail and computer systems are not to be used to send or receive copyrighted materials, trade secrets, proprietary financial information, or similar materials.
- That the company retains the right to access and search all computer directories, diskettes, files, databases, e-mail messages, and any other electronic transmissions contained or used in conjunction with its computer or electronic systems without prior notice and that employees who place information on the company's systems understand that the company has the right to review, edit, copy, republish and distribute such information.
- When in doubt, pick up the phone and talk to someone before acting.
- Less is more in terms of content.
- Simply copying in-house or outside counsel does not make the communication privileged.
- If the communication really should be privileged, that fact should be noted in the "Re" line. Privilege requires that the communication's dominant purposes is to confer with counsel and/or obtain legal advice from the attorney.
- Bad e-mails are always an issue in modern litigation. If the purpose of an e-mail is to deliver bad news, corrective action, or some other negative communication, think carefully about whether another means of delivery is more appropriate. If one still proceeds, treat the e-mail as if it were a letter and word it thoughtfully.
- Violation of the company's electronic communications policy will result in discipline, up to and including termination.

Consideration also should be given to including a separate policy on blogging.

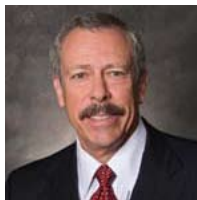
We routinely assist clients in designing and training on e-mail and electronic communications policies and will be happy to answer any questions you have in this regard.

Douglas C. Northup focuses his practice in on commercial, tort, and professional liability litigation. Mr. Northup handles complex product liability matters and has represented manufacturers of, among other things, firearms, forklift equipment, pharmaceutical drugs, tires, and heavy mining equipment. He also assists clients with avoiding and minimizing the risk of litigation through contractual indemnity and limitation of liability clauses and insurance. He earned his B.A., (1984) from New Mexico State University and his J.D., (1991), summa cum laude, from Oklahoma City University.

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