

Know Before You Send

BEST PRACTICES FOR EMAIL IN A LITIGIOUS WORLD



You can't unsend an email. In today's litigation landscape, a single email can become grounds for expensive discovery battles or the basis for a winning summary judgment brief or even a trial.

Proactively managing how employees and/or attorneys communicate via email (and via text, instant message and voicemail) is essential to protecting your company from risk and containing litigation costs.

10 Best Practices to Protect Your Company



1 ► TRAIN PERSONNEL ON EMAIL BEST PRACTICES

Training is much less costly than the litigation expenses that can accompany a single bad email.



2 ► FOLLOW THE "JURY OR NEWSPAPER" RULE

If you would not want your email displayed on a big screen in front of a jury or published in a newspaper, then do not write it. Some statements are not legally problematic but will not read well to a judge or jury.



3 ► PICK UP THE PHONE

Call ahead to discuss a sensitive situation and intentionally confirm the points to include in an email before sending it.



4 ► THINK ABOUT THE AUDIENCE FOR EVERY EMAIL

Confirm that the recipients are in fact the intended recipients. Beware of auto-populating, "reply all" functions and list-servs.



5 ► CONSIDER THE IMPORTANCE OF TONE

Tone (humor, sarcasm, etc.) is easily misinterpreted in email. Create an email culture that discourages flippant responses and informal tones.



6 ► BE AWARE OF YOUR EMAIL SOURCES

When working remotely or on mobile devices, emails can inadvertently be sent from personal or shared email accounts. Establish device settings with proper security restrictions.



7 ► MAINTAIN CONFIDENTIALITY IN YOUR EMAILS

Train personnel on types of information to keep confidential and how to properly restrict access to that information to maintain confidentiality.



8 ► KEEP ATTORNEY ADVICE COMMUNICATIONS TAILORED TO A NARROW GROUP

Not every email with a lawyer's name as a recipient, or even as the sender, is a privileged communication. Be careful when forwarding legal advice.



9 ► BE CAREFUL WITH BRING YOUR OWN DEVICE (BYOD) POLICIES

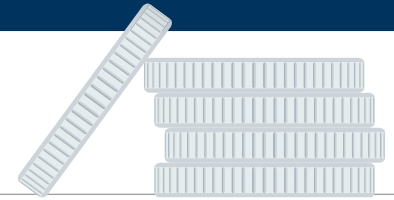
Make sure company BYOD policies provide clear directives for confidentiality, data preservation, security measures, acceptable use guidelines and employee departures.



10 ► CREATE & MAINTAIN A BALANCED DOCUMENT RETENTION POLICY

Properly crafted email retention policies help guard against "problem" emails, spoliation claims and the cost of discovery.

Wise Communication Makes Cents



5 TIMES WHEN EMAILS COST BUSINESSES

- 1▶ **EMPLOYER-EMAILED STATEMENTS** that an employee was “going over the top,” and “may be losing control again” helped a plaintiff win \$13 million in a gender discrimination and retaliation case (*BMG Rights Management (US) LLC v. Cox Communications Inc.*).



Prevention: BEST PRACTICE #2

- 2▶ **AN AUTOFILL ACCIDENT** sent privileged materials to opposing counsel, who used them in counterclaims (*Terraphase Eng'g, Inc. v. Arcadis, U.S., Inc.*).



Prevention: BEST PRACTICE #4

- 3▶ **ATTORNEY-CLIENT PRIVILEGE** was not granted to a company on emails with its media consultants and work-product protection was waived for a letter at issue because it had been disclosed to a third party (*George Bousamra, M.D., et al., v. Excelsa Health et al.*).



Prevention: BEST PRACTICES #7 & #8

- 4▶ **FAILURE TO INCLUDE BYODS** in a litigation hold caused loss of relevant email and other data, and a magistrate judge issued sanctions against the defendant (*Small v. Univ. Med. Ctr. S. Nev.*).



Prevention: BEST PRACTICE #9

- 5▶ **DELETED EMAILS** led a judge to vacate a \$21.5 million win, finding that the plaintiff had engaged in discovery misconduct.



Prevention: BEST PRACTICE #10