

BEFORE CLICKING THE “SEND” BUTTON...

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Email has drastically impacted the way we communicate. It is faster and less expensive than facsimile or ordinary mail, and can reduce the amount of paper and files that frequently fill an office. Furthermore, the increased use of smartphones allows for the instantaneous exchange of information and documents from virtually any location, at any time. However, while email certainly has its benefits, it also has its inherent dangers and pitfalls, particularly in the context of litigation.

Email has evolved into an area of particular interest in litigation, specifically internal company emails. Because the use of email is so frequent and a preferred informal method of conversation, it has become a fertile source of damaging and/or useful (depending of course on what side you are on) evidence. Indeed, a controversial email can irreparably destroy a witness' credibility or compromise a company's case. Off-hand comments that were never intended to be read by anyone other than the recipient of the email may turn out to be damning admissions or distractions in resultant lawsuits.

The domain name on your email address (i.e., @ABCcompany.com) may also give the impression that your comments are representative of the company, as opposed to an individual viewpoint. As such, every person on a construction project—from project engineers to project executives—should understand and appreciate that virtually every email written relating to any aspect of a



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project may be discoverable in the event the project results in litigation, and used against your company. To avoid these problems, there are several rules to keep in mind when drafting an email, regardless of whether the email is sent to an owner's representative, subcontractor, material supplier, or simply to the co-worker in the office next door. These rules should be considered regardless of how mundane the email is or how certain the sender is that its contents will never be disclosed to a third party.

NEVER WRITE SOMETHING YOU WOULD BE EMBARRASSED READING TO YOUR MOTHER OR BOSS

Because email has become so informal, many fail to exercise the appropriate levels of discretion. Keep in mind that in the event your case goes to trial, the email you are writing may be displayed on a projector and read to a jury of 12 individuals whom you have never met. More importantly, the email will likely be taken out of context by the opposing party. Regardless of what you meant at the time you wrote it, or how appropriate or amusing it was at the time you wrote it, there is nothing more embarrassing or harmful to a

case than an inappropriate email.

Too often, employees carelessly treat email messages as conversations, including in them defamatory remarks, opinions contrary to corporate policy or statements against corporate interests. Refrain from writing disparaging comments about individuals, questionable humor, or intimate personal details of your life.

Before you click send, ask yourself, “Would I be embarrassed to read this email to my mother or boss?” If the answer is “yes,” you should reconsider sending the email.

PAY ATTENTION TO GRAMMAR

Email has become so informal that authors regularly disregard punctuation and grammar. For example, authors use abbreviations such as “r” in lieu of “are,” or “u” instead of “you.” The use of abbreviations, although quicker, can lead to confusion or ambiguities when read or interpreted by others. Further, emails with no stops or commas are difficult to read and can sometimes even change the meaning of the text. Accordingly, always use “spell check” before sending your emails.

Furthermore, cases consistently hinge on credibility and professionalism. An email using proper syntax, punctuation, spelling, and language is much more credible and effective than one that uses trendy abbreviations and lacks proper punctuation. Your email may be a crucial piece of evidence in a lawsuit; although it may take a few more minutes, treat each email as a stand-alone document that is demonstrative of professionalism and intellect.

REFRAIN FROM USING PROFANITY

Unfortunately, construction workers have the reputation of using colorful and inappropriate language. While the use of profanity may be commonplace on construction projects, the use of foul language in emails can offend either the recipients of the emails or a jury who is asked to consider the same in litigation. There is always a more appropriate word to use in lieu of profanity; consider the use of alternatives when sending emails. Similarly, do not include sexually suggestive language, jokes, or attachments.

UNDERSTAND THE ATTORNEY-CLIENT PRIVILEGE

The use of email also plays an important role in the context of establishing or maintaining the attorney-client privilege. The attorney-client privilege is a legal concept that protects communications between a client and his or her attorney, and keeps those communications confidential. The privilege allows for confidentiality of oral and written communication between a client and the attorney, and this in turn protects the client's ability to be honest with the lawyer without fear of future disclosure.

However, in the context of emails, it must be understood that not all communications directed to a lawyer will be considered an attorney-client communication protected from disclosure. Also, the attorney-client privilege may be waived under certain circumstances if disclosed to third parties.

Many people have the incorrect

assumption that simply copying a lawyer on an email will protect an otherwise non-privileged email from disclosure; this is not always true. A sender should not seek to protect an otherwise non-privileged communication by simply copying a lawyer with the expectation of complete immunity. Rather, a court will instead look at the "dominant purpose" to determine if the communication between the client and his lawyer should be protected. Under the "dominant purpose" test, a communication will only be protected if the dominant purpose of the email was for the solicitation or provision of legal advice. For example, it is unlikely that an email sent that is simply a defamatory statement against a third party would be protected by simply copying your lawyer on the email. If the only reason you are copying your lawyer on an email is an effort to keep that email private, you should reconsider sending the email.

The attorney/client privilege can be compromised or waived when information that would have otherwise been privileged is disclosed to a third party. One of the biggest dangers is when the attorney-client privilege is arguably waived when the email is inadvertently forwarded to a third party as part of an email chain. The attorney-client privilege is a fundamental right that should be protected at all costs. It is critical that prior to sending an email chain, the sender review each independent email contained in the chain to ensure that no privileged communication contained therein is disseminated to third parties. Never

forward any emails to third parties that include in the email string either a direct communication between you and your lawyers, or which discuss the substance of any direct communications or advice from your lawyers. Even if a court ultimately finds the disclosure was inadvertent and does not waive the attorney-client privilege, and further requires the email be returned or destroyed by the unintended recipient, you cannot "unring the bell" if that party has already read the confidential communication.

CONCLUSION

Email has become a primary method of communication in the workplace, and there are many issues concerning both the attorney-client privilege and the use of these emails in litigation that have important implications for both employers and employees. Poor email practice can result in dangerous documents that later can be used against the company. Email messages should be prepared as vigilantly as a letter or memorandum, and not treated as informal communications.

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