

The exploding use of e-mail has dramatically changed the way clients do business and the manner in which they communicate internally and externally. This article will briefly examine important issues surrounding the use of e-mail by clients in their business relationships, including the legal implications of e-mail for pretrial discovery and litigation purposes.

E-mail is an easy and fast way for clients to communicate, and to transmit and receive documents. A computer with access to the Internet or other e-mail access is all that is necessary. With the click of a mouse, an individual can send electronically, and practically instantaneously, a message or document to a colleague in the office, a vendor across town or a client across the country. This quickness and convenience often results in communication by clients that is considerably more informal than a letter carefully drafted, edited and revised multiple times before being sent.

An English professor and writer whom I heard speak several years ago noted that e-mail had changed for the better the way his students thought about writing. Instead of talking on the telephone or procrastinating before writing and sending a letter, his students were using e-mail regularly and thus writing more often. While there is little doubt that the advent of e-mail has significantly increased the amount of written communications, e-mail presents a host of thorny legal issues that perhaps the English professor never contemplated.

One problem is that unless the e-mail drafter takes time to revise, edit and proofread the e-mail message before sending it, it may contain typographical and other errors which would not normally be found in a carefully written and edited letter. Innocent mistakes can have profound impact when contained in a letter or agreement transmitted by an e-mail message.

## *A) Internal E-Mail*

The widespread usage of internal e-mail by employees presents a number of issues which firms need to carefully consider. Internal e-mail may be discoverable during litigation, as discussed below. In addition, many employees are able to forward a message to user groups or private mail lists, either within the firm, outside the firm, or both. This raises the possibility that a confidential message, perhaps containing proprietary information, can be sent, inadvertently to everyone in the firm as well as to outsiders.

Firms also need to monitor the use of internal e-mail by employees to make sure that internal e-mails do not contain inappropriate language or offensive graphics which might violate firm policies concerning sexual harassment or workplace anti-discrimination laws.

## *B) Keeping E-Mail Confidential*

A host of confidentiality issues arise in connection with the use of emails. For example, who is entitled to receive an e-mail message or document? Who actually has access to the e-mail message or document? When the message is deleted from the sender/and or the recipient's e-mail folder, does it still exist somewhere else? For how long?

In office computer systems, firms often create back-up files to copy documents each night or at a regular interval to insure against inadvertent corruption of document file or computer system failure. Should such back-up systems routinely include copying e-mail messages? If so, who should have access to the back-up e-mails and for how long before the messages are destroyed? Should a firm have the right or obligation to review the number and/or content of e-mail messages sent by employees? If an e-mail is not successfully transmitted to the intended recipient, should anyone other than the sender be included in the routing of the return of the message?

These questions become even more critically important to individuals and firms involved in, or who may be involved in, litigation in the future. One suggestion is to treat e-mails no differently than a document sent by facsimile. Thus, similar to the warning contained on many fax cover sheets -- and on almost all faxes sent by lawyers -- an e-mail user may choose to include a caveat at the bottom of the message.

The caveat may advise that the information contained in the e-mail message, and any attachment, is intended only for the personal and confidential use of the designated recipient. The warning should also indicate that the message may be privileged and confidential attorney-client communication. It should also advise that if the reader is not the intended recipient, the e-mail has been received in error and should not be disseminated or copied, and that the email should be deleted immediately and the sender notified by telephone.

*D) Discovery of E-Mails*

As a general rule, computerized data is discoverable. Thus, even if a party produces a hard copy of electronic evidence, he or she may still be required to produce the electronic version.

Counsel may request discovery of electronic mail during discovery. However, opposing counsel may challenge such discovery resulting in higher litigation costs and delays. Early in the litigation process, counsel may put the other side on notice that it is looking for specific categories of information, including the types of information sought and the specific persons whose computers may be examined.

Requests for discovery of e-mail messages -- whether in an employee's inbox or outbox, deleted file or the firm's back-up file -- must be made timely since many companies keep backup files for a relatively short period of time to avoid problems connected with electronic discovery.

The practices discussed in this article may be acceptable as a part of a well thought out corporate document retention policy. However, as a general rule, once a company is engaged in litigation or anticipates litigation on a particular issue in the future, it is not proper to deliberately dispose of e-mail messages or e-mail documents which may be needed and required by a party in the litigation.

*E) Conclusion.* Clients need to think carefully about how their employees use e-mail for business and other purposes. While e-mail offers the ability to communicate and do business efficiently and economically, it also creates an electronic paper trail which can be obtained by intended and unintended recipients. E-mail also may be required to be produced during the discovery phase of a lawsuit.

While encouraging the use of e-mail by employees for legitimate business purposes, where appropriate, firms need to take necessary steps to make sure that the usage of e-mail is not abused, and that adequate safeguards are incorporated into a firm's overall document creation, storage, and retention systems.

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