

# Electronic communications

How to avoid getting stabbed by e-mail's double-edged sword **Interviewed by Usha Viswanathan**

**F**or a litigator, nothing compares to finding a juicy document that provides a sound bite he can repeatedly parade before a jury. Today, as letters and memos are displaced by the widespread use of e-mail, discovering documents that could have a big impact on a claim becomes at once easier, and costlier, for determined litigants.

The benefit of technology's speedy communication is a double-edged sword. Ideas and sentiments are disseminated rapidly and often are produced without much forethought. As messages are forever captured in both the sender's and recipient's hard drives, they can offer unshakeable evidence of a position taken or a state of mind that cannot be retracted later.

*Smart Business* spoke to Tom Newmeyer, founding partner at Newport Beach-based Newmeyer & Dillion LLP, about the consequences of e-mail communications.

## How do you protect yourself in your electronic communications?

By being careful in everything you write. E-mails are fraught with danger because they offer clear-cut and damning evidence for a litigator. In this regard, anyone who regularly communicates through e-mail could learn a valuable lesson from attorneys skilled at taking depositions. In a deposition, lawyers will calculate their questions in the hope that the deposed party will slip up — reveal something that fits perfectly with their client's argument. In effect, they're searching for a 'sound bite.' Similarly, e-mails offer the same potential to trip you up if you do not carefully consider everything you write. You cannot allow a casually rendered thought or phrase — the 'e-mail sound bite' — to eat up your defense.

## How is e-mail subject to discovery?

California defines discovery broadly. If something is reasonably calculated to lead to the discovery of admissible evi-



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dence, it is subject to discovery. This means that courts could, and do, allow requests to obtain the entire contents of hard drives.

In the case of e-mails, it is hard to argue that a request for copies of electronic communications pertaining to the litigation is irrelevant. E-mails offer a permanent record of communications. Plus, attorneys are not necessarily looking for that one smoking-gun e-mail; it's all the responses that rise from an initial communication or that pertain to a claim that could be subject to discovery.

## Is there a hidden cost that arises when individuals and businesses prefer using e-mail?

The most obvious change from a decade ago is that there is more information to retrieve because so much communication is done electronically. It's not unusual to find tens of thousands of pages of documents, mostly consisting of e-mails, to back up an allegation.

The cost of a lawsuit, consequently, rises drastically, because you now must find, produce and review a large volume of communication. And as each e-mail is provided on a single sheet of paper, the

number of pages offered in a defense literally runs into the thousands. The result is that the cost of defending a lawsuit is dramatically higher than it was a decade ago.

## What advice do you offer the business community in protecting itself?

It's extremely important to teach your employees how to write an e-mail. The old saw — never write anything you wouldn't want your mother to read — has never been truer than it is today. Don't disclose information in an e-mail that you normally would not include in paper form. Also, always assume that someone other than the recipient will read your mail, perhaps even a judge or juror.

Be bland and dispassionate. Don't be funny because jokes do not translate well in a courtroom. Stay away from emotional words, such as, 'I'd love to do it.' Say, instead, 'It seems like a good opportunity at the moment.'

Also, never write anything in a state of excitement. Remain constantly on guard for what could later be construed as a threat, a promise to enter into an agreement, slander, discriminatory practices or any number of conditions that could be subject to a lawsuit.

Unlike letters, e-mails are produced almost spontaneously, written informally and delivered instantly. I've seen language in e-mails of a kind that never could appear in letters, which generally are sober, reserved and lack colloquialisms.

A cautionary note here: many people don't know this, but there are ways to search a document by using meta data, a method that allows the viewer to see all previous changes to a document. As attorneys have grown savvier about the available technology, they increasingly have used meta searches on key documents to back their arguments.

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