

## Step Away from the Keyboard

By Anique Gonzalez

With the invention of computers and email, communication became not only much easier but also much more confusing. The typical boundaries that existed in oral communication did not (and still do not) apply to the electronic realm. As a result, a lack of understanding of the true consequences of email is sending businesses and employees into a litigation tailspin as emails are now being used against them in the heat of legal battle.

So, what are the differences between oral and electronic communication that are getting so many people into trouble? The simplest and easiest illustration can be seen in the following examples:

If Joe tells his coworker Jake “I don’t like Anne; we need to get her taken off the project” as they are standing next to the water cooler, there is context to the statement, the conversation occurs between Joe and Jake only, and if Jake chooses to tell others, the statement will most likely be regarded as nothing more than a rumor.

If, on the other hand, this same statement is made in the form of an email and is sent to Jake, Jake could subsequently send it to Veronica, Amanda, Gregg, and Anne, creating a plethora of problems.

This is exactly why general counsel across America are warning employees everywhere to be ever so careful when drafting email — new e-discovery rules mean that email is fair game during lawsuits, even if the offending material was written years ago.

“We all need to educate ourselves and our clients about the large bucket of problems that come up with emails,” R. Scott Meece, global general counsel, senior vice president, and secretary of CIBA Vision Corp., told the *Fulton County Daily Report*. “People send emails as though they were having conversations with someone in a bar.”

And when this bar lingo is put into writing and introduced as evidence during trial, it has the potential to drastically impact the outcomes of cases. In one case, for instance, an email which began with the phrase “don’t put this in writing, but...” was at the crux of the legal debate as the author proceeded to list why he was, in fact, guilty of the issues at hand.

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Indeed, email has started to play such a vital role in civil investigations that computers are increasingly being subpoenaed so that opposing counsel can ascertain if there are incriminating emails that were sent on them. And simply deleting an email won't get rid of it. With the help of technology, emails, even those that have been deleted, can be restored if someone wants them to be. As Meece explained, email "very well can live forever." Moreover, there is now forensic software that illustrates how many times an email was deleted, which shows the evolution of the email itself and also provides insight into the author's thought process.

However, as is often the case with technological advances, improvements do not always mean that there won't be drawbacks.

"My biggest fear with email is not that it can be used against you in some way but that the assumption is it's telling the whole story, and it's not," Meece said. "It may be the truth but not the whole truth, and there may be some silly stuff in there that's not 'nothing but the truth.'"

The fact that modern technology can explain the history of an email does not mean that it is able to provide context. What led the person in question to say what he or she said? Did the person retract his or her statement at a later point or admit that he or she was wrong for saying it in the first place? Maybe the statement was made in anger. If the situation were a movie, for instance, the email, however inappropriate it may have been, would serve as only a single snapshot, and the whole story could not be ascertained from that alone. Unfortunately, though, in court none of that matters.

So how do general counsel prevent email showdowns in the courtroom? It all reverts back to attitude. People view email as a casual form of communication, but they need to realize that they should only put into writing those things that they wouldn't mind seeing as headlines on a newspaper.

And this viewpoint modification will only occur when and if general counsel train employees in the finer points of email etiquette. Otherwise, their companies may be facing sexual harassment or hostile work environment lawsuits with emails serving as those lawsuits' backbones. Anything that is sent from a company computer, company cell phone (yes, this includes any type of message sent on a BlackBerry), or home computer that is used for work is fair game during e-discovery proceedings.

Ultimately, every general counsel needs to make every company employee acutely aware that by writing it down, whatever "it" may be, he or she is essentially putting everything on the record — including those things that shouldn't be there.