

Email, Your Company's Permanent Record Card

By David G. Ebert

Copyright © 2012 David G. Ebert

We routinely in discovery come across internal emails on the following themes (yes, you would be amazed and appalled at how often these show up in employee emails):

- How unreasonable, unskilled, oblivious, etc. the client for whom the employee is performing services is
- The shortcomings and failures of co-workers and superiors
- Which employee suffers from which addiction
- The ways in which the employee or others “put one over” a client, co-worker or superior in some manner
- The merits of anticipated litigation against the employer, including where the employee's own conduct or testimony may be at issue
- How poorly, unfairly, callously, etc. the company treats its employees and clients
- How funny the attached or embedded highly-inappropriate joke or video is

Email has transformed the way litigation is conducted. In the “old days,” fact-finding was driven largely by (conflicting) testimony and competing (and largely useless) after-the-fact “for the record” letters, based primarily on (fading) recollections and (heavily biased) perceptions of events of which no contemporaneous records were kept. Not any more. Conflicting testimony and credibility judgments are still prominent aspects of litigation. But email doesn't lie, there's plenty of it and it is increasingly relied upon as the most compelling evidence of what was done or said, who did or said it, when it was done or said, etc. Emails sent in the moment, long before a fraud claim was even a twinkle in your adversary's lawyer's eye, can be compelling or dispositive evidence of who's right and who's wrong.

We see time and again that employees, if left unchecked, will write in emails content that they would *never* otherwise *think* of putting in a letter. Statements by employees that never should have been made, are now served up to the adversary in emails that never should have been sent. Once the employee hits “send,” the email becomes part of the employer's permanent record card—do teachers still threaten to impair any hopes of a productive life via permanent record cards?—for better or worse. Unlike oral missteps, email can't be taken back, denied or overcome by the “that's not what I said” defense (which has been largely replaced by “yes, I wrote that, but that's not what I *meant*” defense).

It's usually hard to know at the time an email is sent whether it will save the day, or prove devastatingly awful, when the matter is ultimately litigated. But either way, in that litigation, each side will discover among thousands, hundreds of thousands, or millions, of emails that it must turn over, some that you will rejoice in finding, and others that will make your stomach hurt... a lot.

(While drafting this memo, I received a call from a client about an employee who disclosed confidential information about his employer (my client) on a networking forum, including the identity of certain of the employer's clients that the employer was contractually bound not to reveal. Disclosure of company information in the social networking realm is indeed a growing problem that must also be addressed in your employee handbook, employee confidentiality agreement and in employee training.)

Employee emails aren't all bad, and can help the cause. But to minimize the likelihood of bad emails, it is vitally important that you, your company and your employees be educated about the role email can play in litigation, offensively and defensively. Clear and direct written email policies can help reduce the risk of adverse, painful and expensive litigation outcomes. However, the policies must be consistently observed, monitored and coordinated throughout your organization. Developing appropriate policies and practices will depend on a number of factors that must be analyzed from both a legal and business perspective. Until then, the old "Front Page of the New York Times" rule is a reasonable starting point: that is, never put in writing anything that you would not want to see published on the first page, above the fold.

Future articles will discuss the related topics of document retention policies, employee social networking and internet use within the company.