



OUR LOVE / HATE RELATIONSHIP WITH EMAIL

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Not since the fax machine has anything had such an impact on law firm operations as email has. It has transformed communications; quickly supplanting express mail and the fax machine as the primary method of client communication, and especially as the primary method of document exchange. It has elevated client expectations regarding response time. It has led to a mass migration from WordPerfect to Word. It has caused all but the most stubborn and resistant of lawyers to actually touch their keyboards, or at least acknowledge this application's dominance by dictating email responses to clients. Yet, despite the ubiquitous role of email at law firms, it is not a perfect relationship by any means. Email is an imperfect medium at best, and is prone to creating problems if not handled carefully. In fact, just about as soon as there was email, people were getting fired for using it incorrectly.

Although it was anticipated initially that the introduction of email would create all sorts of ethical dilemmas and possible malpractice lawsuits, it has not proven to be particularly problematic in this regard. When the ABA Standing Committee on Ethics and Professional Responsibility issued its opinion in May, 1999 regarding the use of email by attorneys, most states quickly followed suit. The opinion stated that a lawyer is permitted to send clients unencrypted emails over the internet without violating any Rules, because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. It further stated that lawyers should consult with their clients and follow the client's instructions regarding transmitting of highly sensitive information. Hence, with the addition of appropriate language in the engagement letter, an attorney can feel relatively comfortable utilizing this method of communication for sensitive information.

As a further safeguard, most attorneys have added disclaimers to emails. However, the location of the disclaimer at the end of the email which contains sensitive information tends to make it rather worthless. Consider that the disclaimer on a fax transmission is on the cover sheet, which is presumably read *before* the contents of the fax. But when the disclaimer is at the end of the email, it is only read *after* the contents of the email. In light of a recent opinion in another

state reversing the long-standing position that an attorney must disregard misdirected communications, even if they might be of benefit to the attorney's client, it becomes more critical to rethink how we transmit confidential and sensitive information through email.

I have long advised my clients to send anything sensitive not within the email, but as an attachment to the email. That way one must see the disclaimer before opening the attachment. And although encryption is not required, I do think it prudent nowadays to password all but the most mundane document attachments to clients. Simply assign one password for each client, and use it for every document transmitted for that client. Be sure to also educate your client regarding the fact that privileged information transmitted by you to the client may lose privilege if the client in turn forwards it to someone outside their company for review or comment.

As mentioned previously, email is an imperfect medium of communication. Improper use has led to many a misunderstanding, and more than one lost client, job, or friend. Email didn't arrive with an etiquette manual to help users determine how to properly utilize this medium. Until now, that is. There is a new publication entitled "*Send: The Essential Guide to Email for Office and Home*" by David Shipley and Will Schwalbe (Alfred A. Knopf; \$19.95). This book should be required reading for all law firm personnel, or those who train law firm personnel. And that includes attorneys.

There are two principal problems with email. First is the fact that there is no emotional context in email. It lacks the cues provided in verbal or face-to-face communication. As a consequence, the recipient tends to apply their own emotional overlay, including their own fears and anxieties, most often to the detriment of the sender. And whereas letters are normally written with great care so as to be clear on intent and meaning, use of email seems to put most people in a neurological state of disinhibition. As the authors of the book state, "When we're on email, the inhibiting circuits in our brain—which help us monitor and adapt to our audience's responses—have checked out." It's not just a carelessness which leads to miscommunications, it's a lack of the normal due diligence devoted to anticipating response and appropriately crafting the communication accordingly. We often hear someone say, "don't put it in an email if you wouldn't put it in a letter on firm letterhead." Email lulls most users into believing that email is a personal communication, due to its speed. It's almost like a conversation. Almost. And therein lies the deception which makes inhibition (e.g. reasonable caution and care) take a hiatus during the crafting of email.



The second principal problem with email is its convenience. Because it is so easy to use, it is used in many instances when other forms of communication would be much more appropriate, such as a telephone call, fax, or letter. You should often ask yourself, just because I *can* use it, should I? This is particularly true when you receive an email to which you apply your own emotional context, take offense, and quickly dash off a response. I readily admit that I have committed this sin more than once, and regretted it after hitting the SEND key. Although a bouquet of flowers can undo some of the damage of a misadvised email, the bell cannot be unrung once you hit that SEND key. So if emotions run high as you type, put it into your Drafts folder for 24 hours before hitting SEND. It is quite possible that you may have completely misinterpreted the emotional context. And even if you have not, another medium for response may be more appropriate, and definitely more professional.

I love some of the basic wisdom found in the above-mentioned book. For example, it sums up the Eight Deadly Sins of Email:

1. the email which is too vague and requires too much back and forth correspondence to clarify
2. the email that is clearly insulting
3. the email that may ultimately land you in jail, e.g. the smoking gun
4. the cowardly email, e.g. sorry to tell you you're being laid off
5. the email that doesn't go away e.g. re: re: re: re: subject
6. the highly sarcastic email
7. the overly or inappropriately casual email
8. the inappropriate email e.g. sexually suggestive, racially discriminatory and so forth

Some of the concepts presented in the book surprised me, but yet ring true after reading the explanation. For example, the authors maintain that it's almost impossible to use the word "please" in an email without it tending to come across as somewhat obnoxious, making it appear to the recipient that you are chastising them for something they should know or have done. Another concept is that most emails are written so as to avoid contractions, and that makes the tone more formal and severe to the reader. So they strongly suggest that contractions be used to keep a more friendly tone, and avoid making the recipient feel they are being scolded.

Another good point made by the authors is one that I have long recommended; the use of emoticons. Even if not as applicable in business correspondence with clients, it is often the case that a well placed emoticon such as the smiley face :-)) or even an exclamation point can clarify the emotional intent of the writer. Clearly if you are trying to be humorous or sarcastic, emoticons can help keep you out of the danger zone of misinterpretation.



Email is probably the best communication medium ever invented. It defies time zones, physical barriers, makes just about anyone in the world accessible, and is particularly beneficial when communicating with multiple people regarding the same matter. It provides a searchable record (which may sometimes be a negative characteristic), and a means to aggregate related information electronically. And it provides, above all, time to carefully construct your communication. Unlike a telephone call or face-to-face meeting where you must immediately respond, you can take your time with email to craft a more thoughtful response. Just don't forget to do that before hitting SEND!

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