
EMAIL BEST PRACTICES

Managing Legal Risks from Inbox to Jury box

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FROM INBOX TO JURY BOX

Overview

- A. Email is a unique means of communication
- B. Improper use of Email has significant risks and sometimes catastrophic consequences
- C. Email best practices in business setting will minimize legal risk exposure

A. EMAIL IS UNIQUE

- E-mail is a unique form of communication
 - Immediate
 - Informal
 - Permanent
- E-mail is electronic equivalent of DNA
- In 2010, 30% of U.S. Employers had employee email subpoenaed by courts, government regulatory agencies
 - Always Subject of Discovery
 - Frequently Key Evidence at Trial

B. MISUSE OF EMAIL

When “*E*” stands for more than just
Embarrassing. . .”



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When Risk Becomes Catastrophic. . .

To: Michael C. Odom@ANDERSEN WO

cc:

Date: 10/12/2001 10:53 AM

From: Nancy A Temple, Chicago 33 W. Monroe, 50 / 11234

Subject: Document retention policy

Mike-

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy

<http://www.intranet.andersen.com/oncfirm.nsf/content/ResourcesFirmwidePoliciesPolicy-ClientInformationOrganization!OpenDocument>

DORSEY & WHITNEY LLP

United States v. Arthur Anderson

- Prosecution for obstruction of justice
- Infamous Nancy Temple “Document retention policy” email
- Destroyed two companies and countless other careers



ARTHUR
ANDERSEN

United States v. Microsoft



Bill Gates' Emails at heart of Justice Department evidence against Microsoft in the Netscape anti-trust prosecution.

Novell v. Microsoft

Some folks are just slow learners. . .

From: Bill Gates

Sent: Wednesday, January 15, 2003 10:05 AM

To: Jim Allchin

Cc: Chris Jones (WINDOWS); Bharat Shah (NT); Joe Peterson; Will Poole;
Brian Valentine; Anoop Gupta (RESEARCH)

Subject: Windows Usability Systematic degradation flame

I am quite disappointed at how Windows Usability has been going backwards and the program management groups don't drive usability issues.

**Someone decided to trash the one part of Windows that was usable?
The file system is no longer usable. The registry is not usable. This
program listing was one sane place but now it is all crapped up. . .**

DORSEY & WHITNEY LLP

Novell v. Microsoft
The Power of Email in the Jury Box

“I think from his testimony, what I heard, and ***what I saw in the emails***, Bill Gates was a man who took every threat extremely seriously. I think he spoke with a lot of hyperbole and ***that’s because the language in court was a lot less powerful than the language in the emails. . .***”

- *Novell* Juror Corbyn Alvey

HONORABLE MENTION. . .

- Chevron settled a lawsuit for \$2.2 million involving an interoffice email giving 25 reasons why beer is better than women
- Mass class action over Phen-Fen – company executive email, ***“do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?”***

C. EMAIL BEST PRACTICES

Protecting Attorney-Client Privilege

- The Privilege protects communications between client and attorney from forced disclosure to third parties
- Elements of Privilege:
 - Communication between lawyer and client (person or corporation)
 - Purpose is to seek or obtain legal advice
 - Communication must be intended, made and kept in confidence

WAIVER OF ATTORNEY-CLIENT PRIVILEGE

- Email presents unique risks to waiver of attorney-client privilege
- Disseminating the communication to an outside party or beyond the internal “need to know” group will waive the Privilege
- Once a waiver occurs, it is often not limited to the communication (e.g. disclosed Email) but to the entire subject matter of communication
- Do not “forward” confidential Emails
- Mark communications as “Privileged & Confidential”

MORE ON EMAIL BEST PRACTICES

10 Simple Rules to Live By

1. Recognize and accept that you will be held to everything you write in an Email.

“Measure twice, cut once”

- The Carpenter’s Rule

BEST PRACTICES

2. Recognize that your Email is permanent and the “delete” function won’t save you

- Avoid using colorful words and/or phrases that are prone to misinterpretation
- Don’t send Email when you are upset and/or lack complete information
- Don’t guess about the facts

MICHAEL BROWN

[Ex] Director, FEMA



The morning of Katrina, Brown e-mailed to his deputy director of public affairs. . .

“Can I quit now?”

“Can I come home?”

***“I’m trapped now,
please rescue me”***

BEST PRACTICES

4. If you can easily talk in person or by phone, avoid using Email

“Never write if you can speak, never speak if you can nod, never nod if you can wink.”

- Martin Lomasney, 19th C Boston politician

HARRY STONECIPHER



DORSEY & WHITNEY LLP

Ex-CEO, BOEING COMPANY

Honorary President, MILE HIGH CLUB

- Stonecipher was CEO less than 18 months
- Anonymous tip led Boeing's Board to investigate Stonecipher's emails
- Intimate emails between Stonecipher and Debra Peabody, a Boeing VP
- Stonecipher forced out for violating Boeing's code of conduct
- Wife of 50 years filed for divorce

BEST PRACTICES

5. Avoid using Email to express opinions, argue or debate issues or carry on disputes
 - *“Bob, it looks like you guys are falling behind again on this project. . .”*
 - *“Someone is dropping the ball and it looks like we are gonna owe someone a whole lot of money. . .”*
 - *“. . .I guess it will be looked at as our fault. . .”*

BEST PRACTICES

6. Avoid brevity, informality that can create ambiguity and don't make jokes or comments that you wouldn't make in person
 - Email is a minefield for unintended insults
 - It is far too easy for cryptic Email comments to be misconstrued

ARTHUR ANDERSON REVISITED

Brevity is not always the soul of wit

- In house counsel Nancy Temple wrote. . .

“ . . .It might be useful to consider reminder the engagement team of our documentation and retention policy. ***It will be helpful to make sure that we have complied with the policy. . .***”

ARTHUR ANDERSON REVISITED

- What if Temple instead wrote:

“It might be useful to consider reminding the engagement team of our documentation and retention policy. ***We need to take all appropriate steps to ensure that no relevant documents are destroyed.***”

BEST PRACTICES

7. The “Reply All” button is deadly
8. Always check the “To” field before you click “Send”
9. The “Reply All” button is deadly
10. Always check the “To” field before you click “Send”

CONCLUDING THOUGHTS

