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Making legal matters easy and economical for your practice

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## Newsletter, January 2015 Less Talk Less Liability



“You invented a time machine to come back and hit Reply instead of Reply All?”

Don't say it if you don't have to, and never in writing. Here are 3 rules of engagement for the digital age:

*First*, emails, texts and voicemails never go away.

*Second*, there's always somebody sifting through your messages looking for trouble.

*Third*, it's the innocent message that hurts you the most, when taken out of context.

You know when you're writing an email and you're riding a wave of inspiration and emotion, and you think to yourself, this message is really good? Delete it.

## **Emails, texts and voicemails never go away**

Electronic messages last forever. This includes voicemails, which are digitalized and sent as emails. You can delete the message from your server or account, but the message will exist on multiple other servers that you can't control. Your enemies can find any incriminating message if it's worth it to them.

Sometimes your enemies don't have to search hard. Hitting "reply all" is sufficient for your undoing. Sometimes the intended recipient of your email will accidentally or intentionally forward the message to others. Maybe you're trying to get the email out before the end of the workday, and you don't double check the "to / cc / bcc" lines. Even the preachers are sinners -- all lawyers brag of having received sensitive emails accidentally sent by the opposing attorney who intended to send the email only to his or her own client. No lawyer admits to having done it, however.

## **There's always somebody sifting through your messages looking for trouble**

Be afraid of your employees and partners. They're the ones sifting through your emails, whether to support an employment law claim against you, to find grounds to remove you from the business, or to report you to the government.

The government rewards snitches. For example, under the Justice Department's antitrust leniency program, the first member of a price-fixing conspiracy who reports it gets absolute immunity while the others get jail time. The SEC pays whistleblowers to report illegal activities, and it boasts that it gets eight tips a day.

## **It's the innocent message that hurts you the most, when taken out of context**

In litigation, email chains are a grab bag of fun for opposing attorneys. The problem is context. When you write an email, you have only the present facts in mind. But situations change, and tomorrow's context will be very different than today's context. Even if you're certain you have a totally benign motive for your email, and that you and the recipient both know what you're talking about and what you mean, a third party won't know. And if your recipient turns against you, the recipient likely will "forget" your real meaning when you wrote the email. Now your email gets taken out of context, spun against you, and judged in the harsh light of 20/20 hindsight.

When you write, especially when you're feeling the inspiration, try to picture yourself on a witness stand years later, trying to explain why you chose the exact words you did and what you really meant to say. Remember that the opposing attorney will spin the meaning of the email far from its original intent.

## **The answer: send fewer emails and no texts**

Clearly you need to send emails; and clearly, in the heat of the moment, it's hard to follow all of these rules. Try to send fewer emails, however, and take your time when writing them. Avoid texts because by nature they're fast, and it's difficult to control content. Finally, when in doubt, pick up the phone and call. If you get voicemail, just ask the person to call you back. If a matter is sensitive, only leave a trail after you've thought through the implications and consequences of the trail.

As always, call me if you want to talk more.