

The Perils of E-Mail

By Stephen V. Armstrong and Timothy P. Terrell

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Over the past decade or more, e-mail has replaced memos and letters as the means by which lawyers most often communicate with each other and their clients, even about substantive and complicated topics. For new lawyers, this fact of life creates risks. They've grown up using e-mail for informal, spontaneous messages that don't require much thought. In the world they are about to enter, however, the line between e-mail and formal documents such as letters and research memos has long since blurred. As a result, new lawyers have to learn to think more than they're accustomed to before they hit the "Send" button.

Here are the risks they should learn to watch for:

E-Mail Is a Hybrid Genre

Is it more like a voice mail or a letter? That depends on the context. Arranging lunch with a buddy is one thing; discussing an issue with a client or colleague is another. It's possible to go wrong in either direction.

Too much formality: A crisp, businesslike e-mail may seem straightforward and efficient to its writer, but brusque and unfriendly to its reader. One tip we often give new lawyers: Think a little harder than may feel entirely rational about whether to begin with a salutation and end with a sign-off. If you and Jack exchange five e-mails a day, or Jack is an old buddy, then, of course, it would be odd to begin each e-mail with "Jack" and end it with "Best, Jill." In many situations, though, the e-mail's tone will change for the better if you begin

and end with a personal touch—even if the other person does not.

Too much informality: In most law firms and departments, the more senior you are, the more you can get away not only with informality in e-mails, but with misspellings and outright sloppiness. That casualness can mislead junior lawyers into assuming they may respond in kind. The consequences are all the more dangerous because they often never realize the impression they're making. Even in apparently casual communications, and even on BlackBerry devices, they should proofread and copyedit before hitting "Send." For some new lawyers—overworked and accustomed to firing off e-mails quickly to friends—this discipline is difficult.

E-Mail Is Neither Private nor Short-Lived

Here's the advice we give new lawyers joining a firm: Assume any e-mail you write may end up in the wrong hands. In particular, if you make a habit of criticizing other people in e-mails, at some point one of those e-mails will be read by the person you attacked or a friend of hers. That may happen in several ways. You may make a mistake when you send it—and we promise that, eventually, you will. Or it may end up at the bottom of a long chain, forwarded on by someone who didn't notice that your original e-mail criticized the person to whom it's being forwarded. Finally, it may live on in some computer archive, available for discovery five years later in the course of a lawsuit or employment dispute or regulatory investigation. That's a risk even if the e-mail is sent from a personal e-mail account, as long as you're using a computer your firm owns, and even if you're using instant message. If the e-mail is privileged, you're still not safe: Remember that the privilege belongs to the client and can be waived—and, in regulatory investigations, often is. Consequently, if you need to suggest that the action a client proposes is legally dubious or just plain dumb, pick up the phone—do not send an e-mail.

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E-Mail Questions May Be Badly Formed, but the Answers Should Never Be

The ease of using e-mail causes all kinds of problems, especially now that the BlackBerry has become the distraction of choice for lawyers sitting in airports. One problem: Senior lawyers tend to send their subordinates quick questions without taking the trouble to think them through or explain what's really required. A casual question invites an equally casual response. The invitation should be refused: The junior lawyer should take time to think through the implications of a simple question or comment from a senior lawyer or client. Even if the question is about an apparently trivial, non-substantive issue, it's worth thinking about how to make the answer as useful as possible—perhaps in ways the sender hadn't contemplated.

Let's bring these warnings to bear on an example.

Assume Jane, a partner, uses her mobile handheld e-mail unit, newly reprogrammed to work anywhere in the world, to send this typo-riddled message to Ruth, a new associate:

To: Ruth Jones
From: Jane Smith
Subject: Proj. Alpha

Ruht: Can you get the revised trem sheet to me tonight? I'm at the Hilton in Bali.

Jane receives the e-mail at 8 p.m. her time, and immediately fires off a reply:

To: Jane Smith
From: Ruth Jones
Subject: Re: Proj. Alpha

Just about finished but currency of payment still being chewed over. Jack is being difficult about it. Will get revision to you as soon as I can—probably noon tomorrow. Hope you're having fun.

Especially if Ruth is still making a first impression on Jane, this response goes wrong in several ways:

- Although her tone is no more informal than Jane's, she is not Jane. Jane may take the

informality of her reply to be flip, implying that she is not really taking things seriously. If they have been working together for a long time, of course, then the informal protocols of this exchange will be different.

- Because Jane's question looked simple, Ruth assumed the reply could be equally simple. If she had given it more thought, she would have realized that:
 - She didn't know why Jane wanted the revision "tonight." Is she going to be out of touch?
 - She doesn't know what "tonight" means. Tonight in whose time zone?
 - In addition to meeting or failing to meet Jane's deadline, there's a third option: Send the revision without the one missing piece.
 - Depending upon past negotiations, Jane may find it worrying that an issue is still being argued over, even though the issue seems minor.
- If things drag on through several more e-mails, Jane might forward the whole e-mail chain to Jack or people with whom he works, having forgotten Ruth's comment about Jack down at the bottom of the chain.

With a couple of minutes' reflection, Ruth might have sent this reply instead:

To: Jane Smith
From: Ruth Jones
Subject: Re: Proj. Alpha

Jane—Everything is complete except a decision about the currency of payment. That should be easily resolved as soon as Tom is in his office in London tomorrow morning his time (Wednesday). I'll e-mail the revision without that piece in an hour. If you'd prefer fax, let me know. I'll then e-mail you the currency provision by 9 a.m. NY time Wednesday.

Is e-mail the best way to communicate for the rest of the week?

Hope you've had time to relax and enjoy Bali.

“The junior lawyer should take time to think through the implications of a simple question or comment from a senior lawyer or client.”

“For your own professional reputation, you should try to reply to e-mail as quickly as you answer telephone calls.”

Here’s a final risk:

Most Senior Lawyers and Clients Don’t Have Enough Time to Read All Their E-Mail

It’s not uncommon for them to receive a hundred or more substantive e-mails in a day, many of them asking for a response. In that kind of world, e-mail should be designed for practical efficiency, not just substantive quality. We give new lawyers these suggestions:

E-mail should be as concise and efficient as possible. Some busy executives have their secretaries print out their e-mails for them to read. But most people read e-mail by squinting at a computer screen. Even worse, an increasing number read them on the tiny screens of mobile e-mail devices. And almost everyone has developed survival techniques for coping with the flood of e-mails. Among the most brutal of these techniques:

- Skipping e-mails unless something—the content of the “Subject” line, the sender’s name—overcomes that instinct.
- Reading only the first few lines that show up on the “preview” pane, unless something in those lines persuades the reader to keep going.
- Answering an e-mail only when it’s sent the second time.

In this environment, survival dictates that you develop the following habits:

Make the “Subject” line as informative as possible.

Not this:

Subject: Project Alpha

But this:

Subject: Project Alpha Wed. deadline:
final open issue

Not this:

Subject: Project Alpha travel

But this:

Subject: Need approval for Alpha travel
plans

Put the bottom line in the first sentence or two, especially if the e-mail asks the recipient to do

something. If the situation does not lend itself to that approach, say so explicitly at the start. For example: “Apologies for this lengthy e-mail, but the issue needs to be resolved by tomorrow noon on the basis of all the following considerations.”

Keep the paragraphs and sentences short; do anything you can to make the text easy to read. If contemporary readers generally want their information in small bites, that tendency is exacerbated by the format of e-mail: small type, blurry screens, the irritating need to scroll down a page. Make your text as visually appealing as possible. (It often helps to choose a type size larger than the default size.) And be aware that fancy formatting may be lost in transmission, especially if the e-mail is read on a handheld device.

Do not send attachments thoughtlessly. Is the recipient sitting in her office, with a computer that makes it easy to open and print an attachment? Or is she likely to be using a handheld device or sitting in a primitive hotel room without a high-speed Internet connection? If the attachment is not too long, will her life be easier if you paste the text into the e-mail?

Do not take speed for granted. We tend to assume that an e-mail will be answered quickly. For your own professional reputation, you should try to reply to e-mail as quickly as you answer telephone calls. If you will be without access to your e-mail for a while, create one of those “out of office” automatic responses. But, for your own survival, don’t assume that everyone else will be as prompt and organized. If you really need a quick response, make sure the recipient is around to read the e-mail. Even if he is around, until you know his work habits do not assume that he actually reads all his e-mails. Even if you are clever enough to have asked for an automatic “receipt” when the e-mail is opened, and the receipt arrives, still do not assume the e-mail has been read. For all you know, his secretary could be printing out his e-mails and adding them to the foot-high stack in his in-box.

Think before you hit the “Reply All” button.
Enough said.

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