



## PUTTING IT ALL TOGETHER

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ANSI Legal Issues Forum 2008



# H E R R I C K

## Best Practices for Controlling Emails

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October 22, 2008  
World Standards Week 2008

# WHY WE HAVE THE PROBLEM

- Emails are the primary form of communication.
- Emails are considered to be informal.
- Emails are easy to send to multiple parties – with one click.
- Emails can be permanent.
- Employees do not understand how documents can be used in a litigation.



# CONCERNS

- Damaging evidence can be inadvertently created.
- Binding admissions or agreements can be created.
- Legal advice can be rendered without sufficient attention.
- Emails can easily be dispersed throughout the company.
- The hundreds of “good” emails will not matter once one “bad” email has gone out.



# WHAT CAN WE ASSUME?

- Assume all emails will be read by the adversary.
- Assume emails will be used against you and/or the company.
- Assume emails will be taken out of context.
- Assume emails will be used to bind the entire company.
- Assume emails will come to life many years after they are written.



# NEW YORK TIMES RULE

Try not to write anything you would not want to see in the New York Times.

+++++

To: Joe  
From: Tom  
Re: Our Pension Fund

I can't believe you guys have not taken care of trying to figure out what happened with our account. I know we need to figure out who is going to join us for the game on Sunday, but this is the third time this month our books have been screwed up. Of course, we cleared it up the other two times. We have been having trouble reading your handwriting. Your "1's" look like "7's". Still, if I were in charge, I would fire the whole bunch of us.



# NEED TO KNOW

Send emails to as few people as possible.

+++++

To: Tom  
From: Joe  
Cc: Paul, Sally, Susan, Charles  
Re: The Messed Up Accounts

Been sitting here trying to add up the numbers again. Did you guys graduate from kindergarten, or what? Maybe I will figure this out, but looks to me like there may have been some shenanigans with the books. Of course, everyone knows what I am talking about.



# PICK UP THE PHONE

Avoid emails on sensitive topics if a phone call or meeting would be sufficient.

+++++

To: Joe  
From: Tom

I think we really screwed up. Looks like we may have failed to include the “Special Account” in our reports. Oh well, one more mistake. But, I am still not really sure.



# NO COMMENT MAY BE APPROPRIATE

Always avoid commenting on potential liability.

+++++

TO: Tom  
FROM: Joe

Tom, what are we going to do? I bet we violated the law. If we do not fix this problem the Feds will be down our backs and we will get sued, or worse. We will breaking big rocks into little rocks.





# ACCURACY COUNTS

Make sure that every email is as accurate as possible.

+++++

TO: Joe

FROM: Tom

I am not sure but there is possibly \$1,000, or maybe \$100,000 unaccounted for. Still working on it at my end.



# NOT CLEAR? WE LOSE

Realize that if an email is ambiguous, it will be construed against the sender.

+++++

TO: Tom  
RE: The Account

I checked with our other accountants, they often check for errors, so we probably do not have anything to worry about. And, I think they follow GAAP or GAP??? accounting practices, or something like that.



# LEAVE LAWYERING TO THE LAWYERS

Avoid expressing a legal opinion, especially if you are not a lawyer.

+++++

TO: Joe

FROM: Tom

I am sitting here at my kid's soccer game, but I thought I would Blackberry you on this. Hey, I am no lawyer (thank goodness), but I think that we are violating the government rules if we do not report this.



# USE PRIVILEGE LANGUAGE WHEN APPROPRIATE

Mark emails as privileged, when and where appropriate.

+++++

TO: Bigshot Lawyer, Esq.  
FROM: Joe  
RE: PRIVILEGED AND CONFIDENTIAL – ATTORNEY CLIENT  
PRIVILEGE – PRIVILEGE, PRIVILEGE, PRIVILEGE

See, Biggie, I am using that privilege stuff you told me to use in my e-mails to you. What do you think of the new Jets quarterback? And, that new putting wedge is great. Oh, I have something to talk to you about.



“Never talk when you can nod,  
and never nod when you can wink,  
and never write an e-mail  
because it’s death.

You're giving prosecutors  
all the evidence we need.”



# H E R R I C K

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