

E-mail Traps for Unwary Attorneys

A 50-minute, 1-credit CLE class in the area of Law Practice Management.

Objective: To show attorneys and legal assistants the Outlook behaviors that will avoid the common e-mail snafus that are, at best, embarrassing and, at worst, can divulge client confidences.

Materials: NY Ethics Opinion 709
Newspaper and legal periodical articles about e-mail blunders
Handout re "Next Steps"

Timed Agenda: I. Why we are here? (5 minutes)
I. II. Speed Traps (20 minutes).

When the time-saving features of Outlook are not your friends

IV. Other E-mail Traps (20 minutes)
V. Next Steps (5 minutes)

II. Why we are here? (5 minutes)

- A. E-mail is great for keeping in touch with people and speeding up the document collaboration process, but speed kills.
- B. Everybody has had a bad e-mail moment, where you cringe for yourself or for someone else who breeched e-mail etiquette or didn't pay attention to what they were clicking. [Refer to Lycos's 2006 statistic of 42 e-mail blunders committed per second.]
- C. These things happen to very smart people.
 - 1. We'll hear about judges, CEOs of big companies, and others
 - 2. Everybody in this room can make these mistakes if we don't make a conscious effort to slow down and think about what we're doing
- D. Today we'll talk about some good habits you can develop to avoid situations that can be embarrassing for you or, at worst, can divulge client confidences.
 - 1. They all come from the attorney's duty noted in Ethics Opinion 709 to use reasonable care when using e-mail to avoid revealing client confidences or secrets, or the duty in Ethics Option 782 to use reasonable care to avoid revealing client confidences.
 - 2. This is not an ethics class, but I think we can agree as a matter of common sense that reasonable care is a good standard to adopt. [Refer to Freivogel article for those who are interested.]

III. Speed Traps (20 minutes).

When the time-saving features of Outlook are not your friends

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- A. When the e-mail flies out the door before you're done typing it
 - 1. You probably hit Ctrl+enter, which is the keyboard shortcut for send
 - 2. To avoid this, don't add the names until you're ready to send the e-mail [Refer to article about Berkeley Law School "acceptance" e-mail]
 - 3. If you're replying to an e-mail thread, you can cut the names out of the "To" and "Cc" fields and paste them into the top of your reply until you're done typing, then cut and paste them back in to the right fields
 - a. With people outside the firm, the names may not all re-hydrate into e-mail addresses, but you'll know by the black underlines which people's addresses you have to copy and paste from further down the thread or from the original e-mail, which is probably still open on your desk
 - 4. You could also check your Drafts folder and your Outbox folder to see if your e-mail didn't really leave the building after all
- B. Outlook Autocomplete
 - 1. When you let Outlook fill in the names for you
 - a. [Refer to article re NY Times reporter with same last name]
 - b. If you're using that instead of pulling people from contacts, right-click on the name and make sure the right e-mail address behind the name is correct
 - 2. Be especially careful if you're using any groups or distribution lists.
 - a. [Refer to article re Carat's e-mail in September re layoffs]
- C. Watch what you're clicking
 - 1. i.e., Reply instead of Forward
 - a. [refer to article re Mozilo e-mail]
 - b. Lycos's 2006 survey says this represents 34% of all e-mail blunders, so it's very easy to do
 - 2. i.e., Reply vs. Reply All
 - a. [refer to article about judge's replying all to Obama mass mailing]
- D. Take the time to proofread
 - 1. E-mail takes the place of traditional correspondence, and just because it's faster doesn't mean we can get sloppy. [Refer to point #1 in the law Practice Article]

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2. Spell-check is not enough. The automatic "Spell-check on send" setting may send your e-mail out before you get a chance to fix any mistakes that you make in the spell-check process, or any non-spelling mistakes that you notice while running the spell-check
3. Print a copy on paper to really see all of your mistakes
4. Check your attachments
 - a. If there should be an attachment, make sure it is there
 - b. Make sure you've got the right document attached
5. Sending one carefully-crafted e-mail that contains all of the necessary information, even if it takes an extra 5 or 10 minutes for you to do, is far better than sending 3 or 4 e-mails with bits and pieces that you forgot or with typos that you have to correct or clarify

E. How Blackberries can make this worse

1. Predictive text, auto-replace, and two-thumb typing are not conducive to good typing
2. If you don't have to respond immediately, wait until you can get to a real keyboard.
 - a. If you feel the need to respond immediately, you can set up a proofread autotext entry for something like "I've received your email and look forward to addressing it shortly when I have returned to my office."
3. There is a spell-checker on the Blackberry, so at the very least, you can run that.
4. Formatting and pictures also don't show up on many Blackberry e-mail readers, so if you are using bold and underline to make yourself clear or emphasize anything, or if you're including a screen shot or another picture to illustrate your point, please keep in mind that your recipient may not even see it.

IV. Other E-mail Traps (20 minutes)

A. Avoid using the Bcc field

1. If the person you've Bcc'ed doesn't stop and read the header of the e-mail, they won't know they're a Bcc and they could hit Reply All and blow their cover.
2. Instead, consider forwarding them a copy of the e-mail after you've sent it, with a little note at the top.

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3. One time you should use the Bcc is when you're mass-mailing to a bunch of people who would not want their e-mail addresses shared with everyone else on your e-mail list. In that case, put everyone into the Bcc field. If you need to have someone in the To field for the e-mail to go out, use your own e-mail address.
- B. Save frequently
1. You wouldn't type for long in a Word document without saving, and the same rule applies in E-mail
 2. Hit the "Save" button in the toolbar, or click File/Save. The same keyboard shortcut, CTRL+S works, too.
 - a. The Save button is dangerously close to the Send button and File/Save is dangerously close to File/Send, so you may want to get into the habit of using CTRL+S
 3. If you save an e-mail you can close it and come back to it later, without losing your place.
 - a. You'll find your saved e-mail in the Drafts folder, or sometimes right at the top of your Inbox.
 - b. This will give you time that I recommend you take to step away from the e-mail and come back to it with fresh eyes.
- C. E-mail is never private and can never be deleted
1. Is this something you'd want to see on the front page of the Times?
 2. If not, maybe pick up the phone and call the person
 3. You are the attorney, and you should decide what becomes a written record or not
- D. Jokes don't work
1. E-mail never comes out the way you meant it.
 2. "Psychology Today" reported on a study that showed only 56% of sarcasm and humor in e-mail was accurately communicated.
 3. Even more so when the e-mail is forwarded on to other people who don't know you [refer to example of Canadian official telling people where they can go]
- E. Out of Office Reply
1. If you're checking on your Blackberry, do you really need to let people know you're not at your desk?

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2. It can confirm your e-mail address to spammers and annoy listservs
3. [Refer to "out of office" sign article]

F. Rare Workshare Issue

1. We seen an example of Workshare not restarting itself after Outlook crashes, so that documents go out without cleaning
2. NYSBA Ethics Opinion 782 holds that DR 4-101 requires that attorneys use reasonable care to prevent the disclosure of client confidences or secrets in metadata when they send documents by e-mail.
3. So, when Outlook has crashed, I think it would be reasonable to check if Workshare is still running when Outlook comes back up.
 - a. When you've restarted Outlook, go to the Help menu
 - b. Click on "About Microsoft Office Outlook"
 - c. Click on the "Disabled Items" button.
 - d. If you see Workshare listed, select and click "Enable."
 - e. Send a test document to your home e-mail address to make sure the metadata cleaning box comes back up.

V. Next Steps (5 minutes)

- A. [Refer to Next Steps Handout]
- B. Solemnly resolve to slow down when working on e-mail and pay attention to what you are doing
 1. Should this even be an e-mail at all?
 2. Have I proofread this enough for grammar, spelling, and tone?
 3. Are the right people in the right address fields?
 4. Are the attachments that I say are there really attached?
- C. Settings to check and consider changing on your computer
 1. Turn off automatic spell-check and get into the habit of manually spell-checking
 2. Consider turning off autocomplete, and instead using the To button to pick contacts from your Outlook Contacts or the "InterAction Lookup" button to pick contacts from InterAction

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3. If you often find yourself clicking send in slow motion and screaming "Nooooo" at the computer screen, you can set a rule to have all of your e-mails delayed by 2 minutes. That's probably not long enough for anyone to perceive a delay on your part, but it will give you a chance to go to your Outbox and fix the e-mail if the light bulb goes on after you thought you were done.